IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI PAWAN SINGH (JM) & SHRI S.RIFAUR RAHMAN (AM)

ITA NO. 7320/Mum/2018(AY : 2014-15)

UPS Express Private Ltd (Formerly known as UPS Jetair Express Private Ltd) 6-A, Shyam Off JVLR, Majas Village, Jogeshwari (E), Mumbai-400 060 PAN : AAACU4322N	vs	Dy.CIT-11(1)(2), Room No. 1, Aayakar Bhawan, M.K. Road, Mumbai -400020
APPELLANT		**RESPONDEDNT**

Appellant by	Shri Nitesh Joshi (A.R.)
Respondent by	Shri A Mohan (CIT, DR)
Date of hearing	27-01-2020
Date of pronouncement	04-03-2020

O R D E R

PER PAWAN SINGH, JM :

1. This appeal by assessee is directed against the assessment order dated 31-10-2018. The assessee has raised the following grounds of appeal:-

> **"1. Ground No. 1 - Transfer Pricing adjustment in respect of Technical know-how fees of INR 11,02,52,900 paid by Appellant to its Associated Enterprise** ('AE')
>
> 1.1. On the facts and circumstances of the case and in law, the learned Transfer Pricing Officer ('TPO') / Assessing Officer ('AO') erred in holding, and the Hon'ble Dispute Resolution Panel ('DRP') further erred in directing, that the arm's length price in respect of Technical know-how fees of INR 13,02,52,900 paid by the Appellant to its AE was 'NIL'.
>
> 1.2 On the facts and circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in not accepting the computation of arm's length price carried out by the Appellant which was in accordance with the Transactional Net Margin Method prescribed under

Section 92C(J) of the Income-tax Act, 1961 ('the Act') read with Rule 10B(l)(e) of Income-tax Rules,1962 ('the Rules').

1.3. On the facts and circumstances of the case and in law, the learned TPO acted beyond his jurisdiction and contrary to the express provisions of law while determining the arm's length price in respect of Technical know-how fees to be 'NIL'.

1.4. On the facts and circumstances of the case and in law, the learned TPO / AO and Hon'ble DRP have overlooked the relevant material, information and evidence in support of payment of Technical know-how fees and instead based their conclusion on such material and evidence which is either factually incorrect or irrelevant rendering their order to be perverse, illegal and bad in law.

The Appellant prays that the said international transaction be considered to be at arm's length.

With regard to Ground 2 to 4, while there is no transfer pricing adjustment / financial impact, the Appellant objects to the erroneous approach adopted by the learned TPO / AO and Hon'ble DRP.

2. Ground No. 2 - Incorrect imputation of mark-up on recovery of expenses by the Appellant from its AE

2.1. On the facts and circumstances of the case and in law, the learned TPO / AO erred in holding, and the Hon'ble DRP further erred in directing, that the Appellant provides services to its AE throughout the year and thereby levying a mark-up on recovery of expenses.

3. Ground No. 3 - Incorrect rejection of a comparable company

4.1. On the facts and circumstances of the case and in law, the learned TPO / AO erred and Hon'ble DRP further erred in rejecting a comparable company i.e. Patel Integrated Logistics Limited (Segmental) selected by the Appellant based on the contemporaneous data in the transfer pricing study report maintained as per Section 92D of the Act read with Rule 10D of the Rules.

4. Ground No. 4 - Erred in using single year data for margin computation

5.1. On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in not considering the

requirement of proviso to Rule 10B(4) of the Rules while analyzing the data for comparability of companies."

2. At the outset of hearing, the learned authorised representative (Ld.AR) of the assessee submits that he did not want to press grounds 2,3&4 due to low tax effect. The Ld.AR submits that non pressing of these grounds of appeal should not be considered as admission on the part of assessee as similar grounds of appeal on similar addition / adjustment has been raised by assessee in other assessment years.

3. On the other hand, the learned departmental representative (Ld.DR) for the revenue submits that he had no objection if the assessee did not contest these grounds of appeal on merit and that the same may be dismissed as not pressed.

4. We have considered the submission of both the parties and treated the grounds 2, 3 &4 and dismissed the grounds of appeal being not pressed. However, we accept the contention of Ld.AR of the assessee that not contesting of these grounds of appeal on merit will not be taken as admission against the assessee for other years.

5. Ground 1 relates to transfer pricing adjustment in respect of technical know-how fees of Rs.11.02 crores paid by assessee to its AE. At the outset of hearing, the Ld.AR of the assessee submits that this ground of appeal is also covered in favour of assessee and against the revenue by the order of Tribunal in assessee's own case for AY 2013-14 in

ITA No.6318/Mum/2017 dated 27-09-2019. The Ld.AR of the assessee, further invited our attention to para 5.3 of direction of DRP wherein the order of TPO was affirmed by Ld.DRP by following its order for AY 2013-14 dated 25-04-2017. The Ld.AR of the assessee further submits that the TPO while making benchmarking of international transactions related with payment of technical assistance fees to its associated enterprises (AE) has not followed the method for benchmarking the arm's length price (ALP) as prescribed under section (u/s) 92C read with Rules 10B. Similar method was adopted by AO for assessment year 2013-14 which was affirmed by DRP for the year under consideration, the DRP followed the order for 2013-14 which has been set aside by Tribunal. Therefore, the issue raised by assessee is squarely covered in favour of the assessee by the order of Tribunal.

6. The Ld.AR for the assessee further submits that the contention of Ld. DR to restore the issue to the AO / TPO for fresh determination of ALP was also not accepted by the Tribunal. Therefore, the contention, if any that may be raised by Ld. DR should not be accepted for the year under consideration, as well.
7. On the other hand, the Ld. DR for the revenue, after going through the order of Tribunal for AY 2013-14 dated 27-09-2009 and the order of

Ld.DRP submits that on similar grounds of appeal and for similar transaction, the grounds of appeal for AY 2013-14 was allowed in favour of assessee. However, the Ld. DR for the revenue submits that since the AO / TPO has not determined the ALP of transaction with its associate enterprises by following the method provided under section 92C read with Rules 10B, therefore, the issue should be restored to the file of TPO / AO for determining ALP of a transaction afresh, by resorting to the methods prescribed under section 92C read with Rules 10B of the I.T. Rules.

8. We have considered the submissions of both the parties, perused the records carefully and have gone through the orders of authorities below as well as the order passed by the co-ordinate bench for assessment year 2013-14 dated 27-09-2019.

9. We have noted that consequent upon reporting international transaction by assessee with its AE in its return of income in Form - 3CEB, the AO made reference to Transfer Pricing Officer (TPO) for computation of ALP of international transactions. The assessee besides other international transaction, reported transaction of payment of technical assistant fee to UPSAI of Rs. 110,252,900/-. The assessee in its Transfer Pricing Study Report (TPSR), has adopted Transaction Net margin Method (TNMM), as most appropriate. The

assessee identified 6 comparable companies. The assessee has shown its Profit level indicator (PLI) at 6.36% against the arithmetical mean of 6 comparable companies at 2.48% and claimed that its transaction was at arm's length. The TPO rejected two of assessee's comparables and on the basis of final set of four comparables, the TPO determined arithmetic mean at 1.31 against PLI transferred by assessee at 6.36%. The TPO, after studying the TPSR, took the view that assessee has paid for receiving technology from its AE, but has not clarified the technology received as no details were provided.

10. The assessee was issued show cause notice to treat the payment as fees for technical services. The assessee, vide its reply dated 20-06-2017, furnished detailed reply. In the reply, the assessee stated that they have entered into technology licence agreement with its AE in UAE wherein AE granted exclusive right to use technical information in India. The services provided by its AE under the agreement, the assessee was required to pay a technical know-how fees at the rate equal to 2% of gross export revenue. The assessee also furnished the details of gross export revenue and the working of payment for technical knowhow fees. The assessee further stated that it has utilised advance management technique technology know-how received from its AE in its day today business. This technique / know how enabled

assessee to render a comprehensive package delivery services to its customer in more convenient and finished manner, which constitutes of data line system of real time tracking of segments to enable feasibility to the customers on the movement of goods and provide delivery confirmation for the shipments. This technology not only arms assessee track shipment, but also allows allied function such as regarding shipment liable details and revenue in various billing and trade receivables mutual's and eliminates substantial manoeuvre efforts. The assessee claimed that payment of technical knowhow fees is intrinsically linked and is necessary for the business of assessee. The assessee also furnished details of receipt and benefit test. After considering the reply of assessee, the TPO concluded that fees for technical information technology / training, etc, the assessee has not furnished any document to establish receipt of so-called technology, training, etc. during the year. The AO, on the basis of statement of Mr. Stephen, allegedly recorded during AY 2010-11, which was allegedly confirmed by Ragini Kumar, Marketing Manager, concluded that technology used by assessee is very old, there was no new technology provided during the year. The said technology is available for the world for more than 15 – 20 years. Nothing new has been provided to assessee by its AE. There is no training from AE. The

TPO concluded that the assessee failed to benefit test. The assessee has not submitted any document to establish that assessee has received the training, technology, etc. No evidence is furnished to substantiate for the need of such payment. As benefit received for above expenses has not been substantiated, the ALP is determined as Nil. The TPO concluded in the following manner:-

> "Therefore, the assessee has failed the Benefit test. Assessee has not submitted any document to establish that assessee has received the training, technology etc. Assessee, has failed to substantiate with evidence the need for the said payments. Since the benefit received for the above expense has not been substantiated, the ALP is determined as NIL, as in a Arm's Length scenario no independent person would make any payments without benefits received. Further, during the course of hearing, the assessee was asked to demonstrate the fact that services were actually rendered.
>
> The other aspect to note is the manner in which the technical know how fees is determined. The same is determined as 50% of the profit or 2% of the revenue whichever is lower. The profit is the net profit before tax. Thus, the same has got nothing to do with the actual benefit that is received; it is not linked to any analysis of whether any technical know how is received; if a profit is made, half of it has to be passed on. Thus, there is no correlation between the service and the payment. The payment is in the nature of a profit distribution though done under the head of technical knowhow. It is a definite concern expressed in OECD guidelines as well that the transactions between associated enterprises can be arranged in such a manner that do not reflect the substance of the transaction; and in the instance case, the same is a clear example. The amount passed on to the AE does not satisfy the benefit test and hence, the of the same is treated to be zero."

11. Though assessee filed objection before DRP, the upheld the action of TPO by relying on the order of their predecessor for assessment year 2013-14.

12. We have noted that in appeal for AY 2013-14, on similar set of facts for similar payment of technical assistance fees to its AE, similar treatment was met out by AO, and on objection before DRP it was upheld. On further appeal the Tribunal, after considering the similar submission, passed the following order:-

> "6.1. We find that the Id. TPO having not determined the ALP in conformity with the statutory provision and in the process having failed to demonstrate that ALP shown by the assessee is incorrect, the contentions of the Id. DR to restore the issue to the file of the Id. TPO for fresh determination of the ALP, is unacceptable. Respectfully following the aforesaid decision, we hold that there is no provision made in the statute empowering the Id. TPO for determining the ALP of a particular international transaction at Nil without resorting to any methods prescribed. Since, the relief is granted to the assessee on the preliminary issue of the Id. TPO not following the prescribed methods as provided in the statute for determination of ALP, the other arguments advanced by the Id. AR and the Id. DR on merits of ALP adjustment are left open and not adjudicated herein. Accordingly, the ground Nos.1.1 to 1.3 raised by the assessee are allowed."

13. From the aforesaid decision of Tribunal in AY 2013-14, we find that TPO determined the ALP of international transaction, without resorting to the method prescribed in the Act, which has been set aside by the Tribunal. We have further noted that in AY 2013-14 the ld. DR for the revenue also made prayed to restore the issue to the file of TPO

for fresh determination of ALP; the same was not accepted by the coordinate bench, in the earlier.

14. However, for the year under consideration (AY 204-15), we notice that TPO has applied Benefit Test which is not as per the rules prescribed under Rule 10B & 10AB of Income Tax Rules. In our view, the payment of Technical knowhow was never bench marked in the earlier AYs. Considering the totality of the facts and circumstances and the fundamental question that revenue should not be deprived of legitimate tax due to the exchequer. Therefore, in order to bench mark this transaction and to determine proper ALP, of the international transaction, we are inclined to remit this issue back to TPO/AO to determine the ALP afresh as per Rule 10B & 10AB of the I.T. Rules. Needless to order that before making fresh bench marking in accordance with Rule 10AB & 10B read with section 92C, the TPO/ AO shall provide opportunity of hearing to the assessee. Accordingly, the Ground No 1 of the appeal is allowed for statistical purpose.

15. In the result the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 04-03-2020.

Sd/-	Sd/-
(S. Rifaur Rahman)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 04 March ,2020
Pk/-
Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai