

THE INCOME TAX APPELLATE TRIBUNAL
“J” Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pawan Singh (JM)
I.T.(TP) A. No. 791/Mum/2017 (Assessment Year 2012-13)

Megger India Pvt. Ltd. 211, Crystal Paradise Veera Desai Road Andheri West Mumbai-400 053. PAN : AAFCM9884N (Appellant)	Vs.	DCIT Circle- 10(2)(2) Aayakar Bhavan M.K. Road New Marine Lines Mumbai-400 020. (Respondent)
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Assessee by	None
Department by	Shri Vodhal Raj Singh
Date of Hearing	25.11.2019
Date of Pronouncement	03.02.2020

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against order of the assessing officer dated 30.11.2016 passed pursuant to the direction of the dispute resolution panel dated 7.11.2016 for A.Y. 2012-13.

2. Grounds of appeal read as under :-

1. The Learned Dy. Commissioner of Income-tax, Circle 10(2)(2), Mumbai has erred in facts and in law in determining the arm's length price for international transaction in respect of availing of intra-group services, i.e. Administrative and Managerial Services by the Appellant from its Associated Enterprises (AE) at Rs. NIL as against the sum of Rs. 71,67,037/- determined by the Appellant and thereby proposing an adjustment of Rs. 71,67,037/-.
2. The Learned Dy. Commissioner of Income-tax, Circle 10(2)(2), Mumbai has erred in stating that no tangible or direct benefit was derived by the Appellant from receipt of the intra-group services and that the Appellant failed to furnish adequate evidences to demonstrate that the services were actually rendered by the AE, not appreciating the details, explanations and evidences submitted by the Appellant.

3. Brief facts of the case are as under :-

Megger India Private Limited is engaged in the trading and distribution of electric test equipments and measuring instruments of the Megger Group, UK. During the year, the assessee company has undertaken following international transactions :-

Description	Amount (Rs)	Method used
Purchases of equipments/goods from AEs for resale	320,390,001	TNMM
Payment of Management service charges to AE	7,167,037	
Provision of support services to AEs	21,063,940	
Purchase of fixed assets from AEs	686,967	
Recovery of marketing and commercial ('marcom') material costs from AEs	924,175	
Reimbursement of expenses from AEs	725,570	Not applicable
Total	350,957,689	

The assessee selected TNMM as the most appropriate method to benchmark its international transactions of purchases of trading items, purchase of fixed asset, receipts for providing support services, payment for providing technical assistance services and payment for administrative and managerial service, recovery of marketing and commercial ('marcom') material costs from AEs.

4. The assessing officer accepted all the international transactions to be at arm's length price except for payment of management costs to AEs. According to the assessee's transfer pricing study report, the average PLI of the comparable companies and of the assessee on the basis of 3 years data is as follows :-

Nature of International Transaction	Most Appropriate Method	Profit Level Indicator	Megger's Adjusted Operating Margin	Comparables Adjusted weighted average operating margin
International transactions aggregated under the system integration segment	Transactional Net Margin Method	Adjusted Operating Profit / Sales	17.01 per cent	4.37 per cent

On this basis, the assessee contended that its international transactions are at the arm's length. The TPO in Order passed u/s. 92CA(3), determined the arm's length price of the international transactions of payment made for administrative and management services at NIL as against Rs.71,67,037/- claimed by the assessee.

5. While making the adjustment Transfer Pricing officer gave following reasoning :-

- a) The assessee did not produce any primary evidence to show that the services are actually rendered by the AE except describing the nature of services, allocation of cost. At arm's length, the parties dealing in similar circumstances would have such evidence in possession.
- b) The assessee did not produce any evidences regarding the actual services rendered by the AE and how they would be quantified at an arm's length condition.
- c) Details submitted by the assessee, it does not show the utility of services rendered and quantification of the same in arm's length condition. This shows that these charges are not linked with actual services.
- d) The assessee could not produce the details and quantum of expenditure spent by the AE in rendering services in connection with these services even though he was asked specifically.
- e) Just by describing various services, it will not suffice to justify the price charged in intra group services. The assessee is only describing various services rendered by the AE, but did not give the actual amount spent in respect of these expenses; as such dealing between two independent parties would invariably boils down to the actual expenditure incurred in connection with such services and markup thereon.
- f) The assessee has filed a copy of master agreement with its AE which gives the basis of calculation of cost based on revenue which is nothing but a broad-brush approach aimed at flatly equating the costs related to the revenue.

g) After carefully, considering the facts of the case submitted by the assessee, it is seen that the assessee has made detailed submissions regarding the legal provisions but has not responded to the undersigned queries on facts. The assessee has failed to furnish any evidences regarding the receipt of shared services. For determining the arm's length price of international transaction of receipt of shared services by the assessee the following considerations are of prime importance:

- 1) Whether services were received or not?
- 2) Whether services were beneficial to the recipient or not?

The quantum of share services are decided as per agreement entered into with the AEs. Though agreement exists but still the same cannot lead to the conclusion that the services were in fact received for which the payment has been made such a conclusion would be a presumption in the absence of evidence of rendering of services. Receipt of service is essential for allowance of payment either under Income-tax Act or under the Transfer Pricing Provisions. The difference being, if the services are received, benefit arising from the services cannot be questioned u/s.37(l), whereas benefit test is one of the pre-requisites under Transfer Pricing provisions for the service transactions."

Also during the course of the assessment proceedings, assessee did not file any of the specific details to support that how these payments have been derived at. Under these circumstances and facts of the case, it is not possible to determine as to whether the expenses amounting to Rs.71,67,037/- have been incurred wholly and exclusively of the purpose of the business. Therefore, the said expenses are hereby not allowed u/s.37(l) of the I.T. Act, 1961. Alternatively, they shall also stand disallowed u/s.40A(2)(b) of the Act as the assessee failed to establish both before the TPO and the undersigned during the course of the assessment proceedings, to furnish any specific details which could determine whether the expenses so made are not excessive and reasonable.

6. The Assessing Officer in this regard referring to the TPO's order concluded as under :-

"7.2 The assessee has not raised any objection against the above proposed addition/disallowance. However, since the TPO has taken the ALP of the said transaction at NIL, and effectively there has been an upward adjustment of Rs.71,67,037/-, which has also been upheld by the Hon'ble DRP, therefore, the said expenses after being not allowed u/s.37(l) and/or u/s.40A(2)(b) of the Act, are not added back to the total income of the assessee, as the same may result into the double taxation of the said amount."

7. The DRP upheld the action of the Transfer Pricing officer on the ground that the format of the agreement was not appropriate, the details are not available and that benefit test was not complied.

8. Against the above order assessee is in appeal before us. We have heard the learned departmental representative. None appeared on behalf of the assessee despite notice.

9. Upon careful consideration we find that the Transfer Pricing officer has determined the arm's-length price of the intra group services at nil without applying any method of benchmarking the arms length price. Without applying proper method of benchmarking of the arms length price of the international transaction in accordance with the method prescribed in the act the Transfer Pricing adjustment is not sustainable as held by honourable jurisdictional High Court in the case of CIT Vs. Johnson and Johnson Ltd. (247 Taxman 136)

10. Furthermore as held by jurisdictional High Court in the case of CIT Vs. Lever India Exports Ltd. (146 Taxman 133) the benefit test is not to be applied by the Transfer Pricing officer.

11. Furthermore while applying the benefit test the assessing officer himself has contradicted himself that the issue is not of benefit under section 37(1) but that of documentation.

12. Hence in the present case we find that the authorities below have erred in not appreciating the documents submitted by the assessee. While the TPO has not adopted any of the methods prescribed for benchmarking the international transaction, he has erred in applying the benefit test. On the other hand the assessing officer while purporting to invoke section 37(1) contradicted himself by stating that that he is not applying the benefit test, rather by raising issues of the documentation he has stepped into the shoes of the Transfer Pricing officer. The DRP has also erred in holding that the agreement should have been entered into by the parties in a particular manner by incorporating several other clauses. In our considered opinion here the dispute resolution panel exceeded its jurisdiction on this account. The format

of agreement between the parties is not a subject matter of decision of DRP. The dispute resolution panel further erred in agreeing with the Transfer Pricing officer for application of benefit test for computing the arms length price of the international transaction. Accordingly in our considered opinion the Transfer Pricing adjustment is liable to be set aside as appropriate method of benchmarking the arms length price of international transaction as per the statute has not been adopted as held by the honourable jurisdictional High Court in the case of Johnson & Johnson (supra). Furthermore invoking of benefit test in transfer pricing adjustment is also against the ratio laid down by honourable Bombay High Court in the case of Lever India Exports Ltd. (supra). Hence in the background of aforesaid discussion and precedent from honourable jurisdictional High Court we set aside the orders of authorities below and decide the issue in favour of assessee.

13. In the result appeal filed by the assessee stands allowed.

Order has been pronounced in the Court on 3.2.2020.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 3/03/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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