

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 1736/PUN/2018
निर्धारण वर्ष / Assessment Year : 2014-15

Goodyear South Asia Tyres Private Limited, H-18, MIDC Industrial Area, Waluj, Aurangabad PAN : AABCG5544P	Vs.	ACIT, Circle-1, Aurangabad
Appellant		Respondent

ITA No. 1763/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

Goodyear South Asia Tyres Private Limited, H-18, MIDC Industrial Area, Waluj, Aurangabad PAN : AABCG5544P	Vs.	ACIT, Circle-1, Aurangabad
Appellant		Respondent

Assessee by Shri Nikhil Pathak
Revenue by Shri Deepak Garg

Date of hearing 21-10-2020
Date of pronouncement 22-10-2020

आदेश / ORDER

PER R.S.SYAL, VP:

These two appeals by the assessee are directed against the separate final assessment orders dated 28-09-2018 and 14-10-2019 passed by the Assessing Officer (AO) u/s. 143(3) r.w.s. 144C and 92CA of the Income-tax Act, 1961 (hereinafter also called 'the

Act') in relation to the assessment years 2014-15 and 2015-16. As both the appeals are based on common facts, we are, ergo, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2014-15

2. The first issue raised in this appeal is against the Transfer Pricing (TP) addition of Rs.26,87,68,644/- made by the Assessing Officer (AO) in respect of the international transaction of 'Payment of Regional Service charges (RSC)' except the component of I.T. Services. The assessee has also raised an additional ground reading as under:

“The assessee submits that the determination of ALP at Rs. NIL by the learned TPO in respect of Intra Group Services without adopting any of the prescribed method is not justified and hence, the addition made of Rs.26,87,68,644/- may kindly be deleted.”

3. Since the additional ground involves a legal issue and is connected with the first main issue espoused in the memorandum of appeal, and that no further verification of fresh facts is warranted, we admit the same in the light of judgment of the Hon'ble Supreme Court in *National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC)* wherein the Hon'ble Apex Court

has observed that “the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law”. The additional ground will be dealt with at appropriate stage.

4. Succinctly, the factual panorama of the case is that the assessee is an Indian company engaged in the manufacturing of Goodyear branded Medium, Commercial truck tyres, Wire built tyres, Road tyres and Rear farm tyres. Return of income was furnished declaring total income of Rs.75.83 crore. After set-off of brought forward depreciation/loss of Rs.56.74 crore, income was arrived at Rs.19.09 crore. The assessee reported 17 international transactions in Form No.3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the arm’s length price (ALP) of the international transactions. The extant dispute relates to the international transaction of “Payment of Regional Service Charges (RSC)” amounting to Rs.30,22,17,046/-. The assessee adopted the Comparable Uncontrolled Price (CUP) method as the most appropriate method for demonstrating that this international transaction was at ALP. As observed by the TPO, the assessee, in its Transfer Pricing (TP) study report, stated that costs

pertaining to RSC were reimbursed to Goodyear USA on cost-to-cost basis and further Goodyear USA aggregated the services provided by other Goodyear affiliates and compensated them on arm's length basis. The TPO did not accept the benchmarking done by the assessee under the CUP method because the assessee made comparison of the actual transaction (controlled transaction) with the same transaction itself conducted between the assessee and its Associated Enterprise (AE), which was not uncontrolled as stipulated in the mechanism for the application of the CUP method. The TPO requested the assessee to furnish evidence for receipt of services, nature of services, basis for computation of payment of services to the AE and benefit derived from such services. The assessee furnished a copy of agreement, break-up of services, nature of services and a certificate of independent Chartered Accountant (CA) confirming the cost allocation and benefit test documents evidencing receipt of services. At this stage, it is relevant to mention that payment of Rs.30,22,17,046 to Goodyear USA as Regional Service charges pertained to six separate intra-group services including Rs.3,34,48,402/- towards "Information Technology Services". Payment in respect of such

IT services was accepted by the TPO at ALP. It is regarding the balance amount of Rs.26,87,68,644/- relating to the remaining five regional services, that the TPO observed that the assessee furnished copies of certain presentations and e-mails as evidence for availing regional services, which were more in the nature of delivery or exchange of information rather than the rendition of the services. In para 9.4 of the TPO's order, he observed that the assessee was charged for the services for which it would not have paid as an independent enterprise. Further in para 9.5, he observed that the charges levied on the assessee were for the services which did not provide any commercial benefit to it. From the e-mail correspondence, the TPO noticed that the addresses were not identifiable as specifically relating to the assessee. He further noticed that the assessee claimed to have received critical support regarding the production of state of art Radial Tyres for Passenger Cars under "Production Tyre performance/Product Resolution", for which it started paying Technological Know-how fees separately w.e.f. 01-01-2011 for providing services that were akin to those described under Production and the Performance/Product Resolution under the regional services. After considering the

entire material, the TPO came to hold that the payment of Rs.26,87,68,644/- was not at ALP. He adopted Nil value as ALP of the international transaction and accordingly recommended transfer pricing adjustment of equal amount. The AO accordingly passed the Draft order making adjustment of Rs.26.87 crore on this score. The assessee approached the Dispute Resolution Panel (DRP) against the transfer pricing adjustment. The DRP observed that identical issue was examined by it for the assessment year 2012-13 and after detailed examination, the view point of the authorities below determining Nil ALP, was approved. After reproducing relevant parts of the DRP directions for the assessment year 2012-13, the DRP simply followed the same and confirmed the transfer pricing adjustment of Rs.26,87,68,644/-. The AO made transfer pricing addition of this amount in the final assessment order, which has been impugned before the Tribunal in the instant appeal.

5. We have heard the rival submissions through virtual court and gone through the relevant material on record. The issue raked up before the Tribunal is the transfer pricing addition of Rs.26,87,68,644/- in respect of international transaction of

payment of Regional Service Charges pertaining to five intra-group services, whose ALP has been determined by the TPO at Nil.

6. The TPO in para 9.18 of his order took note of the fact that the issue is similar to that pertaining to the assessment years 2011-12 and 2012-13. The DRP, in its direction dated 30.07.2018, also noticed that similar transfer pricing adjustment was approved by it for the A.Y. 2012-13. After reproducing the relevant parts of the DRP directions for the earlier year, it held that “Since, the facts are identical for this year also, we are in agreement with the observation made by DRP in A.Y. 2012-13 on merits”. It would be apposite to mention that the final assessment orders passed by the AO making similar additions for the A.Yrs. 2011-12 and 2012-13 came up for consideration before the Tribunal. Vide its order dated 04-09-2019 (in ITA No.1068/PUN/2016 and 684/PUN/2017), the Tribunal deleted the additions so made in respect of the RSC. A copy of such order has been placed at pages 1122 onwards of the paper book. The Id. AR stated that since the orders passed by the authorities below for making the addition for the current year are based on the orders for the A.Ys. 2011-12 and

2012-13, which have been reversed by the Tribunal, the instant addition should be consequently deleted.

7. We find from the concurrent findings of the DRP and the TPO that in reaching the conclusion that the assessee did not receive any regional services, they relied on the orders for the earlier years. Since such orders have been overturned, it becomes vivid that the fact of rendition of the Regional services for the year under consideration can be possibly but not conclusively inferred. Be that as it may, the question of rendering of services is independent every year, which has to be proved on the basis of positive evidence. Simply because the assessee was found to have availed services in the preceding year, the same *per se* would not lead to inference that the services were also received in the current year. The factum of availing services needs to be established independently every year.

8. Notwithstanding the fact that the question of rendition of services in earlier years is similar to that of the year under appeal, still, there is an important aspect which calls for a *de novo* examination of the issue. This crucial aspect is the deviation in the selection of the most appropriate method for the instant year. For

the A.Y. 2012-13, the assessee aggregated the international transaction of payment of RSC along with certain other international transactions under the Transactional Net Margin Method (TNMM), whereas for the year under consideration, the assessee adopted the CUP method for showing the transaction of payment of RSC at ALP. When two or more connected transactions are aggregated, the excess of price charged or paid in respect of one transaction gets automatically adjusted against the shortage of price charged or paid in respect of other transactions in the overall determination of the ALP of the aggregated transactions. But when a particular transaction is benchmarked on an individual basis, its ALP needs to be determined distinctly *vis-à-vis* other international transactions. If such particular transaction is not found at ALP, even though some other transactions are at safe ALP, there can be no question of cross-subsidization of the favourable margin from other transactions against the adverse margin in the particular transaction. In such a scenario, transfer pricing addition is to be made on individual basis in the particular transaction, if warranted, on the benchmarking analysis undertaken of that particular transaction alone by ignoring the other

transactions benchmarked separately. Since the international transaction of payment of the RSC for the year has been benchmarked by the assessee on separate basis under the CUP method distinct from other international transactions in contrast with the combined approach adopted for the earlier year, the ALP of such a transaction requires separate determination.

9. Adverting to the factual landscape, the TPO determined Nil ALP for the five regional services at the transacted value of Rs.26.87 crore. In reaching this conclusion, he summed up his finding on pages 41 to 44 of the order, which are reproduced as under:-

- “- The documentary evidences submitted by the Assessee in order to establish the receipt of services were mostly copies of the email correspondence and presentations. These evidences are found to be more in the nature of exchange of information than that of rendering of services to the Assessee. Further, it is not clear from the mails whether they were addressed to the employees of the Assessee or that of the other group entity in India, i.e. Goodyear India Ltd.
- The certificate issued by the independent auditor is only with regard to correctness of the cost allocation as per the terms of the agreement and the same cannot be considered as a documentary evidence for establishing the ALP of the transaction.
 - Most of the services for which the Assessee has been charged by the AE with either performed by the Assessee

itself or by the other resident group entity, i.e. Goodyear India Ltd. under a cost sharing arrangement with the said resident company. It is seen that many of the services for which the Assessee is being charged by the AE are being provided by the resident group entity also under a cost sharing arrangement.

- The AE has charged the Assessee for “Legal Services” which is covered under the head “General/Administration Services”. However, the Assessee itself has debited an amount of Rs.127 lakhs under the head “Legal & Professional” expenses in its books of account.
- The duplication in the services being rendered is also reflected in the payments made to the same AE in USA, in pursuance of a separate Technical Assistance and License Agreement entered into with the said entity. On perusal of the said agreement, it is noticed that the services provided by AE are similar to the services provided by the AE under the head ‘Production & Tyre Performance/Product Resolution’ in pursuance of the Regional Services Agreement.
- No primary documentation or backup data was submitted by the Assessee in support of its claim that the costs relating to shareholder services/stewardship activities have been segregated as non-beneficial services and only the cost relating to beneficial services were allocated to the assessee and other group entities.
- As per OECD Guidelines, one of the important factors for deciding the question as to whether an intra group service has been rendered when an activity is performed for one or more group member depends on whether the activity provides the group member with economic or commercial value to enhance its commercial position. This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the

activity in-house for itself. However, in the Assessee's case, it is seen from the perusal of email correspondence that there are instances where the Assessee has been charged for the services for which it would not have paid as an independent enterprise.

- Mere description of the services without demonstrating the specific service rendered by the AE is not sufficient for justifying the ALP of the RSC paid by the Assessee.
- The contention of the Assessee that it is the prerogative of the taxpayer to decide the business expediency of any expenditure and the revenue cannot question the commercial expediency. In this regard it is to be stated that the issue under consideration is not regarding commercial expediency or otherwise of the expenditure but it is the determination of the arm's length price of the transaction. A transaction cannot be treated to be at arm's length unless it is substantiated that there was a need for making such payments and the services for which payments were made were actually received by the Assessee.
- The Hon'ble Bangalore ITAT, in its decision in the case of Cranes Software international Ltd., while confirming the determination of ALP of the transaction of payment towards apportionment of common expenses, held that the agreements between the subsidiaries could at best be considered only as self-effectuating documents since the AEs were subsidiaries of the Assessee. The Hon'ble Tribunal held that considerable onus was on the Assessee to show that actual services were rendered by its subsidiaries.”

10. To sum up, the findings of the TPO on Nil ALP determination are founded either on the ground that there was no evidence of receipt of services by the assessee; or it was a case of duplicate services; or the assessee did not receive any benefit from such

services; or there was no need for services; or these were shareholder services; or though the certificate by the auditor on cost allocation was correct but there was no documentary evidence for establishing the ALP.

11. Section 92(1) of the Act provides that: “Any income arising from an international transaction shall be computed having regard to the arm’s length price.” Computation of ALP has been dealt with in section 92C which provides that: “The arm’s length price in relation to an international transaction or ... shall be determined by one of the following methods, being the most appropriate method...’. The mechanism for determining the ALP under these methods has been given in Rule 10B. Insofar as the intra-group services under consideration are concerned, the determination of ALP primarily requires examination of three factors as to

- (i) Whether the services were actually availed?
- (ii) Whether the costs are rightly allocated to the assessee?
- (iii) Whether the payment by the assessee is at ALP?

12. We will examine the above three factors in seriatim:

(i) Whether the services were actually availed?

13. The assessee entered into a Service Agreement with Goodyear Tire & Rubber Company, Ohio, United States of America (hereinafter called “Goodyear USA”) for receipt of regional services. This Agreement, whose copy has been placed at pages 76 to 151 of the paper book, came into effect from 01-04-2012. Prior to this, the assessee was receiving similar Regional Services under another Services Agreement effective from 01-04-2010, whose copy has been placed at page 13 onwards of the third paper book. The Tribunal in its order for the assessment years 2011-12 and 2012-13 has examined the nature of services as per for the former Agreement effective from 01-04-2010. However, on perusal of both the Agreements, namely, the one which is relevant for the year under consideration and the one which was considered by the Tribunal in its order for earlier years, it becomes manifest that most of the clauses are substantially similar. The Id. DR also admitted the fact of similarity in the two Agreements insofar as the issue in dispute is concerned. Clause 2 of the Agreement relevant to the year under consideration deals with “Services to be provided”. It sets out the nature of services, which

are six in nature, being, General/Administration; Financial; Sales/Marketing; IT services; Production and Tire performance/Issue Resolution; and Purchasing and Materials Management. Since the IT services have been accepted by the TPO at arms' length, we will skip reference to the same in the Agreement. Details of the remaining five services have been given in Exhibits which are attachments to the Agreement. Under General/Administration Services, given in Exhibit A, there are two major sub-heads, viz., General Human Resource Services and Business Development and Planning. There is a detailed narration of services under these two sub-heads. "Financial Services" have been dealt with under Exhibit B, with sub-heads of Finance and Accounting Services; Audit Services; Tax Services; and Treasury Services. Under these sub-heads, there is again a detailed narration of the specific services. "Sales/Marketing" services have been given in Exhibit C. It talks of assistance to be provided by the assessee's AEs in establishing and maintaining top level contact with the management of existing and potential customer; Sales activities in accordance with the policies; Assistance in Advertising and Sale Promotion activities; Support in collection

and analysing local marketing information and Assistance in providing marketing information etc. “Production and Tire performance/Issue Resolution” services have been given in Exhibit E, with sub-heads of Production and Tire performance/Issue Resolution. “Purchasing and Material Management” services have been set out in Exhibit F. It has two sub-heads, namely, Purchasing and Material Management (Supply chain coordination/assistance). There is further bifurcation of the nature of services under both the sub-heads. Clause 5 of the Agreement with heading ‘Personnel’ provides that Goodyear USA, at its option, may obtain assistance from sub-contractors including its affiliates or any other concerns in rendering services to the assessee. Definition of the term “Affiliate” has been given in Clause 1.2 of the Agreement to mean “any other legal entity that, directly or indirectly, is 50% or more owned by, or otherwise controls or is controlled by, such party”. On perusal of the above referred clauses of the Service Agreement effective from 01-04-2012, it becomes evident that Goodyear USA undertook to provide six types of Regional Services to the assessee and other group companies across the globe. Such services were to

be provided not only directly by the Goodyear USA but also its other group concerns.

14. Having noticed that there was an Agreement for provision of services to the assessee, the next important issue is to ascertain if such services were actually rendered to the assessee. The TPO has also accepted that the assessee produced certain e-mails before him to demonstrate the receipt of services. He, however, did not infer the factum of receipt of services from them by holding that such e-mails were either general or did not specifically refer to the receipt of services by the assessee. On examination of material on record, it is found that the assessee furnished copious details to the TPO justifying the receipt of services under each broad head, whose copies have also been placed on record. We will advert to some of them to ascertain whether any services were actually availed by the assessee.

15. Pages 232 to 238 of the paper book contain a summary of emails on selective basis evidencing receipt of “Production and Tyre performance services”. The assessee has tabulated 78 e-mails demonstrating receipt of such services in this table. Texts of such e-mails are available in the paper book from pages 253 to 458.

Page 253 of the paper book is an e-mail dated 01-04-2013 sent by Alexandre Braun to Pramod Sakhare. Pramod Sakhare is an employee of the assessee and Alexandre Braun is from the regional team providing Production and Tyre performance services. There is a reference to some circular of policy specifications amongst the local teams containing details of customer OEMs and replacement tyres. Next e-mail is dated 03-04-2013, whose text has been placed at page 257 of the paper book. This e-mail refers to the regional team assisting the assessee in obtaining a draft CCSD and green specs required by local team (i.e. the assessee) in the manufacturing process. Next e-mail of the same date, namely, 03-04-2013 was sent by Gregory Jardot to Pramod Sakhare about performing certain tests and seeking clarification from the local team regarding the shipping status of the tyres sent for testing. In this way, texts of all the e-mails deal with Production and Tyre performance. In respect of “Procurement and Material Management” services, the assessee has placed summary of e-mails on pages 239 to 242 of the paper book, again on representative basis. Text of such e-mails have been placed at pages 459 to 619 of the paper book. From such e-mails, it can be

again noticed that these have been exchanged between Regional team from abroad and the assessee's employees in India. In such e-mails, there is discussion about various aspects of procurement and material management, such as, coding higher volume of materials from global suppliers; planning the global negotiation process; pricing policy adopted by a supplier, planning of procurement strategy efficiently; and issuing the prices of materials etc. Selective e-mail communications in respect of third category of services, namely, 'Sales and Marketing' have been summarised on pages 243 to 245 of the paper book. Text of such e-mails have been placed at pages 620 to 698 of the paper book. Such e-mails talk about various aspect of Sales and Marketing, such as, identification of the correct code against a customer Suzuki; Developing different sizes of Tyres; Regional Team Guiding the assessee as to how the testing and submission can be made within a time frame; construction of the submissions to be made to Suzuki by providing inputs on the type of compounds that should be used for manufacturing tyres etc. Summary of selective e-mails on "Finance Services" has been placed at pages 246 to 248 of the paper book. Text of the e-mails have been given at pages 699 to

924 of the paper book. In such e-mails, there is discussion about the automation of payment processing through SAP; framing all the treasury policies for the assessee; implementing corporate tax, global tax provision software' and pension plans etc. Selective summary of 'Human Resource and General Administrative services' e-mails has been given at page 249 onwards of the paper book. Text of such e-mails have been placed on pages 925 onwards of the paper book. These services refer to track of salary range and merit guidelines; maintaining the HR SAP named HR connect; periodic calls with local HR teams to discuss the periodic merit plans; and updating the details of separated employees along with details of organization in which particular employee was allotted.

16. On having a glimpse of such a detailed account of nature of regional services furnished to the assessee, there remains not even an iota of doubt that the assessee did receive such services from Goodyear USA and other affiliates. In such circumstances, it is absolutely not justified on the part of the TPO/DRP to hold that these were general e-mails not evidencing any provision of services to the assessee.

17. The TPO has further referred to the fact that it was a case of duplication of services. To buttress such a view point, he noticed that most of the services for which the assessee was charged by the AE, were either performed by the assessee itself or by the other resident group entity. He specifically referred to Production and Tyre Performance/Product Resolution services *vis-a-vis* Technical Assistance and License Agreement entered into with Goodyear USA. It can be seen that the regional services provided to the assessee are general in nature to be used in the conduct of day-to-day activities. As against that, payments separately recorded by the assessee in its Profit and loss account are towards specific services availed in India from third parties. The TPO referred to separate Technical Assistance and License Agreement entered into with Goodyear USA *vis-a-vis* the payment for Technical services under Regional Services. We find that the Technical Knowhow Agreement dated 01-01-2011 was entered into by the assessee (copy placed at page 171 of the paper book) for obtaining Technical information and know-how regarding “Covered products”. Royalty was to be paid @5% of each calendar year on the assessee’s net sales. In lieu of receipt of such technical

assistance, the assessee paid a sum of Rs.38.43 crore by declaring this international transaction at Sl. No. 14 on page 3 of the TPO's order, which has been accepted by the TPO at ALP. On the other hand, the payment for technical regional services in dispute refers to such technical guidance/resolution which the assessee received on day-to-day basis on the issues during the manufacturing activity. To accentuate on the duplication of services, the TPO referred to the payment of Rs.1.27 crore under the head 'Legal & Professional' expenses debited to the Profit and loss account, which was in addition to the legal charges paid under the regional services. Here again, we find that the separate payment debited to the Profit & Loss account is towards availing the services of the consultants in India for local compliance. Thus, it is evident that there is no duplication of services as was canvassed by the TPO.

18. The next point taken up by the TPO is that the assessee did not derive any benefit from such services or there was no need for such services. Suffice to say, it is prerogative of the assessee to have or not to have any services in the course of its business. Assessee is the best judge to decide if any particular services are required for carrying on its business. The TPO cannot step into the

shoes of the assessee and decide if there was any need for services. Evidence of availing services by the assessee forecloses the examination by the TPO whether such services were needed or not and whether any benefit was derived or not.

19. The next issue taken up by the TPO is that the services availed by the assessee were in nature of shareholder services. Shareholder services take place when some act or service is done by a shareholder to the company in order to ensure that his investment in the shares is safe and further such an act or service does not produce any effect to the company receiving it. The TPO has referred to regional services being in the nature of shareholder services in a generic sense. He has not specifically spelt out which services are shareholder services. From the detailed narration of services above, it is more than overt that the services did produce effect to the assessee company. As such, they go outside the ambit of the shareholder services.

20. In view of the foregoing discussion, we are fully satisfied that the assessee availed the regional services in the carrying on its business at the transacted value of Rs.26.87 crore.

(ii) Whether the costs are rightly allocated to the assessee?

21. Having held that the assessee did receive regional services from Goodyear USA and other affiliates, the next question which looms large before the Tribunal is to decide the amount of costs incurred by the service-providing companies on rendition of services. For this, we need to go back to Service Agreement effective from 01-04-2012. Definition clause 1.6 of the Agreement defines “Cost” to mean: “all expenses incurred by Goodyear, either directly or indirectly in providing the Services, including but not limited to wages, salaries and benefits to the persons providing the services, amounts paid to sub-contractors, administrative expenses, expenses associated with the use of physical space (including rent and utilities), amortization and depreciation of assets used by Goodyear, any fee required to obtain the accountants’ certificate referred to in section 8.2” Clause 3 of the Agreement deals with allocation of costs. Sub-clause (a) states that *the assessee “will only receive, and be obligated to pay for, those services that pertain to its business and are provided by Goodyear.* Clause 3(b) states that: “The *Recipient* (that is, the assessee) *would be allocated, restricted to the services mentioned under this*

Agreement to proportionate cost viz-a-viz such services being rendered to other Affiliates in an equitable and appropriate manner.” Manner of Allocation of costs has also been set out in the Agreement itself. Clause 3.2 of the Agreement states that the assessee agrees to share the general/administrative costs for such services at 50% on the basis of Net Sales and 50% on the basis of personnel employed. Insofar as the Financial services are concerned, the assessee agreed to share the costs for such services at 50% on the basis of total assets reported in the balance sheet and 50% on the basis of Net sales. Similarly, for the Sales and Marketing services, the allocation key is the Net sales of the participants. Similar is the position regarding the Production and Tire performance/Issue Resolution and Purchasing and Material Management Services. On going through the above clauses of the Agreement, it becomes evident that the assessee's share in the overall regional services costs incurred by Goodyear USA and other group entities is based on actual services provided to and availed by it and not any adhocism and further that such share is determined in terms of the Agreement. The assessee placed before the TPO a certificate from the Auditors of Goodyear USA, whose

copy has also been placed at pages 213 onwards of the paper book. In this certificate, the Auditor has certified that the allocation of costs was done in terms of Appendix A to the certificate, which has been placed at page 215 of the paper book. The assessee also placed before the TPO a note on the process followed for allocation of Regional Service charges, which is available at pages 217 onwards of the paper book. Page 226 of the paper book is the actual cost allocation working giving the assessee's share in RSC at Rs.30.22 crore. It has been noticed above that Goodyear USA as well as its Affiliates provided regional services to various group entities including the assessee. The costs incurred by all such service-providing entities were pooled with Goodyear Singapore. Goodyear USA initially added a 7.5% mark-up on its costs incurred for the purposes of pooling it with Goodyear Singapore. The Singapore entity also added a mark-up of 5% on the costs incurred by it. Other Goodyear entities also participated in rendering regional services. Apart from Goodyear Singapore, Goodyear Thailand and Goodyear Shanghai also added a mark-up of 5% on the costs which were pooled with Goodyear Singapore. Thereafter, Goodyear Singapore allocated the costs in terms of the

actual services availed by the respective entities including the assessee. The assessee's share in the total costs has been tabulated at page 226 of the paper book as under :-

Goodyear South Asia Tyres Private Limited
Assessment Year 2014-15
ANNEXURE 1C – COST ALLOCATION WORKING

Month	Base amount invoiced by Goodyear Singapore to Goodyear US	Mark-up charged by Goodyear Singapore while raising invoice	GST charged by Goodyear Singapore while raising invoice to Goodyear US	Total amount invoiced by Goodyear Singapore to Goodyear US	Mark-up charged by Goodyear US of 7.5% removed while invoicing	IT costs incurred by GTRC Pertaining to GSATL	Retained in GTRC ledger	Total amount invoiced by Goodyear US to GSATL	Total amount invoiced By Goodyear US to GSATL
	(USD)	(USD)	(USD)	(USD)	(USD)	(USD)	(USD)	INR	
	(A)	(B)	(C)	(D) = (A+B+C)	(E)	(F)	(G)	(H)=(D-E+F-G)	
April-13	445,497	2,292	3,370	451,159	6,783	4,175		448,551	24,076,821
May-13	445,497	2,292	3,370	451,159	6,783	4,252		448,628	25,349,064
June-13	445,497	2,292	3,370	451,159	6,922	6,230		450,467	26,752,996
July-13	445,497	2,292	3,370	451,159	6,829	2,031		446,361	26,949,260
Aug-13	268,492	772	1,134	270,398	9,731	10,403	(7,243)	278,313	18,285,986
Sep-13	445,497	2,292	3,370	451,159	6,829	18,493		462,823	28,980,798
Oct-13	445,497	2,292	3,370	451,159	6,829	(12,264)		432,066	26,570,696
Nov-13	265,917	167	246	266,330	12,189	4,580		258,722	16,156,973
Dec-13	507,424	2,017	2,965	512,406	10,113	4,445		506,738	31,316,867
Jan-14	420,942	1,966	2,890	425,798	8,419	4,569		421,948	26,437,865
Feb-14	420,942	1,966	2,890	425,798	8,419	4,266		421,946	26,040,363
Mar-14	420,942	1,966	2,890	425,798	8,419	5,044		422,423	25,299,356
Total	4,977,640	22,609	33,235	5,033,484	98,264	56,223	(7,243)	4,998,686	302,217,046

22. It can be seen there from the above table that the mark-up of 7.5% charged by Goodyear USA at the stage of pooling of costs, was unloaded at the time of allocation. To illustrate, for determination of the costs charged to the assessee for the month of April, 2013, all the Goodyear entities on an aggregate basis

incurred costs at 4,51,159 US dollars pertaining to the assessee, other than IT costs, with the respective mark-ups, wherever charged. Thereafter, 7.5% mark-up initially charged by Goodyear USA at 6,783 US Dollars was deducted. After adding the IT costs considered separately, the assessee's share for the month of April, 2013 was determined at 4,48,551 US \$ converted into Rs.2.40 crore. Total of allocated costs for 12 months period, in this way, came at Rs.30.22 crore, which has been invoiced by Goodyear USA to the assessee. All such details were filed before the TPO, who has acknowledged this fact in second bullet point in para 9.19 on page 42 of impugned order by noticing that: *"The certificate issued by the independent auditor is only with regard to correctness of the cost allocation as per the terms of the Agreement and the same cannot be considered as a documentary evidence for establishing the ALP of the transaction."* The TPO has nowhere in his order questioned the correctness of the certificate of the auditor on cost allocation. Thus, it manifestly establishes the correctness of the cost allocation as per the terms of the Agreement. This brings us to the point that the assessee was allocated Rs.30.22 crore as Regional Service charges on the basis

of actual costs incurred by Goodyear USA and other Goodyear affiliates on which only three Goodyear entities, namely, Goodyear Singapore, Goodyear Shanghai and Goodyear Thailand added mark-up of 5% while Goodyear USA eventually and other entities not adding any mark-up.

(iii) Whether the payment by the assessee is at ALP?

23. The next issue is to determine if the payment made by the assessee is at arm's length? In this regard, it is observed that the assessee claimed to have benchmarked this transaction under the CUP method by submitting before the TPO, as has been recorded on page 3 para 5 of his order, that: "costs pertaining to RSC are reimbursed to Goodyear USA on cost-to-cost basis. It is further stated that the Goodyear USA aggregates the services provided by other Goodyear affiliates and compensates them on an arm's length basis. Accordingly, the transaction was claimed to be compliant with arm's length principle". What is pertinent from the benchmarking exercise undertaken by the assessee is that in determining the ALP, it took the actual transaction with its AE itself as a benchmark for comparison. The benchmarking even

under the CUP method became more relevant when the assessee itself admitted before the TPO that other Goodyear affiliates were compensated on an arm's length basis. This implies, as has been noticed above, that certain Goodyear entities charged mark-up and it was not a case of mere cost reimbursements. Once it was undisputed that some of the Goodyear entities were compensated with a certain mark-up, then it was all the more vital to show that such mark-up was really at arm's length.

24. At this juncture, it would be apt to note the methodology under the CUP method as prescribed under rule 10B(1)(a) as under:-

“(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified ;

(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market ;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction”.

25. The CUP method stipulates that firstly, the price paid for services in a comparable uncontrolled transaction is identified. The

price in comparable uncontrolled transaction is then adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transaction. Such adjusted price is taken as ALP in respect of the services. It is a simple and plain that under the CUP method, the price actually paid is compared with the price paid in comparable uncontrolled transactions. In other words, existence of at least two transactions is *sine qua non* for benchmarking, viz., first, the controlled international transaction whose ALP is to be determined and second, the comparable uncontrolled transaction, which is taken as a benchmark for comparison with the controlled transaction.

26. In sharp contrast to the mandate of rule 10B(1)(a), the assessee tried to demonstrate the ALP determination by comparing its controlled transaction with the transaction itself, whereas, the later necessarily ought to have been a comparable uncontrolled transaction. In other words, the actual transaction has also been taken as a comparable uncontrolled transaction, which position is apparently contrary to the law. Since the assessee did not consider any comparable uncontrolled transaction, we desist from according

our imprimatur to the manner in which the CUP method was applied by the assessee.

27. Similar is the position with the TPO also, who went on to determine Nil ALP without resorting to any method. Referring to rule 10AB applicable from A.Y. 2012-13 providing for adoption of any method other than the five specified methods in section 92C(1), the Id. DR submitted that the TPO adopted any other method. We do not find any substance in the argument of the Id. DR that the TPO applied 'any other method'. Firstly, the TPO has nowhere mentioned in his order that he was applying such 'any other method' in terms of rule 10AB. Secondly, the TPO has not determined the ALP in any manner. He simply wrote in para 10.2 of his order that: "the arm's length price of the balance amount of Rs.26,87,68,644/- is taken as Nil and accordingly an adjustment of Rs.26,87,68,644/- is made to the value of international transactions of payment of Regional service charges made to the AE". This indicates that the TPO did not determine the ALP under any method much less 'any other method'. In such circumstances, we cannot countenance the argument of the Id. DR, which is just in the air and does not emanate from the TPO's order.

28. Thus, it is seen that like the assessee who did not conduct any benchmarking and straightway treated the transaction at ALP under the CUP method without comparing it with any other comparable uncontrolled transaction, the TPO also did not apply any of the prescribed methods for determining the ALP. Here the additional ground comes into play as per which it has been contended that in the absence of the TPO applying any method determining the ALP, his action was vitiated and the addition be deleted on this score alone. In support of the additional ground, the Id. AR vehemently relied on certain decisions.

29. We respectfully agree with the proposition propounded and do not dispute the *ratio* laid down in the cited decisions. However, if we hold that the ALP determination by the TPO was not done under any specific or general method and hence the same should be obliterated, a *fortiori* would be that the ALP determination by the assessee would resurface. We have observed *supra* that the assessee also did not undertake any benchmarking exercise and simply claimed the controlled transaction to be at ALP under the CUP method without comparing it with any other comparable uncontrolled transaction. In other words, the assessee also did not

apply any method for the ALP determination. By applying the *ratio decidendi* of the cited cases in the prevailing facts, with which we otherwise fully agree, would land us in an incurable situation inasmuch the wiping out of the TPO's ALP determination would leave the benchmarking exercise undone, making the provisions of Chapter-X redundant, which are otherwise applicable and mandate the determination of the ALP of the international transaction. It goes without saying that judicial decisions are guiding principles and as a rule, need to be followed in similar circumstances. However, dissimilarity in facts or changed legal position mark exception to the general rule. Had there been any valid ALP determination by the assessee, we would have readily accepted the proposition laid down in such decisions and set aside the TPO's ALP determination based on no method. But acceptance of such an argument in the instant case will lead to burying the ALP determination of an international transaction with an admitted mark-up, which position is contrary to the prescription of the Chapter-X of the Act. The additional ground urging to set aside the transfer pricing addition on this count, in the prevailing facts is, ergo, not allowed.

30. Having seen that neither the ALP determination of the assessee nor the Revenue is as per law, the next thing is to find out if the payment by the assessee in respect of regional services was at ALP? One of the recognized methods as per section 92C(1) of the Act is the 'Cost plus method'. This method is ordinarily employed, *inter alia*, in the case of provision of services. The manner of determination of the ALP as per this method is enshrined in Rule 10B(1)(c). Under this method, the direct and indirect costs incurred by the enterprise in respect of services provided to an associated enterprise are determined. Such costs are increased by the amount of normal gross profit arising from similar uncontrolled transaction. The resultant amount is taken as an arm's length price in relation to provision of services by the enterprise.

31. Adverting to the facts of the case, it is found that the independent auditor issued certificate as to allocation of actual costs incurred by various Goodyear entities in providing services to the assessee as per the Agreement. The TPO has also not disputed the correctness of such a certificate. This can help us in determining the figure of direct and indirect costs incurred by the AEs in rendering services to the assessee. The next step is

determination of the normal gross profit mark-up on such costs in a comparable uncontrolled situation, which when applied to the actual direct and indirect costs, would give the ALP of the transaction of provision of services.

32. At this stage, we may usefully refer to second proviso to section 92C(2) of the Act, whose relevant part provides that: 'if the variation between the arm's length price so determined and price at which the international transaction ... has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction ... has actually been undertaken shall be deemed to be the arm's length price.' The tolerance range applicable for the A.Ys. 2014-15 and 2015-16 under consideration, as per the Notification issued by the Central Government, is 3% in all cases other than wholesale trading. The third proviso states that: 'where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction undertaken on or after the 1st day of April, 2014, shall be computed in such manner as may be prescribed and accordingly

the first and second proviso shall not apply'. Such manner of computation has been provided under rule 10CA. The third proviso came into force w.e.f. A.Y. 2015-16. This proviso applies where the application of the most appropriate method gives more than one arm's length price, a situation with which we are not concerned right now. If third proviso to section 92C(2) read with rule 10CA applies, then application of the second proviso along with the first is ousted. Per contra, when there is only one arm's length price, then the third proviso and rule 10CA do not get magnetized and the case gets governed by the second proviso. Suffice to say, if there is only one comparable, second proviso to section 92C(2) will apply providing for $\pm 3\%$ tolerance range; and if there are more than one comparables, rule 10CA will apply providing for either arm's length range or simple average with $\pm 3\%$ tolerance range depending upon whether the number of comparables are six or more on one hand or between 2 to 5 on the other. The logic behind providing for this cushion of $\pm 3\%$ or arm's length range, as the case may be, is to rationalize the ALP determination inasmuch as price in two identically placed transactions may sometimes genuinely vary depending upon the

bargaining power or the financial conditions along with a host of factors. Presently, we do not have two or more comparable uncontrolled transactions. Thus rule 10CA does not apply and the case will be governed by the second proviso to section 92C(2) with tolerance range of $\pm 3\%$.

33. It is simple and plain that, ordinarily, arm's length margin in rendition of services cannot be less than zero per cent in an uncontrolled transaction. However, it may go up to any level depending upon the facts and circumstances of each case. Let us proceed with the lowest arm's length margin of zero percent in a hypothetical comparable uncontrolled transaction. Going by the command of second proviso to section 92C(2), if the variation between the arm's length price so determined (which is equal to the costs incurred by the Goodyear entities in rendering services with zero mark-up on costs) and price at which the international transaction has actually been undertaken (which is actual costs incurred plus mark-up on such costs) does not exceed three per cent of the transacted value, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price.

34. The Id. AR was directed to place on record entity-wise regional services costs charged to the assessee by various Goodyear entities with the overall costs and percentage of mark-up on overall basis. On the next date of hearing, such a calculation was placed in a tabular form, which is as under: -

**Goodyear South Asia Tyres Private Limited
Assessment Year 2014-15**

Chart giving details of mark-up charged by Group Companies

Sr. No.	Name of the Company	Base Value of services	Mark-up	GST	Total amount including mark-up	Mark-up charged by Singapore	GST on Singapore mark-up	Mark-up of USA (Removed)	Net Mark-up	IT Cost incurred by Goodyear USA	Amount retained by Goodyear USA	Total Value of services	Mark-up% (Total Value of services)	Mark-up% (Base Value)
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	(K)	(L=H/K)	(M=H/A)
1	Goodyear Shanghai	16,92,227	84,611	1,06,610	18,83,448	-	-	-	84,611	-	-	18,83,448	4.49%	5.00%
2	Goodyear USA	15,06,746	98,264	-	16,05,010	-	-	(98,264)	-	56,223	(7,243)	15,70,211	0.00%	0.00%
3	Goodyear Singapore	4,68,594	-	-	4,68,594	22,609	33,235	-	22,609	-	-	5,24,438	4.31%	4.82%
4	Goodyear Thailand	79,837	3,992	5,868	89,697	-	-	-	3,992	-	-	86,697	4.45%	5.00%
5	Others	9,30,890	-	-	9,30,890	-	-	-	-	-	-	9,30,890	0.00%	0.00%
	Total	46,78,294	1,86,867	1,12,478	49,77,640	22,609	33,235	(98,264)	1,11,212	56,223	(7,243)	49,98,686	2.22%	2.38%

Note :

1. The amount referred in Column D tallies with the amount mentioned in Column A on page 226 of the paper book. This amount is inclusive of the mark-up charged by Goodyear USA, Goodyear, Shanghai and Goodyear Thailand but does not include the mark-up charged by Goodyear Singapore.
2. The amount referred in Column K tallies with the amount mentioned in Column H on page 226 of the paper book

35. It can be seen from the above calculation given on behalf of the assessee and duly verified by the Id. DR that the mark-up on actual costs incurred by the Goodyear entities in rendering regional services to the assessee is 2.22% on total value of services invoiced. This calculation is based on taking all the six regional

services together. As the IT services are not to be considered for our purpose, the ld. AR pointed out that even if such services are considered as without any mark-up, the mark-up on aggregate basis in respect of the remaining five services will be 2.52%. Such mark-up is within the tolerance range of 3%. In other words, even if presume that the comparable uncontrolled transaction is at zero mark-up, still the value of the international transaction is within the notified tolerance range. In that view of the matter, the case gets covered by the second proviso to section 92C(2) of the Act not warranting any transfer pricing addition. We, therefore, order to delete the addition of Rs.26.87 crore and odd.

36. No other ground was pressed by the ld. AR. Such grounds, therefore, stand dismissed.

A.Y. 2015-16 :

37. The only issue pressed in this appeal raised through Ground Nos. 1 to 6 and additional ground is against the addition of Rs.32,06,19,150/- made by the AO on account of transfer pricing adjustment towards the payment of Regional Service Charges.

38. Briefly, the factual matrix of the case is that the assessee filed return declaring total income of Rs.99.31 crore, declaring certain international transactions in Form No.3CEB. The AO made a reference to the TPO for determining the ALP of the international transactions. The only international transaction disputed in the instant appeal is “Payment of Regional Service Charges” amounting to Rs.36,67,34,639/-. The assessee applied the CUP method for demonstrating that this transaction was at ALP. The basis for the assessee to claim the transaction at ALP remains the same as for the preceding year. The TPO accepted the payment of IT services charges of Rs.4,61,15,489/- at ALP. For the remaining amount of Rs.32,06,19,150/- paid by the assessee towards five regional services, the TPO determined Nil ALP on the same basis as was done for the preceding year. The DRP, following its direction for the A.Y. 2014-15, upheld the view point of the TPO that has been incorporated in the final assessment order impugned before the Tribunal. Aggrieved thereby, the assessee has come up in appeal.

39. Having heard both the sides and gone through the relevant material on record, it is found as an admitted position by the rival

parties that the facts and circumstances of the transfer pricing addition of Rs.32,06,19,150/- are *mutatis mutandis* similar to those of the A.Y. 2014-15. For the instant year also, the assessee applied the CUP method on an irrational basis as has been discussed above for the preceding year. The TPO also followed the suit and determined Nil ALP without application of any method. The case of the TPO remained that the assessee either did not receive any services or the services were duplicate in nature or unwarranted or shareholders service or no benefit was derived. It is on such basis that the TPO came to hold that the assessee did not receive regional services. Here, it is again pertinent to mention that the assessee availed regional services in the same manner as for the preceding year. Relevant evidence in support of availing the services have been placed on record. The ld. DR did not dispute that the evidence for the instant year is similar to that of the preceding year. Following the view taken for the A.Y. 2014-15, we hold that the assessee did avail regional support services from Goodyear USA and other affiliates.

40. Coming to the second aspect as to whether the costs were rightly allocated to the assessee, again we find that the position

remains the same. The Id. DR did not dispute the correctness of the allocation of costs.

41. Turning to the last aspect as to whether the payment by the assessee was at ALP, here we find that the assessee has placed on record a chart giving detail of mark-ups charged by the Group companies, which is reproduced as under:

Sr. No	Name of the Company	Base Value of services	Mark-Up	GST	Total amount including mark-up	Mark-up charged by Singapore	GST on Singapore mark-up	Mark-up of USA (Removed)	Net Mark up	IT Cost incurred by Goodyear USA	Amount retained by Goodyear USA	Total Value of services	Mark-up% (Total Value of services)	Mark-up% (Base Value)
		(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	(K)	(L=H/K)	(M=H/A)
1	Goodyear Shanghai	18,32,238	91,612	1,15,431	20,39,280	-	-	-	91,612	-	-	20,39,280	4.49%	5.00%
2	Goodyear USA	21,32,675	1,13,534	-	22,46,209	-	-	(1,13,534)	-	75,601	83,585	21,24,691	0.00%	0.00%
3	Goodyear Singapore	5,20,600	-	-	5,20,600	25,550	37,556	-	25,550	-	-	5,83,706	4.38%	4.91%
4	Goodyear Thailand	99,983	4,999	7,349	1,12,331	-	-	-	4,999	-	-	1,12,331	4.45%	5.00%
5	Others	11,15,343	-	-	11,15,343	-	-	-	-	-	-	11,15,343	0.00%	0.00%
	Total	57,00,839	2,10,145	1,22,780	60,33,764	25,550	37,556	(1,13,534)	1,22,161	75,601	83,585	59,75,352	2.04%	2.14%

Note :

1. The amount referred in Column D tallies with the amount mentioned in Column A on page 306 of the paper book. This amount is inclusive of the mark-up charged by Goodyear USA, Goodyear, Shanghai and Goodyear Thailand but does not include the mark-up charged by Goodyear Singapore.
2. The amount referred in Column K tallies with the amount mentioned in Column H on page 306 of the paper book

42. The Id. DR fairly conceded that the calculation done on behalf of the assessee in the above table is correct. It can be seen from the above chart that the mark-up on total value of services rendered to the assessee at the invoice value is 2.04%. This calculation is again based on taking all the six regional services together. As the IT services are not to be considered for the current

purpose, the ld. AR pointed out that even if such services are considered as without any mark-up, the mark-up on aggregate basis in respect of the remaining five services will be 2.34%. Such mark-up is within the tolerance range of 3%. In other words, even if presume that the comparable uncontrolled transaction is at zero mark-up, still the value of the international transaction is within the notified tolerance range. Going by the second proviso to section 92C(2) of the Act, we hold that the international transaction of receipt of five Regional Support Services is at ALP and does not warrant any transfer pricing addition. The consequential addition of Rs.32.06 crore and odd made by the AO is hereby deleted.

43. No other ground was pressed by the ld. DR, the same, therefore, stand dismissed.

44. In the result, both the appeals are partly allowed.

Order pronounced in the Open Court on 22nd October, 2020.

Sd/-
(PARTHA SARATHI CHAUDHURY)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 22nd October, 2020
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT (DRP-3) Mumbai-1,
CIT (DRP-3) Mumbai-2 and CIT (DRP-3), Mumbai-3
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे “बी” /
DR ‘B’, ITAT, Pune
5. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	21-10-2020	Sr.PS
2.	Draft placed before author	22-10-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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