

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 7600/MUM/2012
Assessment Year: 2008-09**

The Boston Consulting Group
(India) Pvt. Ltd., 14th Floor,
Nariman Bhavan, 227,
Nariman Point, Mumbai-
400021.

**PAN No. AABCB3524G
Appellant**

Vs. The Assistant Commissioner of
Income Tax, Circle-3(1),
Room No. 607, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

Respondent

Assessee by : Mr. Jehangir D. Mistri/Aditya Kastiya, AR
Revenue by : Mr. Michael Jerald, DR

Last Date of Hearing : 06/03/2020
Date of Pronouncement : 31/07/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order passed by the Asst. Commissioner of Income Tax, Circle 3(1), Mumbai (in short 'AO') u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

On the facts and circumstances of the case and in law, the AO erred in concluding the assessment u/s 143(3) r.w.s. 144C(13) of the Act, as follows:

1. determining the arm's-length price of the Appellant's international transaction of payment of license fees for time and billing software at Nil instead of Rs.1,62,74,359/- as determined by the Appellant.
2. determining the arm's length price of the Appellant's international transaction of payment of regional administration and regional co-ordination cost allocation at Nil instead of Rs.2,83,61,859/- as determined by the Appellant.
3. determining the arm's length price of the Appellant's international transaction of payment of information technology cost allocation at Rs.50,00,000/- instead of Rs.260,06,610/- as determined by the Appellant.
4. deeming an adjustment of Rs.15,20,688 on account of late recovery of expenses from associated enterprises.
5. disallowing the foreign travel expenses of Rs.7,41,721.
6. erred in not granting credit of Tax Deducted at Source of Rs.1,91,87,629 pertaining to income offered to tax in AY 2008-09.

3. Briefly stated, the facts of the case are that the appellant filed its return of income for the assessment year (AY) 2008-09 on 29.09.2008 declaring total taxable income of Rs.32,11,98,407/-. The appellant is a wholly owned subsidiary of BCG Holding Corporation, USA ('BCG Hold Co.'). It commenced its operations from May 2000. The appellant, like the group worldwide is mainly into strategy consulting. It is also engaged in the business of rendering strategy consulting services such as business strategy, marketing and sales strategy, portfolio strategy etc. During the year under consideration, the appellant entered into the following international transactions with its AEs :

- Provision of Management Consultancy Service;
- Payment of License Fees for Time and Billing Software;
- Regional Training, Administration and Co-ordinate Cost Allocation;

- Information Technology Cost Allocation;
- Worldwide Training Cost Allocation;
- Global Finance Cost Allocation; and
- Reimbursement of expense received and paid.

The appellant has adopted the Comparable Uncontrolled Price ('CUP') method to determine the arm's length price (ALP) in respect of the above international transactions entered by it with its AEs. The Transfer Pricing Officer (TPO) has made an adjustment in respect of the following international transactions :

International Transaction entered into with AEs	Amount of adjustment (Rs.)
Payment of License Fees for Time and Billing Software	16,274,359
Regional and Worldwide Training cost allocation	37,307,488
Information Technology Cost Allocation	21,006,610
Reimbursement of Expenses recovered	1,520,688
Total Transfer Pricing Adjustment	76,109,145

The AO passed an order u/s 143(3) r.w.s. 144C(13) making an adjustment of Rs.6,78,51,641/- towards transfer pricing.

In addition to the above transfer pricing adjustments, the AO made an addition of Rs.7,41,721/- (foreign travel expenses) in the order u/s 143(3) r.w.s. 144C(13).

4. We discuss together the transfer pricing adjustment (the 1st, 2nd and 3rd ground of appeal).

We begin with the 1st transfer pricing adjustment made by the AO. During the year under consideration, the appellant has paid Rs.1,62,74,359/- to BCG Holding Corporation, USA towards licenses for time and billing software. The ALP of the payment has been determined by using CUP as a method for benchmarking and for this purpose, the price of a similar software module licensed by Oracle Corporation was used as a comparable uncontrolled price. Before the TPO, the appellant submitted that BCG Holding Corporation, USA has developed a state-of-the-art time and billing system with electronic time sheet capabilities, with an intention to integrate BCGs Worldwide Reporting System and facilitate international co-ordination. The BCG Holding Corporation has provided the license to the appellant *vide* a technology licensing and assistance agreement dated 01.01.2005 in consideration for royalty @ USD 2750 per employee per annum which has resulted in the payment of aforesaid amount of Rs.1.62 crore during the year. However, the TPO was not convinced with the above submission of the assessee and made an adjustment of the entire amount, considering the value of the transactions to be Nil. While making the disallowance, the TPO has stated that the software had been installed many years ago and its shelf life had expired. The AO following the direction of the DRP made an adjustment of Rs.1,62,74,359/-.

The 2nd adjustment made by the TPO is towards regional cost allocation. The facts are that BCG Hong Kong is the hub for providing regional training, administration and co-ordination assistance to each of the BCG entities in the Asia Pacific Region (within which BCG India falls) so that the activities of those entities are synchronized with worldwide policies of BCG

and quality and ethical standards set by BCG are adhered to, thus enabling the provision of seamless services to all clients. The appellant has executed regional cost allocation agreement dated 01.01.2002 with BCG Hong Kong. The appellant submitted before the TPO that the expenses incurred by BCG Hong Kong for organizing and/or imparting training to the employees of various BCG entities in the Asia Pacific Region were allocated to each entity based on the cost per attendee, while the expenses incurred in connection with assisting in administrative methods are allocated based on the time spent on each entity for rendering such assistance. The TPO was not convinced with the above submission of the appellant on the ground that the claim is not fully supported by evidence. Further, the TPO noted that the appellant failed to produce complete details and explanation in respect of 26 personnel ; further failed to justify any other services received from BCG Hong Kong. Therefore, the TPO made an addition of Rs.3,73,07,488/-. As per the direction of the DRP, the AO restricted the disallowance to Rs.2,90,49,984/-.

The 3rd adjustment made by the TPO is in respect of payment for information technology. During the year under consideration, the appellant has paid Rs.2,60,06,610/- to the parent company in USA towards information technology cost allocation. The appellant submitted before the TPO that BCG Inc. acts as a hub for providing centralized network and project management and other aspects of information technology. It also submitted that BCG Inc. besides providing software application for use by the appellant, also provides global connectivity to BCG affiliates *via* Wide Area Network (WAN). Also the appellant stated before the TPO that there are dedicated persons within the infrastructure group for providing services across the globe regarding data

base administration, data centre services, integrated services etc. Further, it was explained to the TPO by the appellant that IT support has benefited it (the appellant) in increasing its efficiency, expansion, accessibility and service quality etc. and that the allocation of further expenses has been made on the basis of head count for the year under consideration. However, the TPO was not convinced with the above submission of the appellant on the ground that it is a glaring instance of unfair cost allocation where the appellant has remitted Rs.2,60,06,610/- for allowing its employees to use certain commonly used softwares, thereby paying much more than what a company in ordinary uncontrolled situation would like to spend for the purpose. The TPO treated Rs.50,00,000/- as ALP for availing the above services under the head information technology. Thus he made an adjustment of balance amount of Rs.2,10,06,610/-. The AO following the order of the DRP made an addition of Rs.2,10,06,610/-.

5. Before us, the Ld. counsel for the appellant submits that the TPO is required to determine ALP in accordance with one of the prescribed methods, whereas in the instance case, he has failed to do so. In this regard, reliance is placed by him on the judgment of the Hon'ble Bombay High Court in *CIT v. Lever India Exports Ltd.* (ITA No. 1306, 1307, 1349 of 2014), *CIT v. Merek Ltd.* (ITA No. 272 of 2014), *CIT v. Kodak India Pvt. Ltd.* (ITA No. 15 of 2014, *CIT v. Johnson and Johnson Ltd.* (ITA No. 1291 of 2014). Further, reliance is placed by him on the order of the Tribunal in *ACIT v. Netafim Irrigation India Pvt. Ltd.* (ITA No. 3668/Mum/2008 & ITA No. 4837/Mum/2009), *Elkem South Asia Pvt. Ltd. v. DCIT* (ITA No. 1070/Mum/2014), *Durovalves India Pvt. Ltd. v. ACIT* (ITA No. 2483/PN/2012), *DCIT v. Kodak Graphic Communication (I) Pvt. Ltd.* (ITA

No. 6762/Mum/2012), *Howden Insurance Brokers India Pvt. Ltd. v. DCIT* (ITA No. 6997/Mum/2012), *Schneider Electric India Private Limited v. DCIT* (ITA No. 209/Ahd/2015), *Hansraj Mathuradas v. ITO* (ITA No. 2397/Mum/2010) and *Painter India v. ACIT* (ITA No. 2732/Mum/2012).

6. On the other hand, the Ld. Departmental Representative (DR) submits that the TPO has rightly arrived at the transfer pricing adjustments on the basis of documents/evidence available on record. It is stated that in respect of the 1st adjustment of payment of license fees, originally the appellant had submitted a copy of PWC report of 2001 with a letter from PWC that the valuation clearly applies for the current year; whereas after the query from the TPO, the appellant filed another report (May 2009). It was not explained to the TPO why the report prepared in May 2009 was not submitted in the first instance.

Regarding the 2nd adjustment, the Ld. DR submits that as the appellant failed to file the complete supporting evidence, the AO has rightly made an addition of Rs.2,90,49,984/-.

Regarding the 3rd adjustment, the Ld. DR explains that the TPO has rightly made the allocation of Rs.50,00,000/- and disallowed the balance of Rs.2,10,06,610/-.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

An examination of the order of the TPO made u/s 92CA(3) dated 20.10.2011 clearly indicates that while making the adjustment of

Rs.1,62,74,359/- (payment for time and billing software license), Rs.3,73,07,488/- (regional and worldwide training) and Rs.2,10,06,610/- (payment for information technology cost allocation), he has not adopted any of the prescribed method.

In the case of *M/s Lever India Exports Ltd.* (supra), the Hon'ble Bombay High Court has held that the jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an international transaction in terms of Chapter X of the Act r.w. Rule 10A to 10E of the Income Tax Rules. It further held that the ad-hoc determination of ALP by the TPO *dehors* section 92C of the Act cannot be sustained.

In *M/s Merck Ltd.* (supra), the respondent-assessee had entered into an agreement with its AE to provide technical knowhow/consultancy in 12 fields as indicated therein for a consideration of Rs.1.57 crores. The respondent-assessee availed services of its AE during the subject year (AY 2003-04) only in 3 out of 12 fields listed in the agreement. The TPO, therefore, proceeded to hold that the entire consideration of Rs.1.57 crore is attributable to the 3 technical services which the respondent-assessee availed of and held that no consideration was payable in respect of 9 services provided for in the agreement. Thus the entire payment of Rs.1.57 crore was attributable only to the 3 services availed out of the 12 listed out in the agreement. It further held that only Rs.40 lacs could be considered as ALP attributable to 3 services and made adjustment of Rs.1.17 crore resulting in its addition to the taxable income. In appeal, the CIT(A) upheld addition of Rs.1.17 crores made and taxable income consequent to the adjustment made on account of technical knowhow/consultancy agreement. On further appeal, the Tribunal upheld the

submissions of the respondent-assessee and recorded further the fact that no transfer pricing exercise was done by the AO/TPO to determine the value of the services received by the respondent-assessee in respect of the 3 services which it had availed from its AE before holding that the ALP in this case is Rs.40 lacs. The Tribunal further held that “consideration payable for the services availed of by the respondent-assessee to determine the ALP was not carried out”. On appeal by the Revenue, the Hon’ble Bombay High Court held that :

“Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the Respondent-Assessee in the present facts was not justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services payable by the Respondent-Assessee to its AE, make the entire Transfer pricing Agreement unsustainable in law.”

In *M/s Johnson & Johnson Ltd.* (supra), the Tribunal allowed the respondent-assessee’s appeal before it by deleting the addition of Rs.200.82 lacs being the transfer pricing adjustment on account of sales promotion and publicity expenses being payable by the respondent-assessee’s parent M/s Johnson & Johnson, USA. This on the ground that the TPO has, while holding that the parent company should share this expenditure on publicity and sales promotion as it benefits therefrom, as higher sales result in higher royalty, has not determined the ALP by following any of the methods prescribed u/s 92C(1) of the Act r.w. Rule 10B. On appeal by the revenue, the Hon’ble Bombay High Court held that :

(ii) The TPO is obliged under the law to determine the ALP by following any one of the prescribed methods of determining the ALP as detailed in Section 92C(1) of

the Act. In this case, there is nothing on record to indicate that the TPO had applied any one of the prescribed methods in Section 92C(1) of the Act to determine the ALP before disallowing the payment of Rs.200.82 lakhs incurred by the Respondent on account of publicity and sales management as being excessive and/or payable by its parent, M/s. Johnson & Johnson, USA.

(iii) The impugned order holds that transfer pricing adjustment done by disallowing the payment, on the basis of an assumption that it is excessive, is an action completely dehors the provisions of transfer pricing adjustment found in chapter X of the Act. The determination of the ALP has to be done only by following one of the methods prescribed under the Act.

(iv) In view of the above, as the Revenue has not acted in accordance with the clear mandate of law, the questions as proposed does not give rise to any substantial question of law. Thus, not entertained.”

In *M/s Kodak India Pvt. Ltd.* (supra), the above position of law is reiterated by the Hon’ble Bombay High Court.

As mentioned earlier, we notice that the TPO/AO has arrived at the ALP by not adopting any of the methods prescribed u/s 92C of the Act in respect of (i) payment of license fees for time and billing software, (ii) payment of regional administration and regional co-ordination cost allocation and (iii) payment of information technology cost allocation.

In view of the above factual scenario, we are of the considered view that the ratio laid down by the Hon’ble Bombay High Court in *Lever India Exports Ltd.; Merck Ltd.; Johnson & Johnson Ltd.* and *Kodak India Pvt .Ltd.* mentioned hereinabove is squarely applicable to the facts of the case. Therefore, following the same, we allow the 1st, 2nd and 3rd ground of appeal.

8. The 4th ground of appeal relates to adjustment of Rs.15,20,688/- on account of late recovery of expenses from AEs.

From the details filed by the appellant, the TPO observed that out of the total receivable reimbursements from AEs of Rs.3,64,95,404/-, it has recovered Rs.1,78,74,722/- in the month of April 2008 i.e. one month after the end of the financial year. However, the remaining amount of Rs.1,86,20,673/- was recovered on 5.12.2008, after a gap of 8 months. The TPO calculated an adjustment, by charging interest @ 12.25% which comes to Rs.15,20,688/-. The AO has followed the order of the TPO.

9. Before us, the Ld. counsel submits that the observations of the DRP on this issue are as under:-

"As regards, the adjustments on reimbursement of expenses, the AO has accepted most of the reimbursement to make an adjustment only on account of interest not charged on recovery of expenses. This does not seem to be valid in principle as there is no discussion or evidence that the payment to be made to the AE is also charged interest on delay by the assessee. Since, expenses are recovered both ways, interest cannot be charged only on one side by the assessee from the AE."

It is further explained that after the above mentioned observations, the DRP should have issued directions for deleting the adjustment. However, it is stated in the DRP's order that the adjustment of Rs.15,20,688/- should be made. It appears that there is an inadvertent error in the DRP's order while issuing directions on this issue. In the subsequent year i.e. AY 2009-10, the DRP has deleted the adjustment. There is no appeal by the Department in AY 2009-10. From AY 2010-11, the TPO has not made this adjustment.

In view of the above, the Ld. counsel submits this issue be set aside to the file of the TPO to decide the same as per the stand of the Department in subsequent years i.e. from AY 2009-10 onwards.

On the other hand, the Ld. DR supports the order passed by the TPO/AO.

10. We have heard the rival submissions and perused the relevant materials on record. We are of the considered view that there is merit in the above contentions of the Ld. counsel. Having considered the facts as apparent from record, we restore the matter to the file of the AO/TPO to decide the above issue as per the stand of the Department in subsequent years i.e. from AY 2009-10 onwards.

11. The 5th ground of appeal relates to disallowance of foreign travel expenses of Rs.7,41,721/- by the AO.

During the course of assessment proceedings, the AO noticed that the assessee has claimed deduction of Rs.7,41,721/- on account of 'foreign travel expenses' which were incurred for other than employees. Observing that the assessee was not able to bring out adequate evidence to justify its claim of business expediency, the AO made a disallowance of the above amount by relying on the decision of the Hon'ble Gujarat High Court in *Shahibag Entrepreneurs Ltd.* 215 ITR 810.

12. The Ld. counsel submits that in the given case the spouses have accompanied only at the request of the BCG Holdco, organizing the meet and fringe benefit tax has been paid on these expenses. It is stated that the employees were invited along with their spouses to the meet to ensure

sufficient networking and bonding within the personnel of the entire group. Thus it is stated that the appellant is a corporate entity and incurs such expenses on its employees which it finds expedient from a business and employee morale perspective.

On the other hand, the Ld. DR submits that the addition of Rs.7,41,721/- made by the AO which is based on facts of the case be affirmed.

13. We have heard the rival submissions and perused the relevant materials on record. Admittedly, in the instant case, these expenses have been incurred in connection with the spouses of the employees who accompanied them to the Worldwide Officers Meet. As recorded by the AO, the appellant has failed to produce any supporting evidence to justify its claim of business expediency. Because of lack of supporting evidence, the instant case is distinguishable from the general case laws.

As no supporting evidence has been filed before us, we confirm the disallowance of Rs.7,41,721/- made by the AO. However, we direct the AO to verify the claim of the appellant that fringe benefit tax has been paid on the above and make consequential order as per the provisions of the Act.

14. The 6th ground of appeal is dismissed as not pressed.

15. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 06.03.2020, this order thereon is being pronounced today, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963,

which deals with pronouncement of orders. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, a nationwide lockdown was imposed for 21 days to prevent the spread of Covid-19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid-19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and *vide* order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also

observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".

The Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

16. In the result, the appeal filed by the assessee is partly allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/07/2020

Rahul Sharma, Sr. P.S.

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,

(Dy./Asstt. Registrar)
ITAT, Mumbai