

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "Friday" NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

(Through Video Conferencing)

ITAs No.7617/DEL/2018, 9093/DEL/2019 & 9094/DEL/2019
Assessment Year: 2011-12, 2014-15 & 2015-16

Atotech India Pvt. Ltd., 66 KM Stone, NH-8, Delhi Jaipur Highway, Village-Sidhrawali Gurgaon, Haryana.	v.	DCIT, Circe-1(1), Gurgaon.
TAN/PAN: AACCM0338G		
(Appellant)		(Respondent)

Appellant by:	S/Shri Ravi Sharma & Anubhav Rastogi, Adv.		
Respondent by:	Ms. Rakhi Vimal, Sr.D.R.		
Date of hearing:	27	11	2020
Date of pronouncement:	27	11	2020

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeals have been filed by the assessee against the separate impugned final assessment orders u/s 144C/143(3) dated 11.10.2019 for the Assessment Year 2011-12; dated 16.10.2018 for the Assessment Year 2014-15; and dated 11.10.2019 for the Assessment Year 2015-16, passed in pursuance of direction of the Id. Dispute Resolution Panel-1. In all the appeals, common issue is involved relating to Transfer Pricing Adjustment on account of payment of Research and Development and other R&D related services, which has been held to be intra group services (IGS) by the

TPO. In all the years under appeal, the ld. TPO has determined the ALP and the contribution made towards research and development activities at Nil.

2. The facts in brief are that Atotech India Pvt. Ltd. is a subsidiary of Atotech BV Netherlands engaged in the business of manufacturing and marketing of specialty chemicals and compounds used for general metal finishing and production of printed circuit boards. The ld. TPO has characterized payments made under cost sharing agreement (CSA) under IGS and has determined the arm's length price at 'Nil'. Ld. TPO also observed that assessee has paid Rs.2,23,93,98,692/-towards cost-sharing expenses to its AE as under:

Sl. No.	Transaction	Particulars	Amount – in Rs.
1.	Research & Development		145,024,029
2.	Management Group Cost (Global)		91,800,200
3.	Management Group Cost (Regional)		2,574,463
	Total		239,398,692

TPO after considering submissions advanced by assessee proposed an adjustment of Rs.2,21,60,608/-as arm's length price of intra-group services by applying CUP method and thereby proposing an upward adjustment of Rs.21,72,38,084/- towards the intra group services (cost-sharing services) being difference between ALP determined by assessee and ALP determined by Ld. TPO.

3. Ld. Counsel informed that for the Assessment Year 2011-12, matter had come up before the Tribunal in the first round of proceedings and the Tribunal has set aside the matter to the file of the Assessing Officer with the following directions:-

Insofar as the Tribunal orders in the case of the assessee on the applicability of the most appropriate method are concerned, we find that as ITA Nos.3419 & 6571/Del/2016 & 1112/Del/2014 11 against the assessee applying the TNMM, the TPO applied the CUP method for determining the ALP of the international transaction in the immediately preceding year. The Tribunal approved the CUP as the most appropriate method, but on the basis of a concession given by the assessee as has been recorded therein. The ld. AR did not give any concession for the applicability of the CUP as the most appropriate method for the year under consideration. We further find from the order of the Tribunal for the assessment year 2011-12 that there is no adjudication on the applicability of a particular method as most appropriate for determining the ALP of the international transaction.

13. By now, it is fairly settled through a catena of decisions that the CUP is the most appropriate method to determine the ALP of an international transaction because it seeks to compare the price charged or paid for property transferred or services rendered, provided proper comparables are available. It is under this method alone that the price charged or paid is directly compared with the price charged or paid in an uncontrolled comparable transaction. The remaining four

specific methods seek to make comparison of the price charged or paid indirectly through the medium of ITA Nos.3419 & 6571/Del/2016 & 1112/Del/2014 12 normal profit arising in a comparable uncontrolled transaction. Further, the CUP method is a transaction specific method which strives to determine the ALP of an international transaction on a micro level, thereby lending more credibility to the ALP of a transaction.

14. Considering the decision in Knorr-Bremse (supra) and the view taken by the Tribunal in assessee's own case as discussed above, we set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction of 'Management Group cost', primarily, under the CUP method. While applying the CUP method, it is always obligatory to bring on record some comparable uncontrolled instance as per the mandate of rule 10B(1)(a)(i). Not even a single comparable instance has been brought on record by the TPO in his order to facilitate comparison between the price paid by the assessee vis-à-vis that paid by other comparables in similar uncontrolled circumstances. It was on account of his having canvassed a view that either the services were not received by the assessee or were duplicate in nature.

Such a view has been overturned by us in earlier paras. Under these circumstances, we are left with no option but to set aside the impugned ITA Nos.3419 & 6571/Del/2016 & 1112/Del/2014 13 order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction, primarily, under the CUP method. In

case, the TPO finds that the CUP method cannot be applied either due to non-availability of the relevant data or for some other genuine reasons, he is free to apply any other appropriate method for a fresh determination of the ALP of the international transaction of 'Management Group cost'. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings."

4. In a remand back proceedings before the ld. TPO, the TPO has characterized the payment made for the R&D activities as contract for R&D services by assessee to its AE and other R&D services for intra group services, he applied residual profit method. For the payment made for R&D activities he has determined the ALP at Rs.4,17,02,436/- against sum of Rs.11,75,29,948/- incurred by the assessee and made addition of Rs.7,18,27,512/- and did not accept the value of payment by the assessee towards other R&D related task (management group task) at arm's length price and treated all such payments at 'Nil'. Before the DRP, the assessee had filed additional evidences substantiating the support have received per group entities on account CSA and the remand report was sought from the ld. TPO to analyse the same. The TPO has submitted his remand report. The DRP issued direction deleting the assessment made on account R&D expenses, but entirely upholding the adjustment made by the ld. TPO on account of payment made by management related CSA.

5. Ld. Counsel submitted that similar issues were involved

in the appeal before the Tribunal for the Assessment Year 2007-08 in ITA No.104/Del/2012, wherein the Tribunal has remanded back the matter to the file of the Assessing Officer stating as under:

- Commercial expediency of the Assessee can-not be questioned while determining arm's length price;
- Need, necessity and benefit cannot be acceptable criteria for benchmarking an international transaction;
- Consider the ruling pronounced by Hon'ble ITAT in matter of Dresser-Rand India Pvt. Ltd. vs. ACIT [ITA No. 8753/Mum/20io] while deciding the issue.

6. Further, in the order for the Assessment Year 2011-12 in ITA No.66/Del/2015, the Tribunal has set aside the issue to the file of the TPO to examine the issue afresh after considering the following:-

- i) Contention of the Assessee that the ALP of the contributions made towards the Research & Development related activity was accepted to be at arm's length by the Ld. TPO during previous assessment year's namely AY 2007-08, AY 2008-09, AY 2009-10 & AY 2010-11 and the fact that the contributions were made under the similar agreement as in force for current AY and similar intensity of activities were performed by the Assessee and similar evidences have been submitted during the course of assessment proceedings as in earlier years;

ii) Contention of Assessee that the benefits received represents activities carried out under CSA and is not an outcome of intra-group services;

iii) Judicial guidance provided by the Hon'ble Delhi High Court in case of CIT versus Cushman Wakefield 46 Taxmann.com 317 (DEL) (paragraphs number 37 and 45).

7. Again this Tribunal in assessee's own case for the Assessment Year 2008-09, 2009-10 and 2012-13 has set aside the matter for fresh adjudication after considering the following.

a. Contention of Assessee that the benefits received represent activities carried out under CSA and are not an outcome of intra-group services;

b. Judicial guidance provided by the Hon'ble. Punjab & Haryana High Court in Knorr-Bremse India P. Ltd. vs. ACIT (2016) 380 1TR 307 (P&H) wherein it: was held that the applicability of 'benefit test' cannot be countenanced."

8. Since the additions made therein are similar to Assessment Years 2007-08, 2008-09, 2009-10 and 2012-13, wherein the matter has been set aside, therefore, he submitted that following the same, this issues raised in these appeals can be remanded back to the file of the TPO with similar directions.

9. Ld. DR also admitted that matter can be restored back to the file of the TPO for fresh adjudication in line of direction

given by the Tribunal in earlier years.

10. After considering the submissions and the impugned orders as well as the Tribunal order in assessee's own case for the earlier years, we find that the only controversy involved in all the assessee's appeals is with regard to payment made for management related activities under CSA which has been taken at 'Nil' by the TPO. This adjustment is a recurring issue in assessee's own case right from the Assessment Years 2007-08, 2009-10 and Assessment Year 2012-13. The Tribunal has remanded this issue to the file of the Assessing Officer with certain directions. The relevant findings and observations of the Tribunal in the appeal for the Assessment Year 2012-13 is reproduced hereunder:

“Here, again, both the sides agree that the facts and circumstances of this appeal are similar to those of preceding years dealt with above except that in this year the TPO, apart from determining Nil ALP of the international transaction of payment of ‘Management group cost’, also recommended transfer pricing adjustment in respect of ‘R&D assistance ITA Nos.3419 & 6571/Del/2016 & 1112/Del/2014 15 cost.’ The Tribunal has passed an order for the immediately preceding year restoring the fresh determination of the ALP of ‘R&D assistance cost’ and ‘Management group cost’ to the file of the AO/TPO. Following the view taken in such an order of the immediately preceding year and the two earlier years dealt with hereinabove, we set aside the impugned order and remit the matter to the file of Assessing Officer/TPO for a fresh determination of the ALP of the international transaction of

‘Management group cost’ and ‘R&D assistance cost’ in accordance with the observations made in our detailed order for the assessment year 2008-09 above.”

11. Thus, in the same lines, we direct the TPO to carry out fresh analysis and determine the Arm’s Length Price and the payments relating to other R&D task and decide the issue fresh in accordance with law.

12. Since, in all the three years, the issues are common arising out of adequate set of facts and the reasoning given by the TPO/DRP, therefore, the impugned issue as raised in the grounds of appeal before us are remanded back to the file of the TPO/Assessing Officer to be decided afresh in accordance with direction and guidelines given by the Tribunal in assessee’s own case.

13. In result, all the three appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court on 27th November, 2020

Sd/-

**[G.S. PANNU]
VICE PRESIDENT**

DATED: 27th November, 2020
Pkk

Sd/-

**[AMIT SHUKLA]
JUDICIAL MEMBER**