

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

Before Sh. Kul Bharat, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 886/Del/2017 : Asstt. Year : 2012-13

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| Corning Technologies India Pvt. Ltd., 2 nd Floor, DLF Building 9B, DLF Cyber City, Phase-III, Gurugram, Haryana-122002 | Vs | DCIT, Circle-1(1), Gurgaon |
| (APPELLANT) | | (RESPONDENT) |
| PAN No. AADCC6645D | | |

Assessee by : Sh. M. P. Lohia, CA

Revenue by : Sh. Surenderpal, CIT DR

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| Date of Hearing: 06.07.2021 |
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| Date of Pronouncement: 17.09.2021 |
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 30.01.2017 passed by the AO u/s 143(3)/144C of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That the assessing officer ('AO') erred on facts and in law in completing the assessment under section 144C read with section 143(3) of the Income-tax Act, 1961 ('the Act') at a loss of Rs. 3,29,43,540 as against the loss of Rs. 6,79,40,379 returned by the appellant.

2. That the AO erred on facts and in law in making an adjustment of Rs.3,49,96,839 allegedly on account of the difference in the arm's length price of the

international transactions undertaken by the appellant on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer ('TPO').

3. That the AO/TPO erred on facts and in law in making adjustment of Rs. 34,67,344 to the income of the appellant on account of difference in the arm's length price of the international transaction of provision of market support services to the associated enterprise.

3.1 That the AO/TPO erred on facts and in law in considering Just Dial Ltd. as comparable not appreciating that the audited financial statement of the company for the financial year 2011-12 is not available in public domain and also do not satisfy the comparability criteria laid down in rule 10B(2) of the Income Tax Rules, 1962 ('the Rules').

3.2 That the AO/TPO erred on facts and in law in rejecting the following comparable companies considered by the appellant in the Transfer Pricing Documentation not appreciating that these companies are functionally comparable to the appellant:

| S. No. | Name of the company |
|--------|--|
| 1. | Indian Tourism Development Corporation Ltd. |
| 2. | Cyber Media Research Ltd. (Formerly IDC (India) Ltd.) |
| 3. | EDCIL (India) Ltd. (Segmental) |
| 4. | In house productions Ltd |

3.3 That the AO/TPO erred on facts and in law in rejecting comparability adjustment on account of working capital employed by the appellant vis-a-vis comparable companies.

3.4 That the AO/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to

the comparable companies who were independent comparable companies.

3.5 That on the facts and in the circumstances of the case and in law, the AO/TPO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that no evidence has been provided by the appellant to prove that risk has actually been undertaken by the comparable companies.

4. That the AO/TPO erred on facts and in law in making an adjustment of Rs. 3,15,29,495 on account of arm's length price of the international transaction of receipt of administration support services on the basis of the order passed under section 92CA(3) of the Act by the TPO.

4.1 That the AO/TPO erred on facts and in law in determining the arm's length price of the international transaction of payment of administration support services fees at NIL allegedly concluding that no such service/ benefit has been received by the appellant and therefore, there is no rationale for paying this support services fees to the associated enterprise.

4.2 That the AO/TPO erred on facts and in law in allegedly holding that the appellant failed to place on record any documentary evidence substantiating receipt of administrative support services from the associated enterprises.

4.3 That the AO/TPO erred on facts and in law in computing adjustment on account of international transaction of payment of administration support service fee without reasonably applying any prescribed methods, thereby, violating the basic principles of TP regulations."

3. Corning Technologies India Pvt. Ltd. (CTIPL) was incorporated on 02.06.2009. The company is engaged in the business of purchase and sale of ophthalmic glass products, ophthalmic plastic lenses and life science products in the Indian market and rendering marketing services and support services to its Group companies. CTIPL has taken over the entire business of Corning India, on a slump sale basis w.e.f. 01.02.2012, pursuant to the approval of the Reserve Bank of India for a purchase consideration of Rs.19,44,70,482/-.

4. In accordance with the provisions of Section 92C r.w. Rule 10B & 10C, the assessee has chosen TNMM as the most appropriate method vide order u/s 92CA(3) dated 29.01.2016. The TPO determined ALP of the transactions and proposed an adjustment of Rs.3,49,96,839/- vide order dated 11.03.2016. The AO pursuant to the directions of the Id. DRP made adjustments of Rs.3,15,29,495/- on account of Intra Group Services and Rs.34,67,344/- on account of market support services.

5. The assessee mainly involved in three different activities namely ophthalmic support, marketing support and provision of Intra Group services.

6. With reference to the marketing research, the assessee appraises the AE of current market trends and developments in India by monitoring the industry, capital prices, political factors, supply and demand of the relevant Indian market in addition to identifying the potential customers in India. It is also involved in providing support and liason between the customers and Corning France (AE).

Comparables:

7. With regard to the comparables selected by the AO in his TP study, the assessee objected to the inclusion of "Just Dial Ltd." The TPO held that it is functionally comparable to the assessee, as the comparable also provides information to the users and connects the buyers to the sellers, the same way "Just Dial" operates. The Id. DRP confirmed the inclusion holding that since the comparable is effectively involved in marketing the information pertaining to different categories of SMEs across multiple platforms and is facilitating trade transactions.

8. Before us, it was argued by the Id. AR that "Just Dial" is having a website and the search service is available to users across multiple platforms such as internet, mobile, voice and text. It was argued that the assessee is a captive service provider providing services only to its AE, and is devoid of any excess remuneration attributable to "brand ownership".

9. The Id. DR argued that what needs to be seen is the functional commonality but not any other issues or functional dissimilarities. It was argued that both the assessee and the comparable in question (Just Dial) are involved in getting new clients, customers to the principle. It is the common functionality that both entities are involved in client procurement and liason work.

10. Having gone through the facts on record and the FAR analysis, we find that while "Just Dial" is a search engine for multifarious activities and is a search engine using different

platforms, dealing with multiple products whereas the assessee is a captive liason and marketing service provider for its AE. Hence, we hold that "Just Dial" cannot held to be a right comparable.

Working Capital Adjustment:

11. With regard to capital adjustment, we find that the Id. DRP allowed the working capital adjustment, however the AO failed to take the cognizance of the same while giving effect to the Id. DRP directions. Hence, the AO is directed to rectify the order to that extent.

Risk Adjustment:

12. With regard to the risk adjustment, the TPO denied risk adjustment on the grounds that the assessee has not clearly shown that the comparables had actually undertaken risks.

13. The Id. DRP held that in cross border transactions, the tested party will typically always be a captive while comparables will always be entrepreneurs for ALP determination. It held that risks can be adjusted only if there is complete and reliable data available otherwise the entire exercise will be tainted by the inaccuracies.

14. Hence, the question before us would be whether the risk of having a single customer is equivalent to the marketing and technical risks attached to the comparable. A single customer risk is an anticipated risk *ab initio*. The anticipated risk may happen or it may not happen. Whereas the risk attributed to the comparables is an existing risk. At the same time, we find that

the assessee is not exposed to any of the risks such as market risk or service liability risk, collection risk, capacity utilization risk for the AE being the sole customer. The question before us is as to whether the risk of having a single customer is equivalent to the marketing and technical risk attached to the comparables. According to the TPO, the assessee has the 'single customer risk' meaning, if the single customer refuses to have any dealings with the assessee, the assessee would lose all of its business and there would be no profit at all. But, as we see it, the risk of having a single customer is anticipated risk which may or may not happen. What we have to see is the position in the relevant period whether the appellant had encountered such a risk during the relevant period or not .

15. In the instant case, it can be seen that the assessee has not encountered the risk of having a single customer, whereas the same cannot be said as regards the comparables. The comparables were dealing in open market and therefore, they were prone to the marketing and technical risks. They would invariably incur certain expenditure on marketing services and also to safeguard the technical inputs used by them. In such a case, the risk encountered by the assessee cannot be said to be the equivalent risks attached to the comparables. The risk attributed to the assessee by the TPO is an anticipated risk whereas the risk attributed by the assessee to the comparables is an existing risk. In such situation, we direct that the risk adjustment be accorded to the net margin of the comparables for bringing them on par with the assessee company.

Administrative Support Services:

16. During the financial year 2011-12, the assessee received "Administrative Support Services" from its associated enterprises for assisting it in carrying its business operations in India. For the aforesaid services, the assessee paid administrative and support service fees amounting to Rs.3,15,29,495/- to the following associated enterprises:

| Name of the AEs | Nature of Service | Amount (INR) |
|---|--|---------------------|
| Corning Inc., United | IT Support | 29,242,674 |
| Corning China(Shanghai) Regional Headquarter ('Corning Shanghai') | Accounting services including processing of accounts | 2,286,821 |
| Total | | 31,529,495 |

17. In the Transfer Pricing Documentation, for the purpose of benchmarking, the assessee applied TNMM as the most appropriate method considering itself to be the tested party. The assessee conducted two separate searches on Onesource Database for determination of the arms length price of the international transactions undertaken with Corning Inc. and Corning China. The results of the benchmarking analysis is summarized as under:

| Name of the AEs | Margin earned by the assessee | Average OP/OC of the comparable companies |
|--|--------------------------------------|--|
| Corning Inc., United States | 5.00% | 9.40% |
| Corning China (Shanghai) Regional Headquarter ('Corning Shanghai') | 5.00% | 14.30% |

18. It was submitted that since the mark up earned by Corning China and Corning Inc. at 5% for rendering of support services to the assessee is lower than the average operating profit margin of the comparable companies, therefore, the international transaction of receipt of administrative support services can be considered to be at arm's length.

19. The TPO determined the value of such "expenditure" at 'NIL' holding that:

- a. No services were actually received by the assessee
- b. No benefit was derived by the assessee by making payment for Administrative Support Services
- c. No evidence was furnished substantiating the receipt of administrative services
- d. The services were not actually needed by the assessee

20. The Id. AR argued that during the relevant financial year, the assessee paid administrative and support fees of Rs.3,15,29,495/- to the associated enterprises which are remunerated at a cost plus 5 percent markup, wherein, cost includes all direct and indirect cost incurred in the provision of aforesaid services. This entails payment of all fixed costs, recognized on the basis of time spent by the service provider, and the same is allocated to the service recipient on the basis of the volume of usage, plus a mark-up of 5 percent.

21. For provision of administrative support services, the assessee entered into the following agreements with its associated enterprise namely Corning China (Shanghai) Regional Headquarter for the purpose of Accounting services

and with Corning Inc., United States for the purpose of IT Support.

22. Cost allocation keys applied by respective associated enterprises for the purpose of allocating expenses to group entities alongwith the invoices raised by the associated enterprises are as under:

| Name of the AEs | Nature of Service | Amount | Allocation keys | Invoices raised/ correspondence between the assessee and AEs |
|--|---|---------------|--|---|
| Corning Inc., United States | IT Support | 29,242,674 | Costs are allocated on the basis of number of users of server and related facilities on laptop, handheld devices. | Enclosed as annexure 3, 4 & 5 to reply dated 20.01.2016 |
| Corning China(Shanghai) Regional Headquarter | Accounting "services including processing of accounts | 2,286,821 | The basis of allocation for these administrative support services is volume of activity/transactions or Full Time Equivalent ("FTE") dedicated to service the particular service availing entity. The payment terms as agreed between the assessee and the associated enterprises is provided in clause 4, "Annual Service Costs" of the Shared Service Agreement. | Enclosed as annexure 3, 4 & 5 to reply dated 20.01.2016 |

23. Similarly, accounting services provided by Corning Shanghai in the nature of processing of accounting vouchers, sanctioning of payments, undertaking monthly closings, and various other accounting processes to other group entities, rather than each entity maintaining its own department to undertake such functions, and incurring costs in this regard.

24. It was argued that the shared service centers offer the advantage of economical, specialized services, expertise in terms of knowledge of Corning products, adherence to Corning culture, Corning rules and procedures and most importantly confidentiality. Apart from that, the shared service centers cater to all Corning entities based out of Asia and the volumes of transactions of the assessee are very less compared to the volume of other Corning Asian entities.

25. It was argued that outsourcing the same, work to third party vendors would not only involve training them in Corning group's procedures and infrastructure but also involve a compromise on data confidentiality as well as on the stability of the services. Further, if each group entity is expected to contract with local vendors themselves, the group's operations as a whole will not only become far more expensive but also inefficient since each group entity will be replicating the same work and multiple third party vendors shall be involved in processing the same transactions. Arguing thus, the Id. AR canvassed that the mark-up of 5% on the services is to be allowed.

26. The entire grounds consists of two issues, whether in fact the services were rendered and availed by the assessee and if so, whether the mark-up of 5% can be considered as comparable with the market averages. Culling from the details filed and arguments of both the parties, we find that there is no dispute about availing of the services. The evidences include the e-mails, invoices, agreements submitted at page nos. 294 to 397 of the paper book. The assessee has also provided

details of cost allocation at page nos. 285 to 288 of the paper book. Hence, it cannot be said that the services have not been provided to the assessee. With regard to the mark-up of 5% paid by the assessee, we find that the economical analysis submitted by the assessee at page nos. 121 to 128 of the paper book is acceptable at the same time, the comparable namely, Pay Cheques.Inc. showing the OP/OC of 56.12% is being excluded owing to the extraordinary profits. Taking into consideration, the remaining comparables, we find that the arithmetic mean is more than the 5% mark-up charged from the company. Hence, we hold that no adjustment is called for while determining the ALP on account of payment for Intra Group Services.

27. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 17/09/2021.

Sd/-

(Kul Bharat)
Judicial Member

Dated: 17/09/2021

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR