IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.7424/Mum./2017
(Assessment Year : 2013–14)

Rolls Royce Marine India Pvt. Ltd.
Plot no.D–505, TTC Industrial Area
MIDC, Turbhe, Nari Mumbai 400 703
PAN – AAACU4687L
……………. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–15(3)(1), Mumbai
……………. Respondent

Assessee by : Ms. Karishma Patharphekar
Revenue by : Shri Vodhalraj Singh

Date of Hearing – 14.11.2019	Date of Order – 05.02.2020

O R D E R

PER SAKTIJIT DEY, J.M.

This is an appeal by the assessee against the assessment order dated 30th October 2017, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2013–14, in pursuance to the directions of the Dispute Resolution Panel (DRP)–2, Mumbai.

2. Grounds no.1, 2 and 3, being general grounds do not require adjudication, hence, dismissed.

3. In grounds no.4, 5 and 6, the assessee has raised the issue of addition made on account of adjustment made to the arm's length price (ALP) of provision of Application engineering Service to the Associated Enterprises (AE).

4. Brief facts are, the assessee, a resident company, is a part of Rolls Royce Group. As stated by the Transfer Pricing Officer and learned DRP, this Group operates globally in four segments i.e., Civil Aerospace, Defence Aerospace, Marine and Energy. It is stated that the Group Marine Division is one of the Global Leaders in Power Propulsion and Motion Control Systems. During the year under consideration, the assessee entered into various international transactions with its overseas AEs. One amongst them being provision of Application Engineering Service. During the proceedings under section 92CA(1) of the Act, the Transfer Pricing Officer, on a perusal of the transfer pricing study report filed by the assessee, found that the assessee has adopted Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) to benchmark the transaction relating to the provision of Application Engineering Service worth ₹ 5,52,00,000. Further, he noticed that the assessee has selected four companies as comparables with updated arithmetic mean

of 6.13% as against the margin shown by the assessee @ 7.98%. After perusing the transfer pricing study report, though, the Transfer Pricing Officer accepted the four comparables selected by the assessee, however, proposing certain additional comparables, he called upon the assessee to explain why such comparables should not be selected. In response, the assessee submitted its reply objecting to the additional comparables selected by the Transfer Pricing Officer. However, rejecting the objections of the assessee, the Transfer Pricing Officer proceeded to select five additional comparables. Thus, finally, nine comparables were selected by the Transfer Pricing Officer including four of assessee's comparable. Applying the arithmetic mean of 25.26% of the nine comparables to the operating cost, the Transfer Pricing Officer determined the ALP of provision of the Application Engineering Services at ₹ 6,40,01,360. The resultant shortfall of ₹ 88,29,213, was suggested as upward adjustment to the ALP. On the basis of the adjustment suggested by the Transfer Pricing Officer, the Assessing Officer framed a draft assessment order adding the amount of ₹ 88,29,213. Against the aforesaid addition made in the draft assessment order, the assessee raised objections before learned DRP. However, learned DRP granted partial relief to the assessee by reducing the adjustment to ₹ 81,03,664.

5. The learned Authorised Representative submitted, the dispute between the assessee and the Revenue is only with regard to the selection of four out of five additional comparables selected by the Transfer Pricing Officer. She submitted, if these four comparables are excluded, the margin shown by the assessee would be within the tolerance range of the arithmetic mean of the rest of the comparables requiring no further adjustment. Proceeding further, the learned Authorised Representative submitted, **Holtec Consulting Pvt. Ltd**. cannot be treated as comparable, as, the company is involved in providing comprehensive services from concept to commissioning for greenfield modernization/conversion/expansion of cement as well as captive power plant/waste heat recovery based power plant project. She submitted, the company also provides engineering support service for bulk material, handling and structural steel detailing, etc. in support of such contention, she drew our attention to the information provided in the website of the company. Further, she submitted, in assessee's own case in assessment year 2012–13, in ITA no.689/ Mum./2017, dated 8th October 2017, this company has been rejected as a comparable. Further, she relied upon the decision of the Tribunal, Delhi Bench, in Bechtel India Pvt. Ltd. v/s DCIT, [2016] 66 taxmann. com 160 (Del.)(Trib.).

6. As regards **Tata Consulting Engineers Ltd.,** the learned Authorised Representative submitted, this company cannot be treated as comparable as it renders fully integrated services from concept to commissioning. Whereas, the assessee merely renders designing and support service based on specific instructions provided by the AEs. The learned Authorised Representative submitted, for the aforesaid reason in assessee's own case in assessment year 2012–13, the Tribunal has rejected this company as a comparable. Further, she relied upon the decision of the Tribunal's decision in case of Bechtel India Pvt. Ltd. v/s DCIT (supra).

7. As regards **Kitco Ltd**., the learned Authorised Representative submitted, this company is into diversified business activities, as compared to the assessee which is merely rendering designing and support services based on specific instructions of the AEs. She submitted, as per the information contained in the annual report of the company, it is having ten divisions viz. Infrastructure, Tourism Aviation, Urban Planning, Process Engineering, Human Resource Development, Management and Financial Consultancy, Technical Service, Sea Ports and Environmental Engineering. Without prejudice, she submitted, this company being a Government company cannot be treated as a comparable since the business model followed by a Government Company cannot be compared to the business model of a

company in private sector. In support of her contention, the learned Authorised Representative relied upon the following decisions:–

i) CIT v/s Thyssen Krupp Industries India Pvt. Ltd., [2016] 385 ITR 612 (Bom.);

ii) PCIT v/s WSP Consultants India Pvt. Ltd., [2017] 87 taxmann.com 266 (Del.);

iii) Bechtel India Pvt. Ltd. v/s DCIT, [2016] 66 taxmann.com 6 (Del.) (Trib.); and

iv) Behr India Ltd. v/s ACIT, [2017] 81 taxmann.com 46 (Pune) (Trib.).

8. Insofar as the **Acropetal Technologies Ltd.** is concerned, the learned Authorised Representative submitted, during the year under consideration, the company has witnessed extra ordinary events such as merger and amalgamation. She submitted, the company is also functionally dissimilar as it is into engineering design from concept to execution and also procurement assistance. She submitted, the margin of the company is also widely fluctuating on a year–on–year basis. Thus, she submitted, the company cannot be treated as comparable. In support of such contention, she relied upon the following decisions:–

i) ADP P. Ltd. v/s DCIT, [2017] 81 taxmann.com 46 (Pune) (Trib.);

ii) Maersk Global Centres (I) Pvt. Ltd. v/s ACIT, [2014] 31 ITR (T) 1 (SB); and

iii) Schlumberger Global Support Centre Ltd. v/s DDIT, [2015] 64 taxmann.com 322 (Pune) (Trib.).

9. Opposing the aforesaid contentions of learned Authorised Representative, the learned Departmental Representative strongly relied upon the observations of the Transfer Pricing Officer and learned DRP and submitted that the additional comparables selected by the Transfer Pricing Officer being broadly comparable to the assessee should be retained. Further, he has also relied upon the written submissions filed.

10. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. As regards **Holtec Consulting Pvt. Ltd.,** from the material on record and more particularly the information contained in the website of the company, which has been furnished in the paper book, it is noticed that the company is engaged in providing consulting services in the areas of power, highway, bridges, engineering support services for bulk material handling and structural steel dealing. Thus, it is manifest, this company is not functionally similar to the assessee. Considering these facts this company has been excluded by the Tribunal while deciding assessee's appeal in Assessment Year 2102–13. In fact, identical view has been expressed by the Tribunal in Bechtel India Pvt. Ltd. (supra). Facts being identical, keeping in view the aforesaid decision of the Tribunal, we hold that this company cannot be treated as a

comparable to the assessee. Accordingly, the Assessing Officer is directed to exclude this company.

11. The next company challenged before us is **Tata Consulting Engineers Ltd.** On a perusal of record, it is noticed that the company is not merely involved in engineering design activity. It is engaged in activities that extend from concept to commissioning. Whereas, the assessee renders designing and support service on the specific instruction of the AEs. It is further noticed that this company is into diversified activities, whereas, no segmental accounting is available. Considering the aforesaid facts, the Tribunal, Delhi Bench, in Bechtel India Pvt. Ltd. v/s DCIT, [2016] 66 taxmann.com 6 (Del.) (Trib.), rejected this company as comparable. Facts being more or less identical, following the aforesaid decision of the Co–ordinate Bench, we exclude this as a comparable.

12. As far as **Kitco Ltd.** is concerned, the prime reason on which the assessee seeks removal of the company as a comparable is, it is a Government Company, hence, cannot be treated as comparable. We have noticed that the Hon'ble Jurisdictional High Court in CIT v/s Thyssen Krupp Industries India Pvt. Ltd., has held that a Government Company due to its different business model cannot be treated as comparable. In fact, in case of PICT v/s WSP Consultants India Pvt.

Ltd., the Hon'ble Delhi High Court while considering the comparability of this very company has held that since the company derives income from Government entity, it cannot be considered as comparable. The same view has been expressed by the Tribunal, Delhi Bench, in Bechtel India Pvt. Ltd. (supra) and the decision of the Tribunal, Pune Bench, in Behr India Ltd. (supra). Respectfully following the aforesaid judicial precedents cited before us, we exclude this company as a comparable.

13. As regards **Acropetal Technologies Ltd.**, it is observed, during the year under consideration, extraordinary events relating to merger and amalgamation has taken place which might have impacted the profitability of the company. Further, it is seen from the material on record, the profitability of the company has widely varied/fluctuated over the years. Considering these aspects, the Tribunal in assessee's own case for the assessment year 2012–13, has excluded this company as comparable. Facts being more or less identical, following the aforesaid decision of the Co–ordinate Bench in assessee's own case, we exclude this company as a comparable. Since, the assessee has specifically objected to the selection of the aforesaid comparables before us, we have recorded our finding in respect of these comparables only and the rest of the comparables having not been

opposed by the assessee should be retained. The grounds are allowed as indicated above.

14. In grounds no.7 to 10, the assessee has challenged the addition made to the arm's length price of payment made to the AEs towards corporate fees.

15. Brief facts are, in the course of proceedings before him, the Transfer Pricing Officer noticed that the assessee has paid an amount of ₹ 5.38 crore to the AEs towards Intra Group Services. Noticing this, the Transfer Pricing Officer called upon the assessee to justify the arm's length nature of such payment. In reply, it was submitted that such Intra Group Services are rendered by other Group Companies to enable smooth and efficient operation of the business of the entire group, hence, directly or indirectly benefits the assessee. Explaining further, it was submitted, the nature of service covered in the said Intra Group Services are technical support, product strategy and of optimization services, product training, sharing of global reporting software, information technology support services, organization and human resources services, business management related services, etc. Further, it was submitted, the expenditure incurred towards such Intra Group Services have been charged to the assessee on a Cost Plus mark–up and are allocated based on the turnover of the assessee vis–

a–vis total turnover of all Group companies. In support of its claim the assessee also furnished certain e–mail communication with the Group companies. The Transfer Pricing Officer, however, did not find the explanation of the assessee convincing. He observed, no specific evidences have been furnished by the assessee to demonstrate that any kind of services have been provided to the assessee. He observed, the assessee failed to demonstrate receipt of any service which could justify the payment of corporate/management fee. He observed, if at all any service is rendered, it is in the nature of shareholder service and in an arm's length scenario, no independent party would pay the same amount for such services which the assessee claims to have received from the AEs. He also observed, the assessee has failed to bring any comparable to justify such services. Referring to the OECD guidelines and judicial precedents, the Transfer Pricing Officer ultimately concluded that the arm's length price of the Intra Group Services has to be determined at nil. Accordingly, he suggested an adjustment of ₹ 5,38,29,405. The assessee objected to the aforesaid adjustment before learned DRP. However, learned DRP agreed with the Transfer Pricing Officer that since the assessee has not proved the actual receipt of services and benefit derived by it, the arm's length price of such corporate/management fee has to be determined as nil. Further, the DRP observed, while deciding identical issue in assessee’s

own case for the assessment year 2012–13, it has upheld similar adjustment made by the Transfer Pricing Officer. Of course, considering assessee's submissions that it has entered into a Cost Plus arrangement with the AEs, learned DRP directed the Assessing Officer to verify whether the assessee has charged out the corporate fee to the AEs and received a mark up on the same and further he directed the Assessing Officer not to make any addition in case the payment and receipt are in respect of the very same AE. As a result of such directions of learned DRP, the adjustment of ₹ 5,38,28,405, made by the Transfer Pricing Officer was reduced to ₹ 2,28,59,453.

16. The learned Authorised Representative submitted, under no circumstances, the arm's length price of an international transaction with the AEs relating to Intra Group Services can be determined at nil. She submitted, while determining the arm's length price of a particular international transaction, the Transfer Pricing Officer has to follow any one of the prescribed methods provided under the statute. She submitted, though, in his order the Transfer Pricing Officer has mentioned that he has used CUP method, however, he has not brought on record a single comparable, but, has made the disallowance on an ad–hoc basis. She submitted, in the earlier years also, though, the assessee had made payment of corporate fee, however, the Transfer Pricing Officer has never disturbed the arm's length price. There being

no change in the facts compared to the earlier years, rule of consistency should prevail. The learned Authorised Representative submitted, even though learned DRP was convinced that the assessee has received Intra Group Services, still, a part of the addition has been sustained. She submitted, the determination of arm's length price of corporate fee both by the Transfer Pricing Officer and learned DRP is merely on conjecture and surmises and completely ad–hoc in nature. Therefore, the adjustment should be deleted. In support of such contention, the learned Authorised Representative relied upon the following decisions:–

i) *CIT v/s Merck Ltd., [2016] 389 ITR 70 (Bom.);*

ii) *CIT v/s Lever India Exports Ltd., [2017] 80 taxmann.com 337 (Bom.);*

iii) *CIT v/s Johnson & Johnson Ltd., [2017] 80 taxmann.com 337 (Bom.);*

iv) *DCIT v/s Diebold Software Services Pvt. Ltd., [2014] 151 ITD 463 (Mum.) (Trib.);*

v) *Kodak India Pvt. Ltd. v/s ACIT, [2013] 37 taxmann.com 233 (Mum.)(Trib.);*

vi) *CIT v/s Kodak India Pvt. Ltd., [2016] 288 CTR 46 (Bom.);*

vii) *Watson Pharma Pvt. Ltd. v/s DCIT, [2015] 54 taxmann.com 88 (Mum.) (Trib.);*

viii) *DCIT v/s UCB India Ltd., [2016] 70 taxmann.com 164 (Mum.) (Trib.); and*

ix) *ITO v/s Intertoll ICS India Pvt. Ltd., [2016] 71 taxmann.com 353 (Mum.) (Trib.).*

17. The learned Departmental Representative submitted, in assessment year 2012–13, identical issue was restored back by the Tribunal for fresh adjudication. Thus, he submitted, similar direction may be given in the impugned assessment year as well.

18. In rejoinder, the learned Authorised Representative submitted, in the assessment year 2012–13, the assessee had not furnished necessary evidences to support its claim. Only before the Tribunal, the assessee furnished additional evidences and on considering them, the Tribunal restored the issue to the Assessing Officer. Whereas, she submitted, in the impugned assessment year all the evidences relating to payment made towards Intra Group Services were available before the Transfer Pricing Officer as well as before learned DRP. She submitted, even the DRP has not disputed this fact and has held that the assessee has received some services. Therefore, there is no reason to restore the matter back to the Assessing Officer.

19. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. As could be seen, the Transfer Pricing Officer has disallowed the payment made towards Intra Group Services (Corporate Fee) primarily on the reason that the assessee failed to furnish required documentary evidences to show that it has received such services from the AEs and further, to show

that it has been benefited by such services. Further, the Transfer Pricing Officer has observed that in an arm's length scenario, no independent party would have made such payment to another party. Thus, the Transfer Pricing Officer has held that as per CUP method, the payment made is not at arm's length and ultimately has determined the arm's length price of such payment at nil. On a perusal of the aforesaid order of the Transfer Pricing Officer, it is very much clear that he has mentioned that the arm's length price has to be determined by applying CUP method. However, factually, he has not done so. It is very much clear that the Transfer Pricing Officer has not brought even a single comparable to justify the applicability of CUP. Rather, it is evident, the Transfer Pricing Officer has determined the arm's length price at nil on the reasoning that the assessee has not received the service and has not proved the benefit test. Though, learned DRP has upheld the aforesaid decision of the Transfer Pricing Officer, however, accepting without prejudice submissions of the assessee, they have granted partial relief by holding that since the cost is charged back to the AEs with mark–up, no addition can be made if the payment and receipt are to the very same AE. Be that as it may, the issue before us is, whether the Transfer Pricing Officer can determine the arm's length price of an international transaction at nil without following any approved method and whether he can apply the

benefit test. On a careful reading of the relevant statutory provisions i.e., section 92C and rule 10B, we are of the considered opinion that the Transfer Pricing Officer cannot determine the arm's length price of a international transaction at nil on purely ad–hoc basis without applying any one of the prescribed methods. In the facts of the present case, though, the Transfer Pricing Officer has mentioned that CUP is the most appropriate method, however, it is very much clear that he has neither applied CUP method as per letter and spirit of rule 10B(1)(a) nor has followed any other prescribed method while determining the arm's length price at nil. In our considered opinion, the Transfer Pricing Officer is not authorized under the statute to do so. Therefore, the adjustment made by the Transfer Pricing Officer with regard to the arm's length price of the Corporate Fee cannot be sustained. Our aforesaid view is well supported by the judicial precedents cited by the learned Authorised Representative. As regards the contention of the learned Departmental Representative for restoring the issue to the Assessing Officer, we are of the view that there is no necessity to do so in the facts of the present case, as all the required evidences relating to the issue are already on record and have been considered by the Transfer Pricing Officer and learned DRP. In fact, after perusing the evidences available on record, learned DRP has recorded a categorical finding that receipt of service is

ascertainable. Learned DRP has upheld the action of the Transfer Pricing Officer by merely observing that the benefits received by the assessee is not proved and further the assessee has not proved that such services were really required by the assessee. In our considered opinion, the aforesaid decision of the Revenue authorities cannot be upheld in view of the ratio laid in the judicial precedents cited before us. Accordingly, we delete the addition made on account of adjustment made to the arm's length price of Corporate Fee. Grounds are allowed.

20. The issues raised in ground no.11, relate to levy of interest under section 234B and 234C, which is consequential in nature, hence, no adjudication is required. Initiation of penalty proceedings under section 271(1)(c) of the Act being premature at this stage does not require adjudication. Accordingly, this ground is dismissed.

21. In the result, assessee's appeal is partly allowed.
Order pronounced in the open Court on 05.02.2020

Sd/-	Sd/-
PRAMOD KUMAR	**SAKTIJIT DEY**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 05.02.2020

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai