

**IN THE INCOME TAX APPELLATE TRIBUNAL "I"  
BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, AM &  
SHRI PAVAN KUMAR GADALE, JM**

आयकरअपीलसं./ I.T.A. No. 4520/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2010-11)

Exxon Mobil Company India Pvt. Ltd. Plot No. 107, Kalpatru Point, Ground Floor, Road No. 8, Sion(East), Mumbai-400 022	<b>बनाम/ Vs.</b>	Dy. Commissioner of Income Tax, Circle 3(1), Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACE3157H		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Girish Dave, AR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Ajit Pal Singh, DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	29.10.2020
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	10.11.2020

आदेश / ORDER

**PER S. RIFAUR RAHMAN (ACCOUNTANTMEMBER):**

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-56, in short 'Ld. CIT(A)', Mumbai, dated 30.05.2017 for AY 2010-11

in consequence of the order passed u/s 144C of the Act by TPO/AO.

2. The brief facts of the case are, assessee is a company engaged in the business of market development, dissemination of product information of specialty chemicals and polymers. The assessee filed its return of income on 23.09.10 declaring total income of Rs. 49,58,88,748/- under normal provisions and Book Profit of Rs. 46,25,06,014/- u/s 115JB of the Act. Subsequently, the case was selected for scrutiny and necessary notices were issued and served on the assessee. In response, AR of the assessee filed the relevant information as called for.

3. During the year under consideration, the assessee is engaged in providing technical support, back office support and market support services to its Associated Enterprises (AEs). The dispute here is the determination of Transfer Pricing Adjustment in international transactions by the assessee with its AEs and selection of comparables in technical services and back office support services segments, which are as under:-

Sr. No	Description of the transactions	Total value of transactions (Rs.)
1.	Technical services	41,82,916/-
2.	Back office support services	1,12,64,137/-
3.	Amount of Adjustment to total income	1,54,47,053/-

4. In technical support service segment, the arm's length price (ALP) for rendering services was determined to be at 16.85% as against 5.44% received by the assessee. The assessee *suo motu* computed the ALP at 16% under technical support services. Accordingly, it exercised its option as per proviso to section 92C(2) of the Act and voluntarily offered the difference for tax.

5. The assessee benchmarked the transaction on TNMM as 'MAM'. There is no dispute with regard to MAM. In Technical Services, assessee has selected 12 comparables with mean margin of 16.89%. Out of above, TPO included 5 comparables from previous assessment year and rejected 6 comparables selected by the assessee. The final set of comparables selected by the TPO is as under :

<b>Sr. No.</b>	<b>Name of the company</b>	<b>OP/TC%</b>
1.	Aurigene Discovery Technologies Ltd.	20.09%
2	Choksi. Laboratories Ltd,	20.82%
3	Jubliant Chemsys Ltd.	14.88%
4	Vimta Labs Limited	6.81%
5	Max Neeman Medical International Ltd. - Clinical Research Segment	22.34%
6	Pfizer Ltd. - Services Seg,	6.21%
7	Alphageo (India) Ltd.	25.50%
8	Dolphin Medical Services Ltd,	18.72%
9	N G Industries Ltd.	21.13%
10	TCG Lifesciences Ltd.	19.29%
11	Transgene Biotech Ltd. - Diagnostic Services	48.73%
<b>Arithmetic Mean</b>		
<b>20.41%</b>		

6. Thus the TPO made an adjustment based on PLI of the 11 comparables of 20.41% and made an adjustment which is produced below :

Particulars	Year ended 31.03.2010
Total cost	11,76,27,517
OP @ 20.41%	2,40,07,776
Arms Length Value of International	14,16,35,293
Actual income of BRDTC (B)	12,49,37,566
Difference (C) = (A) - (a)	1,66,97,727
Adjustment offered by Assesses to tax (D)	1,25,14,811
Amount of adjustment to total income (E) = (A) — (B)	41,82,916
The assesses will not be entitled to the claim of +1-5% on this transaction as the amount offered by the assesses in the return is by the way of voluntary adjustment.	

7. With respect to back office support segment, assessee selected 15 comparables and TPO rejected 9 comparables and included one comparable i.e. Acropetal Technologies Ltd. TPO determined the average of 22.39% and made an adjustment of Rs.1,12,64,137/-.

8. The AO by following the order of the TPO made an adjustment of Rs.41,82,916/- and Rs. 1,12,64,137/- and also

made disallowance of Rs. 3,24,14,132/- u/s 40(a)(ia) of the Act.

9. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). After considering the submission of assessee, Ld. CIT(A) confirmed the adjustment on account of technical services of Rs. 41,82,916/- on the ground that the assessee had not given sufficient and appropriate evidence for the rejection of 3 comparables selected by the TPO i.e. TCG Lifescience Ltd., Alphageo (India) Ltd. and Transgene Biotech Ltd. In respect of back office support services, the Ld. CIT(A) followed the order of his predecessor-in-office, confirmed the adjustment of Rs. 1,12,64,137/-.

10. Now before us, the assessee is in appeal challenging the order of Ld. CIT(A) on the grounds mentioned below:-

***Disallowance under Transfer pricing***

*1. The Ld. CIT(A) has erred in upholding the order passed by the Ld. TPO / AO holding that the international transactions of the Appellant do not satisfy the arm's length principle and in confirming the adjustment made by the Ld. TPO / AO of INK Rs. 1,54,47,053 in this regard.*

*2. The Ld. CIT(A) erred both in facts and in law in confirming the Ld. AO / TPO's action of making an adjustment of Rs. 41,82,916 to the income of the Appellant by holding that its international transactions of provision of technical support services do not satisfy the arm's length principle envisaged under the Act. In doing so, the Ld. CIT(A) has grossly erred in:*

*2.1 not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, and thereby accepting the functionally different companies while calculating the arm's length price;*

*2.2 following a contradictory approach in considering companies demonstrating supernormal growth in revenue /profit while rejecting companies with declining profits/declining phase;*

*2.3 selecting comparable companies having a very high turnover as compared to the appellant;*

*2.4 confirming the action of the Ld. TPO in cherry picking companies without adopting valid search process;*

*2.5 denying the benefit of (+/-) 5 percent range mentioned in proviso to section 92C(2) of the Act while computing the ALP.*

*3. The Ld. CIT(A) erred both on facts and in law in confirming the Ld. AO/ TPO's action of making an adjustment of Rs. 1,12,64,137 to the income of the Appellant by holding that its international transactions of provision of back office support services do not satisfy the arm's length principle envisaged under the Act. In doing so, the Ld. CIT(A) has grossly erred in:*

*3.1 disregarding the ALP as determined by the appellant in the Transfer Pricing (TP<sup>1</sup>) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules'); and in particular confirming the modification/rejection of filters applied by the appellant in the TP documentation without giving any reason;*

*3.2 relying on the fresh comparable search done by the Ld TPO based on application of revised quantitative/qualitative filters in determining the ALP;*

*3.3 not sharing the complete search matrix for the fresh search done by the Ld. TPO;*

*3.4 not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, and thereby accepting the functionally different companies while calculating the arm's length price;*

*3.5 erroneously retaining in the final comparable set certain companies which have earned extraordinarily high operating margins, thus signifying a high element of entrepreneurial risk as opposed to the limited risk bearing captive IT enabled services provided by the Appellant;*

*3.6 selecting comparable companies having a very high turnover as compared to the appellant;*

*3.7 following a contradictory approach in considering companies demonstrating supernormal growth in revenue /profit while rejecting Companies with declining profits/declining phase;*

*3.8 in confirming that the Ld. TPO can use the power conferred under section 133(6) of the Act for collecting information that was not available to the Appellant in the public domain and using the information so collected for the purpose of selection of comparable companies.*

*4. The learned CIT(A) erred in denying the economic adjustments for the differences in the working capital and risk profile of the Appellant vis-a-vis comparable companies in both technical support and back office support segments.*

5. *The Ld. CIT (A) erred in agreeing with the Ld. TPO's action of holding that only current year (i.e. FY 2008-09) data for comparable companies should be used for comparability analysis despite the fact that the same was not available to the Appellant at the time of preparing its TP documentation;*

***Disallowance under section 40(a)(i)***

6. *The learned CIT(A) erred in confirming the disallowance under section 40(a)(i) of an amount of Rs.3,24,14,132 out of global support service charges paid to ExxonMobil Chemical Asia Pacific Pvt. Ltd (EMCAP) Singapore.*

7. *The learned CIT(A) ought to have appreciated that global support service charges of Rs.3,24,14,132 paid to EMCAP, Singapore was not liable to tax under the Income-tax Act.*

8. *The learned CIT(A) also ought to have appreciated that global support service charges of Rs.3,24,14,132 paid to EMCAP, Singapore was not taxable in India in view of Article 7 of the Tax Treaty between India and Singapore.*

9. *Without prejudice, the learned CIT(A) ought to have appreciated that payment of global support services charges to EMCAP was towards*

*reimbursement of expenses and therefore not liable to tax.*

*10. The learned CIT(A) erred in confirming the action of the Assessing Officer in holding that the appellant should have obtained order under section 195(2) for making the above payments without deduction of tax at source.*

***General***

*11. Each one of the above grounds of appeal is without prejudice to the other.*

*12. The appellant reserves the right to add, alter or amend to the grounds of appeal.*

11. With regard to Ground No. 1 to 5 in respect of transfer pricing adjustments of Rs. 1,54,47,053/-, Ld. AR submitted that these grounds are similar to the grounds of assessee in earlier assessment year, in which Hon'ble ITAT in ITA 4521/Mum/2017 for AY 2008-09 has passed the orders on merits in favour of the assessee.

12. On the other hand, Ld. DR relied on the orders passed by revenue authorities, however he conceded that these grounds are covered by the order of ITAT.

13. Considered the rival submission and material placed on record. We notice from the records that the identical grounds raised in the present appeal in respect of technical and back office support services, have already been decided by the Coordinate Bench of ITAT in ITA No. 4521/Mum/2017 for AY 2008-09 in assessee's own case on merits. For the sake of clarity, which is reproduced below:-

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

*Let us discuss the 3 comparables, finally selected by the TPO/AO which are in dispute. In the case of Alphageo, as per the "Annual Report" for the FY 2008-09, they provide 2D and 3D seismic and related services like seismic data acquisition, processing and interpretation. The Company's comprehensive portfolio of services comprises :*

*Seismic data acquisition*

- > Designing and preplanning of 2D and 3D surveys*
- > Seismic data acquisition in 2D and 3D*

*Seismic data processing*

- > Seismic data processing of 2D and 3D data*
- > Reprocessing*
- > Special processing including pre-stack imaging*
- > AVO inversion and other services*

*Seismic data interpretation*

- Structural and Stratigraphic interpretation*
- Generation, evaluation and ranking of prospects*
- Reservoir data acquisition*
- Reservoir analysis*

*Also we observe that the profit and loss account of the company reflects that the whole operating income is from seismic survey and related service. The Company's business consists of one reportable and geographical segment of seismic data acquisition and its related service within India.*

*On the other hand, the appellant in the instant case is primarily engaged in rendering marketing services to its AEs in India and other designated territories relating to ExxonMobil chemical products ; it also renders technical services to various AEs in the Asia-Pacific region. The appellant also provides back-office services, namely customer support services also called as global customer service, business planning, marketing analysis and regional sales planner services to its AEs.*

*To summarize, the appellant herein is engaged in the business of market development and dissemination of product information of speciality chemicals and polymers. It is also engaged in research and development activities and provides onsite technical and back-office support services.*

*In view of the above facts, we have no hesitation in rejecting Alphageo as a comparable as it is functionally different from the appellant's business.*

*Next we deal with TCG. An examination of the annual report clearly indicates the TCG is engaged in the business of contract research operation. This is evident from the revenue of Rs.1,131,931,865/-, it derived from sales (contract research operations). A perusal of the accounts also indicates that TCG has earned its whole operating income from contract research operations. Thus one can safely conclude that the business of the appellant is functionally different from TCG. Therefore, TCG is rejected as a comparable because it is functionally different from the appellant's business.*

*Then we come to Pfizer. An examination of the accounts clearly indicates that Pfizer has prepared and reported financials with November end, whereas the appellant prepares and reports financial data for financial year end i.e. March. In CIT v PTC Software*

*(I)(P) Ltd. (2016) 75 taxmann.com 31 (Bonn.), the Hon'ble Bombay High Court has held that "data to be used for the comparability analysis should be of the same financial year in which the international transactions were entered into by the tested party". In view of the facts that the data considered are for different periods, which may result in different business conditions, we have no hesitation in rejecting Pfizer as a comparable to the appellant.*

*In view of the above findings, we delete the adjustment of Rs.40,49,175/- made by the AO.*

14. Therefore, respectfully following the above decision of Coordinate Bench in assessee's own case which is applicable *mutatis mutandis* in the present case, we are inclined to accept the submission of Ld. AR. Therefore, we delete the adjustment made in respect of technical support services. Accordingly, this ground is **allowed**.

15. With regard to back office support services, we notice that the Coordinate bench of ITAT in assessee's own case in earlier assessment year has adjusted as below:-

*7. In respect of provision of back-office support services, we find that similar issue arose before the*

*ITAT 'K' Bench, Mumbai in the case of the appellant for AY 2008-09 (ITA No. 3601/Mum/2014). As mentioned earlier, the Ld. CIT(A) while confirming the adjustment of Rs.1,98,30,718/- has followed the order of his predecessor-in-office for AY 2008-09. The Tribunal vide its order dated 23.05.2018 for the AY 2008-09 has set aside the order of the Ld. CIT(A) and restored the matter to the file of the AO/TPO for fresh adjudication.*

*Facts being identical, we follow the above order of the Co-ordinate Bench and restore the matter in respect of provision of back-office support services to the file of the AO/TPO for fresh adjudication, after affording reasonable opportunity of being heard to the appellant.*

16. Therefore, respectfully following the above decision, we are also restore the matter to the file of AO/TPO for fresh assessment /adjudication. Accordingly, this ground is **allowed for statistical purposes.**

17. With regard to Ground No. 6 to 10 in respect disallowance made u/s 40(a)(ia) of the Act, Ld. AR submitted that these grounds are similar to the grounds of assessee in earlier assessment year, in which Hon'ble ITAT in ITA

4521/Mum/2017 for AY 2008-09 has passed the orders on merits in favour of the assessee.

18. On the other hand, Ld. DR relied on the orders passed by revenue authorities, however he conceded that these grounds are covered by the order of ITAT.

19. Considered the rival submission and material placed on record. We notice from the records that the identical grounds raised in the present appeal in respect of disallowance made u/s 40(a)(ia) of the Act, have already been decided by the Coordinate Bench of ITAT in ITA No. 4521/Mum/2017 for AY 2008-09 in assessee's own case on merits. For the sake of clarity, which is reproduced below:-

*We have heard the rival submissions and perused the relevant materials on record. We find that similar disallowance made by the AO, then confirmed by the Ld. CIT(A) has been deleted by the Tribunal vide order dated 21.02.2018 for Ay 2007-08, by observing that :*

*“48. We have heard rival contentions and perused material on record. We have also applied our mind to the decisions relied upon. It is evident, while disallowing the amount in dispute under section*

*40(a)(i) of the Act, the Assessing Officer has held that the payment made by the assessee to EMCAP towards Global support services is in the nature of fees for technical service as defined under Explanation-2 to section 9(1)(vii) of the Act. It is also relevant to note, under Article-12 of India Singapore tax treaty, fees for technical services, though, is taxable in the hands of the recipient in Singapore, however, it can also be taxed in India under certain circumstances. Applying the said provision, it is necessary to determine whether the payment made can at all be termed as fee for technical services as defined under Article—12 of India Singapore Tax Treaty. In our considered opinion, we have to address this issue at the very outset. Article—12(4) of India Singapore tax treaty defines fee for technical services as under:—*

*“12.4 the term “fees for technical “services” as used in this Article means payments of any kind to any person in consideration of services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:*

*(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or*

*(b) make available technical knowledge, experience, skill, know—how or processes, which enables the person acquiring the services to apply the technology contained therein; or*

*(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.”*

*49. The Assessing Officer has treated the payment made as fees for technical services on the reasoning that under the agreement EMCAP has made available managerial and technical services to the assessee. The expression “make available” which also appears in Article 12(4)(b) of the India-US tax treaty would mean the recipient of such service is able to apply or make use of the technical knowledge, knowhow, etc., by himself in his business or for his own benefit and without recourse to the service provider in future and for this purpose a transaction of the technical knowledge, experience, skills, etc., from the service provider to the service recipient is necessary. Some sort of durability or permanency of the result of the rendering of services is envisaged which will remain at the disposal of the service recipient. In other words, the technical knowledge, experience, skill, etc., must remain with the service recipient even after the*

*rendering of the services has come to an end. In contrast to Article—12(4)(b) of the India—U.S. tax treaty, Article— 12(4)(b) of India—Singapore tax treaty has made it more specific by providing that technical knowledge, experience, skill, knowhow or process, would not amount to fees for technical service unless it enables the person acquiring the service to apply the technology therein. A perusal of the agreement between the assessee and EMCAP makes it clear that as per the terms of the agreement EMCAP would provide management consulting, functional advice, administrative, technical, professional and other support services to the assessee either itself or through any affiliate or through third parties. However, there is nothing in the agreement to conclude that in the course of such provision of service, EMCAP has made available any technical knowledge experience, skill, knowhow, or process which enables the assessee to apply the technology contained therein on its own without the aid of EMCAP. The Hon'ble Karnataka High Court while explaining the true import of expression “make available” in case of De Beers India Mineral Pvt. Ltd. (supra) has observed as under:-*

*“What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it “makes available” to the recipient technical knowledge, know-how and the like.*

*The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skill, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available, in other words, payment of consideration would be regarded as "fees for*

*technical/included services” only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.”*

*A careful analysis of the observations of the High Court, makes it clear that “make available” not only would mean that recipient of the service is in a position to derive an enduring benefit out of utilisation of the knowledge or knowhow on his own in future without the aid of the service provider but such technical knowledge, skill, knowhow, etc., must remain with the recipient even after the contract comes to an end. The Court has observed, the technology will be considered to have been made available when the person acquiring the service enable him to apply the technology. Further, the Court went on to hold that the payment can be considered as fees for technical services only if the twin test of rendering service and making technical knowledge available at the same time is satisfied. If we apply the aforesaid tests laid down by the Hon'ble Karnataka High Court to the facts of the present case it becomes clear that it has not been established on record that while rendering the services, EMCAP has made available technical knowledge, knowhow, skill, etc., to the assessee in a manner to enable him to apply them independently or on its own. Therefore, the payment made by the assessee cannot be considered as fees for technical services as*

*defined under Article 12(4)(b) of the India-Singapore tax treaty and for this reason also we do not have to examine taxability of the same under section 9(1)(vii) of the Act. Moreover, it is a fact on record that the payment of global support service fee was made under the agreement which has continued from the year 2003. It is a matter of record that in the preceding assessment years though the assessee has paid global support service fees to EMCAP without deducting tax at source, no disallowance under section 40(a)(i) was ever made. Therefore, there being no difference in facts in the impugned assessment year, considering that the payment was made under the same contract, even, applying the rule of consistency, no disallowance under section 40(a)(i) can be made in the impugned assessment year. Accordingly, we delete the disallowance made by the Assessing Officer. These grounds are allowed.”*

*9.1 For AY 2008-09, the Tribunal has followed the above order while deciding similar addition made by the AO u/s 40(a)(i) of the Act*

*Facts being identical, we follow the above order of the Co-ordinate Bench in appellant's own case for AY 2007-08 and AY 2008-09 and delete the addition of Rs.1,85,29,377/- made by the AO u/s 40(a)(i) of the Act*

20. Therefore, respectfully following the above decision of Coordinate Bench in assessee's own case which is applicable *mutatis mutandis* in the present case, we are inclined to accept the submission of Ld. AR. Therefore, we delete the disallowance made by AO and confirmed by Ld. CIT(A) u/s 40(a)(ia) of the Act. Accordingly, the grounds raised by the assessee are **allowed.**

21. In the net result, the appeal filed by the assessee stands **allowed.**

*Order pronounced in the open court on 10.11. 2020.*

<p><i>Sd/-</i> (Pavan Kumar Gadale) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : <i>Sr.PS. Dhananjay</i></p>	<p><i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 10.11.2020</p>
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**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
  2. प्रत्यर्थी/ The Respondent
  3. आयकरआयुक्त(अपील) / The CIT(A)
  4. आयकरआयुक्त/ CIT- concerned
  5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
  6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

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**आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**

<b>Sr. No.</b>	<b>Details</b>	<b>Date</b>	<b>Initial</b>	<b>Designation</b>
1	Draft dictation sheets are attached	no		Sr.PS/PS
2	Draft dictated on PC			Sr.PS/PS
3	Draft Placed before author			Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on			Sr.PS/PS
8	File sent to the Bench Clerk			Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			