आयकर अपीलीय अधिकरण "जे " न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

माननीय श्री शक्तिजीत दे, न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI SAKTIJIT DEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.6847/Mum/2018
(**निर्धारण वर्ष** / Assessment Year: 2014-15)

Regus Business Centre Private Limited Level-2, Raheja Centre Point Near Mumbai University (Opp. Bandra Kurla Complex) Santacruz East, Mumbai 400 098	**बनाम**/ Vs.	**ACIT-13(3)(1),** 2nd Floor, Room No.229 Aaykar Bhavan, M.K. Road Mumbai 400 020.
PAN/GIR No. AADCR-1920-Q		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Ketan Ved– Ld. AR
Revenue by	:	Ms. Uodal Raj Singh-Ld. Sr. DR

सुनवाई की तारीख/ **Date of Hearing**	:	31/08/2020
घोषणा की तारीख / **Date of Pronouncement**	:	01/09/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2014-15 contest certain Transfer Pricing (TP) adjustments made by Learned Assessing Officer (AO) in final assessment order dated 25/09/2018 passed u/s. 143(3) r.w.s. 144C(13) pursuant to the directions of Learned Dispute Resolution Panel-2, Mumbai [DRP] u/s 144C(5) dated 24/08/2018. The grounds raised by assessee read as under: -

1. **Re.: Adjustment of Rs.36,04,932/- on account of payment regional headquarter charges ["intra group services"]-**

1.1 The Ld. Assessing Officer["AO"]/ the Ld. Dispute Resolution Panel ["DRP"]/ the Ld. Transfer Pricing Officer ["TPO"] have erred in making an upward adjustment of Rs.36,04,932/- to the total income of the appellant by determining the Arms Length Price ["ALP"] of the intra group service charges to its Associated Enterprises ["AE"] as NIL.

1.2 The AO /DRP/TPO have erred in determining the ALP of the intra-group service charges as NIL by applying the Comparable Uncontrolled Price ["CUP"] method without any basis and without undertaking any benchmarking analysis.

1.3 The AO /DRP/TPO erred in questioning the need and utility of the intra-group services availed by the appellant from its AEs, thereby questioning the commercial rationale of the appellant in availing the services.

1.4 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the intra-group services availed by it from its AEs were wholly and exclusively for the purposes of its business and the charges paid for the same were at an arm's length and the stand taken by the TPO/AO /DRP in this regard is incorrect, erroneous and hence the adjustment made ought to be deleted.

2. **Re.: Adjustment of Rs.1,86,73,820/- by considering support services rendered and intercompany loans provided to domestic related parties as deemed international transaction.**

2.1 The AO /DRP/TPO have erred in considering the services rendered by Appellant to its domestic related party and the loans granted by the Appellant to its domestic related party as a deemed international transaction.

2.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the support services provided by the Appellant and the loans granted by the Appellant to its domestic related party do not fall within the purview of deemed international transaction and the stand taken by the AO /DRP/TPO in this regard is incorrect, erroneous and hence the adjustment made ought to be deleted.

2.3 Without prejudice to the aforesaid the AO/DRP/TPO erred in determining the ALP of support services by application of Transaction Net Margin Method ["TNMM"] and selecting companies which are not comparable to the Appellant.

2.4 The AO/DRP/TPO erred in not granting the working capital adjustment while determining the ALP of support services by application of TNMM.

2.5 The AO/ DRP/TPO erred in law and facts of the case by considering intercompany loan provided by the Appellant to its domestic related party as deemed international transaction and imputed notional interest on the same.

3. **Re.: Others**

3.1 The Appellant submits that the AO/DRP/TPO have erred in arriving various unwarranted and erroneous conclusions unsupported by any relevant material in deciding the case.

3.2 The Appellant submits that each grounds of appeals are without prejudice to one another.

Ground No.-3 is general in nature which do not require any specific adjudication. In Ground Nos. 1 & 2, the assessee is aggrieved by Transfer Pricing (TP) adjustment on account of (i) intra-group services adjustment of Rs.36,04,932/-; (ii) support services and inter corporate loans adjustment of Rs.1,86,73,820/-.

2. The Learned Authorized Representative for assessee (AR), Shri Ketan Ved, at the outset, submitted that both the issues are covered by the order of Tribunal in assessee's own case for AY 2012-13, ITA No.1110/Mum/2017 order dated 16/07/2020. A copy of the order has been placed before us. The Ld. AR seek similar direction as well as adjudication in this year. Although Ld. DR relied upon the orders of lower authorities but could not controvert the stated position. No distinguishing facts or features have been demonstrated before the bench in this year.

In the said background, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 The material on record would show that the assessee being resident corporate assessee is stated to be engaged in providing serviced offices, cyber cafes and provider of ancillary business services. The assessee carried out certain international transactions with its Associated Enterprises (AE) which were subject matter of determination of Arm's Length price (ALP) before Ld. Transfer pricing Officer (TPO) vide order u/s 92CA (3) dated 31/10/2017. These transactions were, *inter-alia,* in the nature of payment of Rs.36.04 Lacs by assessee to its AEs as regional management fees and GSC management fees (collectively referred to as 'intra-group services'). These transactions were benchmarked using residuary method. However, Ld. TPO opined

that such payment would be at Arm's Length only when it was substantially proved that the services were actually received by the assessee and the same benefitted the assessee. This fact, in the opinion of Ld. TPO, could not be established by the assessee and the assessee could not submit proof with respect to actual cost incurred by the AEs. Finally, following Ld. DRP's directions for AY 2012-13, the ALP of these transactions was determined as *Nil* and an adjustment of Rs.36.04 Lacs was proposed by Ld. TPO in this respect.

3.2 The second adjustment proposed was on account of cost-allocation and inter-company loans. The assessee allocated costs in relation to employees, marketing and IT costs, the benefit of which was stated to be given to various domestic companies of the group. Similarly, the assessee provided intra-company loans to its domestic related parties. The assessee pleaded that TP provisions, in terms of Sec. 92B, were not applicable to such transactions entered into by the assessee with its Indian Group entities. However, it was noted by Ld. TPO that the holding company of the assessee i.e. Regus India Holdings Ltd, Mauritius was also the holding company of all the domestic entities and therefore, the said provisions were applicable. The holding company would be in a position to control all transactions between the assessee and other entities by virtue of its being a controlling shareholder in all the companies. On similar facts on AY 2012-13, the said transactions were treated as deemed international transactions and therefore, Ld. TPO proceeded to determine the ALP of these transactions. After considering assessee's submissions, Ld. TPO proposed an adjustment of Rs.181.93

Lacs on account of support services and another adjustment of Rs.4.80 Lacs on account of interest on loan.

3.3 The adjustment, thus proposed by Ld. TPO, were incorporated in draft assessment order dated 20/12/2017 which were subjected to assessee's objections before learned DRP. The Ld. DRP disposed-off assessee's objection vide its directions u/s 144C(5) dated 24/08/2018. Pursuant to the same, final assessment order was passed by Ld. AO on 25/09/2018.

4. Upon perusal of Ld. DRP's directions, we find that TP adjustment under both the heads i.e. (i) intra-group services; (ii) support services and inter corporate loans adjustment; has been confirmed following Ld. DRP's directions for AY 2012-13.

Aggrieved, the assessee is under further appeal before us.

5. As rightly pointed out by Ld. AR, the assessee's appeal for AY 2012-13 came up for consideration before coordinate bench of this Tribunal vide ITA No. 1110/Mum/2017 order dated 16/07/2020 wherein both the issue have been dealt with by the bench. The TP adjustment on account of intra-group services have been restored back to the file of Ld. AO with following directions: -

> 6. The first issue in appeal is in respect of adjustment made on account of intra-group services. The assessee has purportedly received support services from its regional headquarter primarily in the areas of management of human resources, sale, debt management and collection, advertisement and marketing, legal services, etc. The TPO applied 'benefit test' on the intra-group services received by the assessee and determined the ALP of such services at 'Nil'. We find that the TPO has failed to properly analyse the support services received by the assessee from its regional headquarter. Further, the settled legal position now is that the ALP of intra group services cannot be determined at 'Nil'. The 'benefit test' analysis which was earlier accepted has now been held to be redundant. The Tribunal in the case of Merck Ltd. v. Dy. CIT 179 TTJ 121 has held the concept of 'benefit test' as irrelevant. The Tribunal held that by applying befit test ALP of intra-group services

cannot be determined at 'Nil'. Thereafter, in various decisions by the Tribunal the application of benefit test analysis has been rejected. Thus, we deem it appropriate to restore the issue back to the file of TPO for fresh adjudication and for determination of ALP of intra-group services by applying most appropriate method specified in section 92C of the Act. Ground No.1 of the appeal is thus, allowed for statistical purposes.

Further, the TP adjustment on account of support services and intra-company loans has been deleted by observing as under: -

8. The ground No.3 of the appeal is against adjustment made in respect of loans extended by the assessee to domestic group companies, held as 'deemed International Transaction'. It is an undisputed fact that the assessee had entered into transactions for extending loans and providing services to the group entities based in India. Before proceeding further, it would be relevant to refer to the meaning of 'international transaction' as defined under the Act. The expression 'International Transaction' has been defined in section 92B of the Act. The provisions of the section as they were applicable in AY 2012-13 are reproduced herein below: -

> Section 92B
>
> (1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.
>
> (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise"

The sub-section (2) to section 92B was amended by the Finance (No.2) Act, 2014 w.e.f. 1-4-2015. By way of amendment the words "deemed to be a transaction" were replaced with "deemed to be an international transaction". After the amendment, the transactions that escaped deeming provisions hitherto were brought within the realm of "deemed international transaction". The instant case pertains to period prior to amendment. Thus, the provisions of Section 92B (2) as they were applicable in the impugned assessment year, would be relevant.

9. A bare perusal of the meaning of "international transaction" defined in section 92B (1) would show that a transaction would fall within the ambit of international transaction if, either or both the associated enterprises are non- resident. In the present case none of the AEs i.e. neither the assessee nor the domestic group companies with which the assessee had entered into transaction are non-residents. All the companies are domestic entities and are subject to tax under the provisions of the Act.

Section 92B (2) of the Act deals with the deeming provisions. The subsection would get attracted if: -

The transaction is between an enterprises and non-AE;

and

- There is prior agreement in relation to the transaction

or

The terms of the transaction are determined in substance between the non-AE and AE.

For invoking deeming provisions, subsection (2) has to be read in conjunction with subsection (1) of Section 92B of the Act. Thus, for subsection (2) to get attracted, the primary condition would be that at least one of the entity with which the assessee has entered into transaction should be non-resident. In the present case, the authorities below have failed to take note of the fact that the transactions in question are within domestic entities only. No overseas entity is involved in the transaction. Unless the conditions set out in subsection (1) are satisfied, the provisions of subsection (2) cannot be invoked. The authorities below in the present case have erred in invoking deeming fiction solely on the premise that since shareholders of overseas holding company are holding shares of the assesse and AEs, 'in substance' the transaction between the assesse and the domestic group entities would fall within the ambit of "deemed international transaction". Deeming provisions cannot be invoked by expanding the latitude of expressions used in the section. The authorities below have failed to take into consideration the fact that all group entities are companies incorporated in India having separate legal existence. Except for common shareholding, no material has been relied on by the TPO/DRP to substantiate that the transaction between the entities was influenced by the overseas holding company.

10. In the case of CIT vs. Kodak India (P) Ltd. (supra), the assessee had sold its imaging business to M/s. Carestream Health India Ltd. during the period relevant to AY 2007-08. The transaction was between two domestic non Associated Enterprises. The TPO held that the transaction is International Transaction within the meaning of section 92B (2) as the overseas holding company of the assessee and Carestream Health India Ltd. had entered into global agreement for sale of business prior to sale of imaging business by the assessee to Carestream Health India Ltd. The Tribunal observed that the transaction is not covered by the definition of 'International Transaction' and hence, the provisions of section 92B (2) would not get attracted. The Tribunal inter alia held that prior to amendment to Section 92B (2) of the Act w.e.f. 1-4- 2015 such a transaction was not deemed to be an International Transaction. The findings of the Tribunal were upheld by the Hon'ble High Court.

11. In our considered view the findings of the lower authorities are based on conjectures and surmises. The authorities below have travelled too far to bring the transactions between the assessee and domestic entities within the domain of

'deemed international transaction' under section 92B (2) of the Act (prior to amendment). We find merit in ground no.3 of the appeal, according the same is allowed.

It was held that the provisions of Section 92B (2) would not get attracted to such transactions prior to 01/04/2015 and these transactions would not be deemed to be International Transactions.

There being no change in facts or circumstances, we see no reason to deviate from the same. Hence, respectfully following the same, the issue of TP adjustment on account of intra-group services stand restored back to the file of Ld. AO / TPO on similar lines. The TP adjustment on account of support services and intra-company loans stand deleted since the same would not constitute deemed international transaction prior to 01/04/2015.

6. Resultantly, the appeal stands partly allowed in terms of our above order.

Order pronounced on 01st September, 2020.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 01/09/2020
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant

2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**