

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES " C " BENCH: BANGALORE

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA Nos.2590 to 2592/Bang/2019
(Assessment Years : 2002-03 to 2004-05)

M/s. Wipro GE Healthcare Private Limited,
No.4, Kadugodi Industrial Area,
Whitefield, Bangalore-560 067
PAN AAACW 1685J

....Appellant.

Vs.

Deputy Commissioner of Income Tax (OSD),
Circle 7(1)(2), Bangalore.

.....Respondent.

Assessee By:	Shri K.R.Pradeep & Smt. G.P.Girija, Advocates.
Revenue By:	Smt. R. Premi, JCIT (D.R)

Date of Hearing :	07.01.2021.
Date of Pronouncement :	07.01.2021.

ORDER

PER SHRI B.R. BASKARAN, A.M. :

All the three appeals filed by the assessee are directed against the orders passed by Ld CIT(A)-10, Bengaluru and they relate to the assessment years 2002-03 to 2004-05. Since common issues are urged in these three appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The grounds of appeal urged by the assessee in all the three years relate to the following two issues:-

(a) Transfer pricing adjustment made in respect of royalty payment.

(b) Re-computation of deduction allowable u/s 10A of the Act.

3. The assessee company is engaged in the business of manufacture, sale and service of medical diagnostic equipments and accessories. It is also engaged in software development and trading in various products.

4. This is second round of proceedings for all the three years under consideration. The first issue relates to the addition made on account of transfer pricing adjustment made in respect of royalty payment. In the first round, the Tribunal, vide its order dated 16-05-2008 passed in ITA No.810 to 812 (Bang)/2007, confirmed the order of Ld CIT(A), who had restored the issue of determination of Arms Length Price (ALP) of Royalty payments to the file of AO/TPO. Accordingly, the TPO passed orders for all the three years on 09-07-2013 and determined the ALP of Royalty payments as NIL value. Accordingly, the royalty payment of Rs.1.74 crores, 1.69 crores and Rs.5.07 crores paid respectively for assessment years 2002-03, 2003-04 and 2004-05 came to be disallowed by the AO in this round.

5. Before Ld CIT(A), the assessee submitted that the ITAT had set aside the issue to the file of TPO with the direction to determine ALP after identifying a comparable and after selecting a method. The assessee also submitted that the ITAT has considered an identical issue in AY 2005-06 and 2006-07 also and restored the same to the file of AO/TPO by following the order passed by it for AY 2002-03 to 2004-05 in the first round and the Tribunal has further stated that, in case no comparable is found in respect of royalty payment made by the assessee, then may treat the royalty payment as operating cost in trading segment and accordingly compute the ALP of the trading segment. It was submitted that the TPO, while giving effect to the order of ITAT for AY 2005-06 and 2006-07, could not find any comparable and hence the TPO treated the royalty payment as part of operating cost in trading segment and accordingly computed the ALP of the trading segment. Accordingly no separate addition was made towards payment of royalty. The Ld CIT(A), however, upheld the order of the TPO.

6. We heard the parties on this issue and perused the record. We notice that co-ordinate bench of ITAT has given following directions to the AO in AY 2005-06 in IT(TP)A No.40/Bang/2011 dated 21.04.2017:-

“ 16. Ground No.9 is regarding payment of royalty. The assessee has paid the royalty to its AE @ 2% on sale. The Assessing Officer / TPO held that none of the comparable company has paid royalty for trading segment. The TPO/A.O. has considered the case of AMDL and held that when the comparable company has not paid the royalty then the payment of royalty is not justified and accordingly made adjustment of the entire amount. On appeal, the CIT (Appeals) has deleted the addition made by the Assessing Officer on account of royalty by following the decision of the Tribunal for the Assessment Year 2002-03.

17. We have heard the learned Departmental Representative as well as learned Authorised Representative and considered the relevant material on record. At the outset, we note that the Tribunal vide order dt.16.05.2008 in assessee's own case for the Assessment Years 2002-03 to 2004-05 has considered this issue whereby this issue was remanded to TPO/A.O. for considering the comparables and then determine the ALP. The CIT (Appeals) has dealt this issue in paras 7.3 and 7.4 as under :

“ 7.3 On this very same issue, CIT (Appeals –VI in his order dt.29.03.2007 for A.Y. 2002-03 has held as under :-

“For A.Y 2002-03 a sum of Rs.1,74,84,318 has been considered for ALP adjustment for the reasons mentioned supra. Whereas, no such adjustment is found required for A.Y. 2003-04 & 2004—05, thus there is an apparent inconsistency in the approach of TPO. Moreover even for A.Y 2002-03, the ALP has been determined ;without selecting the method of identifying uncontrolled transaction. Hence the addition is deleted for A.Y.A.Y 2002-03, the ALP on royalty will be determined afresh after identifying a comparable and selecting the method. However, if the TPO finds the reasons given for not making adjustment in A.Y. 2003-04 and 2004-05 is relevant for this year also, he may choose to do so (emphasis supplied). ALP cannot be determined in isolation of either commercial reality or commercial expediency. Desirable course would be to see in a similarly placed situation what an uncontrolled transctin would reflect. Accordingly it is directed.”

7.4 This direction of the CIT (Appeals) has been confirmed by the Hon'ble ITAT in Page No.43, ITA No.810 to 812/(Bang)/2007 dt.16.05.2008. Since the issue during A.Y. 2005-06 is also the same, the A.O. is directed to follow the same directions of the CIT (Appeals) as held for A.Y. 2002-03 in the appellate order referred to above.”

*The Id. AR has also submitted that in case no comparable is found to determine the ALP of royalty then in view of the decision of this Tribunal in the case of **Toyota Kirloskar Motor (P) Ltd. Vs. ACIT 166 TTJ 189** the royalty payment should be clubbed with the other international transactions of the trading segment and the arm's length may be determined on the composite transaction of trading of medical equipment.*

18. Since the issue was already set aside to the file of Assessing Officer for choosing the proper comparable therefore in view of the earlier order of this Tribunal, we set aside this issue to the record of the TPO/A.O. for reconsideration of the same in the light of directions of the Tribunal for the Assessment Years 2002-03 to 2004-05 (supra). Further in case no comparable is found in respect of the royalty payment by the assessee then the TPO/A.O. may consider the royalty payment as part of the international transactions under trading segment and then determine the ALP by considering the royalty as part of the operating cost for the purpose of computing the margin in the trading segment.”

7. It is the submission of Ld A.R that the Ld CIT(A) did not consider the above said direction given by ITAT in AY 2005-06 & 2006-07 in a proper manner. The assessee has also submitted that the TPO could not find any comparable in the set aside proceedings and hence treated the royalty payment as operating cost in trading segment and accordingly computed the ALP of the trading segment, i.e., no benchmarking done separately for royalty payment. Accordingly he prayed that this issue may also be restored to the file of AO/TPO with similar directions as given by ITAT in AY 2005-06 & 2006-07.

8. We heard Ld D.R and perused the record. We notice that the co-ordinate bench, in AY 2005-06 and 2006-07, has given a specific direction to the effect that, if the TPO could not find any comparable in respect of

royalty payment, then the TPO/AO may consider the royalty payment as part of the international transactions under trading segment and he may consider royalty payment as part of operating cost for the purpose of computing margin in the trading segment. According to Ld A.R, the TPO has followed the alternative direction given by ITAT while giving effect to the order of the ITAT in AY 2005-06 and 2006-07.

9. We notice that the Ld CIT(A) did not properly consider the direction given by ITAT on an identical issue in AY 2005-06 & 2006-07, more particularly, the alternative direction given by ITAT. Hence we are inclined to follow the order passed by ITAT in the assessee's own case for AY 2005-06 & 2006-07. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the three years under consideration and, following the decision rendered by ITAT in AY 2005-06 & 2006-07 on an identical issue, we restore this issue to the file of the AO/TPO in all the three years under consideration with similar direction.

10. The next issue relates to re-computation of deduction u/s 10A of the Act. It is the submission of the Ld A.R that the ITAT, in the earlier round, had restored the issue of transfer pricing adjustment made in respect of Royalty payment only. However, while giving effect to the order of the ITAT, the AO has exceeded his jurisdiction by altering the deduction allowed u/s 10A of the Act. He submitted that the assessee was not given an opportunity by the AO in this regard. He further submitted that Ld CIT(A) has also upheld the action of the Assessing Officer, without considering the jurisdictional aspect. On merits, the Ld A.R submitted that it is well settled principle that the deduction u/s 10A is allowed at undertaking level and not at entity level. He submitted that the Ld CIT(A) has, however, considered the profits available at entity level while adjudicating this issue, which is not correct proposition of law. Further, the same is also against the decision rendered by Hon'ble Supreme Court in the case of Yogokawa Ltd. Accordingly, he submitted that this issue may also be restored to the file of the AO, so that the assessee could be able to furnish proper explanations

and information before the AO with regard to the computation of deduction allowable u/s 10A of the Act.

11. We heard Ld D.R and perused the record. We notice that the Ld CIT(A) has not discussed on jurisdictional issue. Further, it is the submission of the assessee that the Ld CIT(A) has considered the profits at entity level instead of the considering the profit at undertaking level. In any case, it is the submission of Ld A.R that the assessee was not given opportunity of being heard by the AO before making adjustment in the quantum of deduction allowed u/s 10A of the Act.

12. Having regard to the submissions made by Ld A.R, we set aside the order passed by Ld CIT(A) on this issue in all the years under consideration and restore the same to the file of the AO.

13. Needless to mention, the assessee should be given proper opportunity of being heard.

14. In the result, all the three appeals of the assessee are treated as allowed.

Order pronounced in the Open Court on 07.01.2021.

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

Dated: 07.01.2021.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore