

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE
BEFORE SHRI. B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.290/BANG/2017
Assessment Year : 2012 - 13

M/s Disa India Ltd., 5 th Floor, Kushal Garden Arcade, 1A, Peenya Industrial Area, Peenya 2 nd Phase, Bengaluru-560 058. PAN - AAACG 5030 F	Vs.	The Asst. Commissioner of Income Tax, Circle-2(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R Vasudevan, Advocate
Respondent by	:	Shri Farhat Hussain Qureshi, CIT (DR)

Date of Hearing	:	05-11-2020
Date of Pronouncement	:	25-11-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 15/12/2016 passed by Ld.ACIT Circle 2(1)(2), Bangalore under section 143 (3) read with section 144C(13) of the Act, for assessment year 2012-13, on following grounds of appeal:

"The grounds mentioned hereinafter are without prejudice to one another.

I. Transfer Pricing

101. The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Dispute Resolution Panel ("Hon'ble DRP") grossly erred in law and facts of the case in proposing a transfer pricing adjustment under section 92CA of the Income-tax Act, 1961 ("the Act") amounting to INR 1,85,76,691 on account of payment of Group Service Fee and towards commission by the Appellant to its Associated Enterprises ("AEs").

2. The learned AO/learned TPO/Hon'ble DRP erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act. Thereby, disregarding the economic analysis performed by the Appellant in the Transfer Pricing documentation to justify the arm's length nature of the international transaction pertaining to payment of Group Services Fees and towards commission to its AE.

3. The learned AO/learned TPO/Hon'ble DRP erred in considering the arm's length price to be "Nil" with respect to the payments made by the Appellant towards the Group Services received from its AEs.

4. The learned AO/learned TPO/Hon'ble DRP erred in selecting Comparable Uncontrolled Price Method ("CUP") as the most appropriate method in determining the arm's length price of payment towards Group Service Fee to its AE despite the learned TPO not following the provisions prescribed in clause (a) of the sub-rule (1) of Rule 10B of the Rules for determination of ALP in relation to an international transaction under CUP.

5. The learned AO/learned TPO/Hon'ble DRP erred in holding that the international transactions cannot be aggregated in the application of Transactional Net Margin Method ('TNMM') for the transfer pricing analysis without appreciating the fact that the principle of aggregation of closely linked transactions is a well-established rule prescribed by the Organisation for Economic Co-Operation and Development guidelines ('OECD Guidelines') and referred to for guidance in various rulings of Income Tax Appellate Tribunals ('ITAT').

6. The learned AO/learned TPO/Hon'ble DRP erred in not appreciating the Group Services received by the Appellant are inextricably linked and constitute an integral part of the manufacturing activity, thereby justifying aggregation with the transactions in the manufacturing operation. Thereby, not accepting the TNMM adopted by the Appellant as the most appropriate method for justifying the payments made for the receipt of Group Services.

7. The learned AO/learned TPO/Hon'ble DRP erred in ignoring the evidences submitted by the Appellant to prove that it was in need of services, services were actually rendered and the benefit was derived from the services obtained from the AE.

- 8. The learned AO/learned TPO/Hon'ble DRP erred in proposing adjustment amounting to MR 2,85,825 on account of commission paid to its AE.

9. The learned AO/ learned TPO/ Hon'ble DRP erred in not accepting the TNMM adopted by the Appellant as the most appropriate method for benchmarking the transaction of payment of commission to its AE.

10. The learned AO/learned TPO/Hon'ble DRP erred in considering CUP as the appropriate method to compare the commission paid by Appellant to its AE despite the learned TPO not following the provisions prescribed in clause (a) of the sub-rule (1) of Rule 10B of the Rules for determination of ALP in relation to an international transaction under CUP.

II Corporate Tax

11. The learned AO/ Hon'ble DPP erred in disallowing Commission Paid/Payable to the Foreign Firm, Ruba International Trading Est., Jordan amounting to Rs. 4,13,721 u/s 40(a)(ia) of the Act.

12. The learned AO/ Hon'ble DRP erred in not following the direction of the Hon'ble DRP to allow credit for Tax Deducted at Source.

13. The learned AO/learned TPO/Hon'ble DRP erred in levying interest under Section 234A & 234C of the Income-tax Act, 1961.

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

Brief facts of the case are as under:

2. Assessee is a company and filed its return of income for year under consideration, declaring total income of Rs.37,28,19,120/-. Subsequently, notice under section 143(2) and 142(1) of the Act was issued to assessee. In response to statutory notices, representative of assessee appeared before Ld.AO and filed requisite details as called for.

3. Ld.AO observed that, assessee is engaged in business of manufacturing of machinery and equipments. On verification of financial statements filed by assessee, Ld.AO noted that assessee had international transaction exceeding Rs. 15 crores, and therefore, reference was made to the transfer pricing officer to determine arm's length price, as per the provisions of section 92CA of the Act.

4. Upon receipt of reference, Ld.AO called upon assessee to file economic details of international transaction between assessee and its AE in Form 3CEB.

5. Ld.TPO observed that, assessee is engaged in business of manufacturing foundry equipment and metals. Assessee also had a range of sand moulding equipments, short blast and filters. As per the Form 3 CEB filed by assessee, following were the international transaction entered into by assessee:

International Transaction	Total Value of Transaction
Import of raw materials, components	4,33,24,431
Export of equipment and parts	8,19,72,810
Import of traded goods	1,86,14,571
Import of capital goods	94,91,360
Payment for ERP software	34,65,000
Payment of royalty	1,01,84,712
Income from sales commission	1,81,24,976
Rendering of technical services	32,49,778
Payment of commission	3,09,000
Payment of group service fees	1,82,90,866
Payment of group information technology (IT) fees	2,07,40,434
Reimbursement of expenses	4,16,526
Amounts receivable	4,15,33,167
Amounts Payable	3,98,67,807

6. Ld.TPO observed that assessee received business support services, against which payments were made to AE. Ld.TPO

accordingly called upon assessee to establish the services having rendered by AE. Assessee submitted that, the group service fees are incurred centrally by the AE and allocated to the associated enterprises on the basis of percentage of total sales of the region. It was submitted by assessee that, the method adopted by AE to allocate group service fees is based on various keys. Ld.TPO however was of the opinion that no services having economic and commercial benefits have been received by assessee and hence the arms length price of the service is nil.

7. Ld.TPO observed that assessee was not able to justify the need for making payment of Rs.1,82,90,860/- to its AE on account of group service fees. He also noted that, documents submitted by assessee are general in nature and do not prove that it has derived tangible commercial benefit out of the alleged services, and the payment made is commensurated to the benefit received. He was of the opinion that, assessee could not establish that a third-party would have made similar payment for similar services to an uncontrolled party. Ld.TPO thus submitted that, assessee was not able to prove by way of any documentary/evidence of tangible benefit received on account of alleged services. He was of the opinion that, general write-up on alleged benefits submitted by assessee do not constitute credible evidence for justification or quantification of the services rendered.

8. Ld.TPO thus held that, assessee failed to prove the arms length nature of the payment of technical and management costs

amounting to Rs.1,82,19,866/- paid to AE. He thus treated the cost paid as 'nil' due to inadequacies of assessee's argument.

Ld.AO subsequently while passing draft assessment order observed that assessee debited a sum of Rs.4,13,721/- towards provision of commission. It was noted by Ld.AO that, it was an estimated liability on adhoc basis, which cannot be allowed as expenditure under section 37(1) of the Act. He also noted that, assessee should have deducted TDS under section 40(a)(ia) of the Act.

9. Aggrieved by proposed additions, assessee raised objections before DRP.

10. DRP in regards to intragroup services observed as under:

"i) Page 61 and 64 of the paperbook, volume-11, are general submissions which indicates the agree services and the allocation of intra-group services fees, in accordance with the agreement discussed above; Page no.129 towards which our attention is drawn, is also a working of allocation based on the agreement. These documents do not prove that any actual services had been rendered.

ii) Page 3 of the additional evidence, is a confidential and non-disclosure agreement dated 11/10/2013 (which is subsequent to the assessment year) which does not in any way establish that the services commensurate to the fees, were rendered."

11. Regarding disallowance of commission paid/payable to foreign from under section 40(a)(ia) of the Act, Ld DRP observed that no evidence was furnished by assessee it has been observed by DRP that assessee did not establish the onus with supportive documents that expenses had been incurred for purpose of business carried out during the year, and the claim was not contingent in nature. DRP accordingly upheld the disallowance made.

12. Upon receipt of DRP directions, Ld.AO passed impugned assessment order making addition in the hands of assessee.

Aggrieved by order passed by Ld.AO, assessee is in appeal before us now.

13. At the outset, Ld.AR submitted that, various details were furnished by assessee before the authorities below which were not considered in right perspective. Ld.AR submitted that, assessee entered into agreement with respect to management services and that, various details in respect of benefit received, and nature of services rendered by AE were submitted. He also submitted that evidence of services availed through e-mail correspondences for training conducted in India by personnel of AE group, marketing activities conducted by assessee etc., were furnished before authorities below. He submitted that, the cost allocation was based on various keys based on which, the payments have been made by assessee in view of services received.

14. Ld.AR submitted that, authorities below have not verified all these details filed by assessee, and have summarily rejected the submissions. He submitted that, authorities below have wrongly observed that, satisfactory evidences were not filed in support of the claim made by assessee. Ld.AR referring to the observations of DRP, submitted that, allocation of costs in respect of IT services which has been allowed by Ld.TPO are similar to the cost allocation in respect of managerial services disputed by Ld.TPO.

He submitted that identical evidences were filed for both these segments to establish that services were received from AE.

15. Ld.CIT.DR submitted that the issue may be remanded to authorities below for verification of the fact in the light of evidences filed by assessee.

16. We have perused submissions advanced by both sides in light of records placed before us.

17. Grounds from 1-10 relate to payment made to AE in view of intragroup services received by assessee.

18. It is observed that Ld.TPO determined ALP at NIL by applying CUP, *vis-à-vis*, ALP determined by assessee at aggregate level by using TNMM. Ld.TPO held that assessee did not obtain any benefit out of such services and that such services provided by AE were not required, as, assessee failed to provide evidence regarding receipt of services, alleged to be rendered by AE, necessitating any payment. It is observed that, Ld.TPO thus held that, as there is no benefit from services for which payments has been made, he determined ALP of international transaction at Nil, without carrying out any FAR analysis of intra-group services. This approach of Ld.TPO is not acceptable, as once a transaction has been categorised as independent international transaction, it is necessary to determined ALP of such transaction. Ld.TPO cannot consider ALP at 'NIL' and value of transaction has to be computed as per law.

19. The Income Tax Act provides computation of arms length price of any international transaction as under:

Computation of income from international transaction having regard to arm's length price.

92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

Explanation.—For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction [or specified domestic transaction], two or more associated enterprises enter into a mutual agreement or arrangement 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, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

20. According to above provisions following principles emerge:-

- An international Transaction is entered in to between two or more associated enterprises for jointly acquiring or developing some property or for obtaining services.
- The parties to transaction enter in to mutual agreement or arrangement to share cost or expenses incurred or to be incurred in respect of joint property.
- The cost or expenses incurred should be in connection with a benefit or services of facility provided or to be provided to any one or more of such enterprise. The expectation of

mutual benefit is important consideration for the acceptance of arrangement for pooling of resources by the enterprises.

- The enterprises would require that each participant's proportionate share of the contribution is consistent with the proportionate share of overall benefits expected to be received from the arrangement.
- Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of such benefit, service or facility received by the enterprise. In order to satisfy arm's length price participant's contributions must be consistent with what an independent enterprise would have agreed to contribute under comparable circumstances considering the benefits it expects to derive from the agreement.

21. We direct Ld.TPO to judge the requirement of services from viewpoint of assessee as a businessman. Therefore in this regard we are of view that assessee has to substantiate that these services are required by it. We note that assessee has entered into Intra Group Service agreement with AE, which is placed at page 467 of paper book Volume II. This goes to prove that services were required by assessee.

22. *Hon'ble Delhi High Court* in case of *Cushman Wakefield Limited* reported in *46 taxmann.com 317* has held that:

“34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in Dresser-Rand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.):

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the

assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

23. Another aspect that was made clear by coordinate bench of this Tribunal in *Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO* reported in [2012] 137 ITD 21/22 taxmann.com 107 (Mum) is that:

*'37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in *Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20-10-2010]* held that the assessee has to establish before the Transfer Pricing Officer that the payments made were*

commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price."

24. Placing reliance upon aforesaid decisions, we are of considered opinion that for these services, assessee has to demonstrate and satisfy Evidence Test or rendition test and benefit test, as envisaged u/s 92(2) of the Act, and that, services provided by AE are neither duplicative nor shareholder's activity. Ld.AO/TPO is then directed to determine Arm's length price of these services based on documents submitted by assessee by determining "most appropriate method" and Comparability analysis.

Accordingly this issue stands allowed for statistical purposes.

25. Ground 11 is in respect of disallowance of Rs.4,13,721/- under section 40(a)(ia) of the Act.

26. At the outset both sides submit that no details have been furnished in support of the claim of assessee.

27. Accordingly we are of considered opinion that the issue needs to be re-verified by Ld.AO. Assessee is directed to file all relevant details in support of its contention. Ld.AO shall then consider all these doc evidences filed by assessee in accordance with law.

Accordingly this issue stands allowed for statistical purposes.

Ground No. 12 is in respect of TDS credit not being allowed.

28. We direct Ld.AO to verify the same and to grant credit in accordance with law. Assessee is directed to submit details in support.

Accordingly this issue stands allowed for statistical purposes.

29. Ground No.13 is consequential and therefore do not require any adjudication.

In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the open court on 25th Nov, 2020

Sd/-

(B.R BASKARAN)
Accountant Member
Bangalore,

Dated, the 25th Nov, 2020.

/Vms/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

Sd/-

(BEENA PILLAI)
Judicial Member

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-11-2020		Sr.PS
3.	Draft proposed & placed before the second member	-11-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-11-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-11-2020		Sr.PS/PS
6.	Kept for pronouncement on	-11-2020		Sr.PS
7.	Date of uploading the order on Website	-11-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-11-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS