

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI (THROUGH VIDEO CONFERENCING]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 953/DEL/2017  
[A.Y 2012-13]**

DHR Holding India Pvt Ltd  
Unit Nos. 325 to 328  
DLF Towers, Shivaji Marg  
New Delhi

Vs.

The J.C.I.T  
Special Range-3  
New Delhi

PAN : AACCD 6672 N

[Appellant]

[Respondent]

**Date of Hearing : 25.08.2021  
Date of Pronouncement : 27.08.2021**

Assessee by : Shri Ajit Jain, CA

Revenue by : Shri Surender Pal, CIT-DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER,**

This appeal by the assessee is preferred against the order dated 16.12.2016 framed u/s 143(3) r.w.s 144C(3) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

2. The grievances of the assessee read as under:

"1. On facts and in law, the Learned Deputy Commissioner of Income Tax, Transfer Pricing Officer - 1(2)(1) and 1(2)(2) ("Ld. TPO") and Learned Joint Commissioner of Income Tax, Special Range-3, New Delhi / Learned Assessing Officer ("Ld. AO") erred in determining, and Hon'ble Dispute Resolution Panel - I, New Delhi ("Hon'ble DRP") erred in confirming additions amounting to INR 9,15,19,446 to the taxable income of the Appellant on account of Transfer Pricing ('TP') adjustments under section 92CA(3) of the Income-tax Act, 1961 ('the Act').

*Provision of business support services and marketing support services (adjustment of INR 8.99.71.009)*

2. On the facts and in law, the Ld. TPO erred in not treating "amortization of goodwill and noncompete fees" as abnormal and non-recurring expenses ought to be excluded while computing the TNMM operating margin earned from provision of services to Associated Enterprises ("AEs), in contravention of provisions of Rule 10B of the Income tax Rules, 1962 (the "Rules"). In this

regard, the Ld. TPO and Ld. DRP completely disregarded the facts that -

2.1 Such expenses were completely unrelated to the pricing of international transactions;

2.2 The comparable companies incurred no cost of such or similar nature;

2.3 Appropriate adjustment ought to have been provided under Rule 10B(1)(e) of the Rules; and

2.4 Reliance on the Safe Harbour Rules was neither appropriate nor correct.

3. On the facts and in law, Ld. TPO erred in aggregating the international transactions of provision of business support services and provision of marketing support services undertaken by the Appellant by following a combined transaction benchmarking approach and not appreciating that these transactions are not inextricably linked and can be evaluated separately.

4. On the facts and in law, the Ld. TPO violated the provisions of Rule 10B(2) and 10B (3) of the Rules by rejecting certain comparable companies selected in TP Documentation and further selecting certain other companies rejected by the Appellant, without

appreciating that such companies are functionally non-comparable to the Appellant.

5. On the facts and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in disregarding the Appellant a use of multiple year/ prior years' data and in not allowing the benefit of risk adjustments in contravention of the provision of section 92C of the Act read with Rule 10B of the Rules.

Purchase of Medical Equipment (adjustment of INR 14,68,021)

6. On facts and in law, the Hon'ble DRP/ Ld. AO and Ld. TPO erred in making an adjustment to the international transaction of purchase of medical equipment by:

- 6.1 Arriving at 'Nil' value of the imported goods not appreciating that the medical equipment could not have been imported at Nil price.

- 6.2 Arbitrarily rejecting the Transactional Net Margin Method ('TNMM') applied by the Assessee and making an arbitrary adjustment without applying any of the specified methods, thereby disregarding Rule 1 OB and Rule 1OC of the Rules
- 6.3 Not appreciating that the depreciation charged by the Appellant with respect to the purchase of fixed assets was already included in the calculation of operating margin of the trading segment which has otherwise been considered as arm's length by the Ld. TPO himself.

Interest on Outstanding Receivables (adjustment of INR 80,416)

7. On facts and in law, the DRP/ Ld. TPO has erred in not appreciating that the outstanding receivables are a result/consequence of the Appellant's international transactions with its AE and are not a separate international transaction per se; therefore, do not warrant determination of a separate ALP under section 92C of the Act owing to the following;

- 7.1 That no interest was charged on outstanding receivables from third parties in an arm's length scenario from the non-AEs by the Appellant.

- 7.2 No interest is warranted to be paid by the Appellant for the outstanding receivables during the year
- 7.3 That the Appellant had significant payables towards its AEs on which the Appellant has not *paid any* interest to its AEs
- 7.4 That the issue of *outstanding* receivables, if any, is subsumed in the working capital adjustment granted to the assessee *and no separate* adjustment on account of outstanding receivables is called for.
8. On the facts and in law, the Ld. AO erred in not granting full credit of TDS available to the Appellant and further erred in levying interest under section 234B of the Act and arriving at an incorrect demand of INR 10,03,848 instead of refund of INR 17,92,400 due to the Appellant.
9. On the facts and in law, the Ld. AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act."

3. Representatives of both the sides were heard at length. Case records carefully perused and with the assistance of the ld. counsel for the assessee, we have considered the relevant documentary evidences brought on record in the form of paper book, in light of Rule 18(6) of the ITAT Rules.

4. Briefly stated, the facts of the case are that the appellant company is a Danaher Group Company, set up in 2007 and is engaged in the business of trading of various medical instruments and products. The appellant company also renders business support services and marketing support services to its Associates Enterprises [AE].

5. Under the provision of business support services, the appellant company has provided business support services to its AEs, namely, identifying potential distributors and informing them of the products offered by the AEs, passing on all enquiries/information pertaining to distributors to AEs for comments and quotations, providing support services in the nature of software development and testing, hardware development and testing, verification and validation assurance to its AEs, demonstrating the usage of the medical equipments to the distributor to enable them to undertake installation at the customer's

premises and provide information and product training to the distributors.

6. Under the head 'Provision of Marketing Support Services', the appellant acquired certain business operations from third party, namely, Lab India Instruments Pvt Ltd., effective from 11.11.2011. Pursuant to the acquisition, the appellant commenced the provision of Marketing Support Services in the nature of sales support installation, and post warranty services to its AEs.

7. The international transactions entered into by the assessee are as under:

s. No	Type of international transaction	Method selected		Total value of transaction (Rs.)
		MAM	PLI	
i.	Trading of medical equipments/consumables for sale	Transactional Net Margin Method [TNMM]	Operating profit/ Operating Revenue (OP/OR)	97,049,053
ii,	Import of medical equipments capitalised		OP/OR	20,550,167
iii.	Provision of business and technical support services		Operating profit/ Operating cost OP/OC	396,362,471
iv.	Receipt of distribution and marketing services			145432442
v.	Import of consumables for resale			37,352,066

8. During the course of transfer pricing assessment proceedings, the TPO issued a show cause notice, inter alia, asking the assessee to explain the following:

Sl. No.	Type of international transaction	Method selected		Total value of transaction [Rs.]
		MAM	PLI	
i.	Trading of medical equipments/consumables for sale	Transactional Net Margin Method	Operating profit/ Operating Revenue (OP/OR	97049053
ii.	Import of medical equipments capitalized		OP/OR	20550167
iii.	Provision of business and technical support services		Operating profit/ Operating cost OP/OC	396362471
iv.	Receipt of distribution and marketing services		OP/OC	145432442
v.	Import of consumables for resale			37352066

9. The results as submitted by the taxpayer are as under:

<i>Particulars</i>	<i>Business Support Services</i>	<i>Distribution &amp; Marketing services</i>
<i>Operating revenues</i>	393,800,000	184,956,000
<i>Operating costs</i>	357,600,000	7 57,506,000
<i>Operating profit</i>	36,200,000	27,450,000 T
OP/OC	10.12% TNMM	17.43 TNMM

10. On the basis of the aforesaid chart, the TPO observed that the assessee has considered business support services and distribution of marketing services as separate segments whereas the nature of services provided by the assessee under these two segments are of similar nature and, accordingly, held that these should be considered as a single segment.

11. The TPO further observed that the assessee has considered 'amortization of goodwill' as non-operating item. The TPO was of the firm belief that since depreciation of tangible assets is charged to the profit and therefore, amortization of goodwill should also be considered as part of operating cost like depreciation and recomputation of margin aggregating the two segments as under:

<i>Particulars</i>	<i>Amount(in INR)</i>
<i>Operating revenue</i>	<i>578,756,000</i>
<i>Operating costs</i>	<i>585,063,000</i>
<i>Operating profit</i>	<i>(6,307,000)</i>
<i>OP/OC Method</i>	<i>(1.08) TNMM</i>

12. The assessee had used the following comparables for its TP analysis to show that the transactions are at ALP under TNMM:

<u>No.</u>	<u>Company Name</u>	<u>Weighted Average</u> <u>OP/OC(%)</u>
i.	Cyber Media Research Ltd.	11.70
ii.	EDCIL (India) Ltd.	8.65
iii.	HT Music & Entertainment Co. Ltd.	3.52
iv.	ICRA Management Consulting Services Ltd.	2.25
V.	In-house Productions Ltd.	-5.59
vi.	India Tourism Dev Corporation Ltd.	-4.51
vii.	Indus Technical & Financial Consultants Ltd.	4.82
viii	Inmacs Management Services Ltd	31.63
ix.	Overseas Manpower Corporation Ltd	-19.77
	<b><u>Mean</u></b>	<b><u>3.63%</u></b>

13. After analysing the comparables, the TPO finally came to select the following set of comparables to determine the ALP:

Sl. No.	Company Long Name	OP/OC
1.	APITCO Ltd	20.46%
2.	Axis Integrated Systems Ltd	25.80%
3.	BVG India Ltd	24.46%
4.	Cameo Corporate Services Ltd	7.98%
5.	Concept Communication Ltd.	4.00%
6.	Cyber Media (India) Ltd	7.96%
7.	ICRA Management Consulting Services Ltd.	6.62%

8.	Killick Agencies & Mktg. Ltd.	8.96%
9.	Marketing Consultants & Agencies Ltd	10.53%
10.	Inmacs Management Services Ltd	51.12%
	Average	16.79%

14. The arm's length price of the international transaction related to the provision of MSS/BSS is recalculated as under:

Operational cost	58,50,63,000
Arm's length price at margin of 16.79.	68,32,95,078
Price received	57,87,56,000
105% of price received	60,76,93,800
Proposed adjustment u/s 92CA	10,45,39,078

15. Before us, the ld. counsel for the assessee vehemently stated that amortization of goodwill and non-compete fees is an abnormal and non-recurring expense and, therefore, should be excluded while computing the TNMM operating margin earned from provision of services. It is the say of the ld. counsel for the assessee that the said expenses were identified only for accounting purposes considering that acquisition of different line of products by the assessee had resulted in goodwill and non-compete fees. The ld. counsel for the assessee

further stated that such expenses were not incurred as such for the purpose of providing services to its AEs.

16. Referring to the inter-company agreement, the ld. counsel for the assessee pointed out that such expenses were not considered while determining the cost base of the assessee nor such expense influenced the profitability. The ld. counsel for the assessee further drew our attention to the transfer pricing assessment order of subsequent Assessment Years i.e. 2013-14 and 2014-15 and pointed out that in subsequent Assessment Years, neither the Assessing Officer has aggregated the segments nor has considered the amortization of goodwill and non-compete fees as operating expenses.

17. Per contra, the ld. DR was in full support of the findings of the TPO and the DRP and read the relevant findings of the DRP.

18. It is true that the appellant had acquired certain business operations from third party. As a result of this acquisition, the assessee recognized a part of the purchase price as goodwill and non-compete fees in its balance sheet and for computation of tested party

margins, the assessee considered amortization of goodwill and non-compete fees as non-operating expenses as these did not pertain to the provision of services to the AEs.

19. It would be pertinent to refer to Rule 10B(1)(e) of the ITAT Rules which states as under:

*"(e) transactional net margin method, by which,-*

*(i) the net profit margin realized by the enterprise from an international transaction [or a specified domestic transaction] entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base"*

20. It can be seen from the above Rule that only costs incurred in relation to international transaction of provision of services to the AEs should be considered in computation of operating margin. This is in line with the Guidelines of OECD, which at Para 2.80, has mentioned as under:

*"2.80 Non-operating items such as interest income and expenses and income taxes should be excluded from the determination of the net profit indicator. Exceptional and extraordinary items of a non-recurring nature should generally also be excluded."*

21. On identical circumstances, this Tribunal in ITA No. 5158/DEL/2015 and 1049/DEL/2016 in the case of Imsofer Manufacturing India Pvt. Ltd has held as under:

*"7. We have carefully considered the orders of the authorities below. There is no dispute that the machinery purchased by the assessee was lying in capital work in progress. It is also not in dispute that the treatment given by the assessee is in line with the accounting standard issued by the ICAI. In our considered opinion a provision for impairment of assets is not a depreciation charge nor amortisation of fixed assets but it is a provision made to the carrying amount of the fixed assets which is reversible in nature. Moreover section 92 (1) of the Act requires that any income arising from an international transaction / allowance for any expenses shall be computed having regard to arms length price. In our considered view impairment of assets cannot be related as international transaction of the assessee. Further the provision for impairment of assets is not regular business expenditure since it is not recurring in nature and is not related normal business operation and hence not in the nature of operation expenses, therefore, in our considered opinion the same cannot be treated as operating expenditure for the calculation of PLI of the assessee. We accordingly direct the AO / TPO to exclude provision of impairment of assets as operating expenditure. This ground is accordingly allowed."*

22. Further, this Tribunal in Ericsson India Ltd ITA No. 168/DEL/2015 has held as under:

*"Assessee has challenged the findings returned by TPO/DRP treating amortization of goodwill as not extra ordinary in nature. It is the case of the assessee that goodwill is on account of acquisition of units through slump sale under Business Transfer Agreement and in these circumstances, amortization of goodwill is an extra-ordinary item and is not pertaining to the regular operation of the taxpayer, hence non-operating in nature.*

*16. Ld. AR for the assessee contended that Id. DRP in assessee's own case in AYs 2011-12 and 2012-13 and Id. TPO in AY 2013-14 ITA No.168/Del./2015 has already amortized goodwill as extra ordinary in nature by excluding the same by computing operating margin of the taxpayer and order thereof is available at pages 2681 to 2695, 2696 to 2713 and 2718 and 2764 of the paper book. It is also not in dispute that there is no change in the facts of AYs 2010-11, 2011-12, 2012-13 and 2013-14. Perusal of the order passed by Id. DRP available at page 2681 relevant portion at page 2691, shows that amortization of goodwill is an extra-ordinary item and is not pertaining to the regular operation of the assessee, and hence non-operating in nature. So, in these circumstances, we direct the TPO to verify the facts and treat the amortization of the goodwill as non-operating expenditure in order to compute the operating margin of the assessee. So, ground no.7 is determined in favour of the assessee."*

23. Further, we find that in subsequent A.Ys, the TPO has considered amortization of goodwill and non-compete fees as non-operating expenses. Therefore, we do not find any merits in considering them as part of operating expenses for the year under consideration when the facts are same.

24. Considering the facts of the case in totality, in light of the decisions of the co-ordinate bench, we direct the Assessing Officer to treat amortization of goodwill and non-compete fees as abnormal and non recurring expense and exclude them while computing TNMM operating margin earned from provision of services to AEs.

25. Ground No. 2 with all its sub grounds is allowed.

26. Since we have directed for the exclusion of amortization of goodwill and non-compete fees as non-operating expenses while computing the TNMM operating margin, we do not find it necessary to dwell into the issue relating to the comparables. Accordingly, Ground Nos. 3, 4 and 5 become otiose.

27. Ground No. 6 relates to the adjustment on purchase of medical equipments.

28. Facts on record show that the assessee is also engaged in the business of trading of medical equipment i.e. blood gas analysers and consumables. We find that the assessee Appellant follows a unique business model wherein the assessee buys analysers and sells them to third parties i.e. hospitals, medical institutions etc, books the revenue under the trading segment. On the other hand, if the customer is not willing to buy the analysers, such instruments were installed at the customer's premises and the consumables required by the customer in using these instruments were provided by the assessee. We find that the cost of such analysers imported from the AEs, were capitalized in the books of accounts of the assessee and its related operating cost, i.e. depreciation, has been charged to the profit and loss account while computing the profitability of the trading segment. We find that the assessee has used TNMM analysis to bench mark arm's length nature of international transaction of purchase of medical equipment.

29. We find that the TPO has accepted the purchase price of such analysers for the trading segment as arm's length, but surprisingly, determined the arm's length price of purchase of fixed assets at Nil. The Assessing Officer, while framing the final assessment order, even

went ahead one step further and disallowed the claim of depreciation considering the arm's length price determined by the TPO as NIL.

30. The documents referred to by the Id. counsel for the assessee during the course of arguments were considered from which we find that the import of goods was substantiated by furnishing the custom documentation which includes sample invoices along with corresponding bill of entries. Interestingly, we find that the custom's duty paid and cost of transportation were considered as the arm's length price by the lower authorities for computing the allowable depreciation whereas the cost of equipment has been taken at NIL.

31. In our considered opinion, equipment would not have been imported at NIL price even in an independent scenario. Moreover, we do not find that the TPO has applied any method to benchmark the said transaction, which action of the TPO is in violation of Rule 10B of the Income Tax Rules. We find that while treating the purchase of capital goods as NIL, the TPO failed to provide any comparable data which would have suggested that the arm's length price for the purchase of capital goods can be NIL. In our understanding, no third party would have sold such goods free of cost. In our considered

opinion, arm's length price could be lower or higher but cannot be NIL, as the goods have been imported.

32. Incidentally, the same products purchased from the same AE, for the same price, in the same year, cannot be held to be at arm's length for trading goods and not at arm's length for capitalised goods at the same time and in the same breath. Considering the facts of the case in totality, we direct the Assessing Officer to allow the claim of depreciation on the purchase of fixed assets. Ground No. 6 with all its sub grounds is, accordingly, allowed.

33. Ground No. 7 relates to the adjustment of Rs. 80,416/- on account of interest on outstanding receivables.

34. Considering the smallness of the amount, the ld. counsel for the assessee did not seriously contest this ground. The same is dismissed for the smallness of the amount.

35. Ground No. 8 relating to levy of interest u/s 234B of the Act is consequential.

36. Ground No. 9 is premature.

37. In the result, the appeal filed by the assessee in ITA No. 953/DEL/2017 is partly allowed.

The order is pronounced in the open court on 27.08.2021 in the presence of both the rival representatives.

Sd/-

**[SUCHITRA KAMBLE]  
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 27<sup>th</sup> August, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
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Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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