

IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 6886/Mum/2018 (Assessment Year 2015-16)

Megger India Pvt.Ltd. 211, Crystal Paradise Veera Desai Road Andheri(W), Mumbai-400 053 PAN : AAFCM9884N (Appellant)	Vs.	DCIT-10(2)(2) Room No.209, 2 nd Floor, Aaykar Bhawan M.K.Road Mumbai-400 020 (Respondent)
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Assessee by	Shri Satish Mody
Department by	Shri Sushil Kumar Mishra
Date of Hearing	01.07.2021
Date of Pronouncement	24 .09.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-51 dated 29.10.2018 and pertains to Assessment Year 2015-16.

2. The grounds of appeal read as under :

1) The Learned Commissioner of Income-tax - (Appeals) -17, Mumbai has erred in facts and in law in confirming the Assessing Officer's disallowance of availing of intra-group services, i.e. Administrative and Managerial Services by the Appellant from its Associated Enterprises (AE) for Rs. 78,99,011/-.

2) The Learned Commissioner of Income-tax - (Appeals) -17, Mumbai has erred in confirming that no tangible or direct benefit was derived by the Appellant from receipt of the intra-group services and that the Appellant failed to furnish adequate evidences to demonstrate that the services were actually rendered by the AE, not appreciating the details, explanations and evidences submitted by the Appellant.

3. Brief facts of the case are that assessee company is engaged in the business of trading of importing testers and meters from its principles in UK and selling the same in India. In aforesaid assessment, the AO has made

disallowances of management support services u/s. 37(1) and /or/u/s. 40A(2)(b) of the Act. In this regard, he also referred to the observation of TPO for AY 2012-13 and noted that assessee's contention in this regard has been rejected by the TPO in the previous year. He also observed that during assessment proceedings assessee did not file "any of the specific details to support as to why these payments have been derived at". We may gainfully refer to the order of the AO in this regard as under:-

"It was observed during the course of the assessment proceedings that as part of Expenses in the P&L Account, the assessee has claimed an expense amounting to Rs.78,99,011/- in respect of payment of Management Support fee to its holding company M/s Megger Group Ltd. (MGL). The issue was discussed with the AR of the assessee during the course of the assessment proceedings and vide order sheet noting dated; 20/09/2017, the assessee company was asked to justify the claim of management support services u/s 37(1) of the Act, with necessary supporting evidences, elaborating the allowability of the said expenditure.

In response to the query raised, the assessee company has submitted as under: -
"During F. Y. 2014-15, Megger India has been getting support services from its AX. which are detailed as under:-

AE	Amount(Rs) .
<i>Megger Group ltd</i>	78,99,012/-

Megger India is a newly established entity and hence, receives considerable support from its experienced AE vis. MGL on an ongoing basis in the area of long term strategic planning, business development, administration, finance and international tax, management of cash flows, budgeting, etc. Such support enables Megger India to carry on its business operations in a smooth and efficient manner."

The reply of the assessee company has been perused; however, the same is not acceptable. The submissions of the assessee have been considered. The issue under consideration is not whether the expenses so incurred by the assessee were necessarily required to be incurred or not. The point under consideration is that the assessee is paying fee against these services as reimbursement of expenses to its holding company. However, it is not clear as to how the quantum of these services provided by the holding company of the group is determined and how the reimbursement is claimed from the assessee against said expenses by the holding company. In such a scenario/ it is not clear as to whether the payments made by the assessee to its holding company in the nature of re-imbusement of expenses have been incurred wholly and exclusively for the purpose of the business or not. Assessee has filed details in respect of such expenses by way of submitting invoices raised by M/s. Megger Group Ltd. and has also stated that TDS has been deducted on such reimbursements. However, perusal of the invoices so submitted reveals that the only description available on such invoices is Megger Group Management charges 2011. There are no details on the record other than this to satisfy the requirement as discussed earlier in this paragraph.

Assessee was posed with the similar queries by the TPO in A.Y. 2012-13. However, as per TPO's order dated 29/01/2016, for A.Y. 2012-13, the TPO has given a categorical finding, reproduced as under:

"a) The assessee did not produce any primary evidence to show that the services are actually rendered by the AE except describing the nature of services, allocation of cost. At arm's length, the parties dealing in similar circumstances would have such evidence in possession.

b) The assessee did not produce any evidences regarding the actual services rendered by the AE and how they would be quantified at an arm's length condition.

c) Details submitted by the assessee, it does not show the utility of services rendered and quantification of the same in arm's length condition. It shows that these charges are not linked with actual services.

d) The assessee could not produce the details and quantum of expenditure spent by the AE in rendering services in connection with these services even though he was asked specifically,

e) Just by describing various services, it will not suffice to justify the price charged in intra group services. The assessee is only describing various services rendered by the AE, but did not give the actual amount spent in respect of these expenses; as such dealing between two independent parties would invariably boils down to the actual expenditure incurred in connection with such services and markup thereon.

f) The assessee has filed a copy of master agreement with its AE which gives the basis of calculation of cost based on revenue which is nothing but a broad-brush approach aimed at flatly equating the costs related to the revenue.

g) After carefully, considering the facts of the case submitted by the assessee, it is seen that the assessee has made detailed submissions regarding the legal provisions but has not responded to the undersigned queries on facts. The assessee has failed to furnish any evidences regarding the receipt of shared services. For determining the arm's length price of international transaction of receipt of shared services by the assessee the following considerations are of prime importance:

- 1) Whether services were received or not?
- 2) Whether services were beneficial to the recipient or not?

The quantum of share services are decided as per agreement entered into with the AEs, Though agreement exists but still the same cannot lead to the conclusion that the services were in fact received for which the payment has been made such a conclusion would be a presumption in the absence of evidence of rendering of services. Receipt of service is essential for allowance of payment either under Income-tax Act or under the Transfer Pricing Provisions. The difference being, if the services are received, benefit arising from the services cannot be questioned u/s'.37(1), whereas benefit test is one of the pre-requisites under Transfer Pricing provisions for the service transactions."

Also during the course of the assessment proceedings, assessee did not file any of the specific details to support that how these payments have been derived at. Under these circumstances and facts of the case, it is not possible to determine as to whether the expenses amounting to Rs.78,99,011/- have been incurred wholly and exclusively of the purpose of the business. Therefore, the said expenses are hereby not allowed u/s.37(1) of the I, T. Act, 1961. Alternatively, they shall also stand disallowed u/s.40A(2)(b) of the Act as the assessee failed to establish before the undersigned during the course of the assessment proceedings, to furnish any specific details which could determine whether the expenses so made are not excessive and reasonable. Penalty proceedings u/s.271(1)(c) of the Act are initiated simultaneously for furnishing inaccurate particulars of income.

4. Upon assessee's appeal Ld.CIT(A) observed that on identical issue, DRP has decided the issue, in the earlier AY 2012-13, against the assessee, hence he quoted from that order and held that since the facts and circumstances this year are identical to that of AY 2012-13, there is no reason to deviate from the finding of the DRP in the earlier year. Hence, Ld.CIT(A) upheld the order of AO.

5. Against this order, assessee is in appeal before us.

6. We have heard both the parties and perused the records. Ld. Counsel of the assessee submitted that the issue is squarely covered in favour of the assessee the decision of ITAT in assessee's own case for AY 2012-13. Hence, he submitted that orders of the authorities below should be set aside and the issue be decided in favour of the assessee.

7. Per contra, Ld. DR submitted that facts in the present case are different as much as in the earlier, it was the TPO's order, where ITAT has referred that benefit test cannot be applied by the TPO. He further submitted that in the present case, the issue has been examined by the AO and the AO has noted that assessee has not submitted the relevant documents to supports the assessee's case.

8. In the rejoinder, Ld. Counsel of the assessee posited that assessee has duly submitted all the necessary papers but agreed that the issue may be remitted to the AO to examine the relevant papers.

9. Upon careful consideration, we note that ITAT in assessee's own case has decided the issue in favour of the assessee for AY 2012-13 in ITA NO. 791/Mum/2017 by holding as under:-

“Megger India Private Limited is engaged in the trading and distribution of electric test equipments and measuring instruments of the Megger Group, UK. During the year, the assessee company has undertaken following international transactions :-

Description	Amount (Rs)	Method used
Purchases of equipments/goods from AEs for resale	320,390,001	TNMM
Payment of Management service charges to AE	7,167,037	
Provision of support services to AEs	21,063,940	
Purchase of fixed assets from AEs	686,967	
Recovery of marketing and commercial ('marcom') material costs from AEs	924,175	
Reimbursement of expenses from AEs	725,570	Not applicable
Total	350,957,689	

The assessee selected TNMM as the most appropriate method to benchmark its international transactions of purchases of trading items, purchase of fixed asset, receipts for providing support services, payment for providing technical assistance services and payment for administrative and managerial service, recovery of marketing and commercial ('marcom') material costs from AEs. 4. The assessing officer accepted all the international transactions to be at arm's length price except for payment of management costs to AEs. According to the assessee's transfer pricing study report, the average PLI of the comparable companies and of the assessee on the basis of 3 years data is as follows :-

Nature of International Transaction	Most Appropriate Method	Profit Level Indicator	Megger's Adjusted Operating Margin	Comparables Adjusted weighted average operating margin
International transactions aggregated under the system integration segment	Transactional Net Margin Method	Adjusted Operating Profit / Sales	17.01 per cent	4.37 per cent

On this basis, the assessee contended that its international transactions are at the arm's length. The TPO in Order passed u/s. 92CA(3), determined the arm's length price of the international transactions of payment made for administrative and management services at NIL as against Rs.71,67,037/- claimed by the assessee.

5. While making the adjustment Transfer Pricing officer gave following reasoning :-

a) The assessee did not produce any primary evidence to show that the services are actually rendered by the AE except describing the nature of services, allocation of cost.

At arm's length, the parties dealing in similar circumstances would have such evidence in possession.

b) The assessee did not produce any evidences regarding the actual services rendered by the AE and how they would be quantified at an arm's length condition.

c) Details submitted by the assessee, it does not show the utility of services rendered and quantification of the same in arm's length condition. This shows that these charges are not linked with actual services.

d) The assessee could not produce the details and quantum of expenditure spent by the AE in rendering services in connection with these services even though he was asked specifically.

e) Just by describing various services, it will not suffice to justify the price charged in intra group services. The assessee is only describing various services rendered by the AE, but did not give the actual amount spent in respect of these expenses; as such dealing between two independent parties would invariably boils down to the actual expenditure incurred in connection with such services and markup thereon.

f) The assessee has filed a copy of master agreement with its AE which gives the basis of calculation of cost based on revenue which is nothing but a broad-brush approach aimed at flatly equating the costs related to the revenue.

g) After carefully, considering the facts of the case submitted by the assessee, it is seen that the assessee has made detailed submissions regarding the legal provisions but has not responded to the undersigned queries on facts. The assessee has failed to furnish any evidences regarding the receipt of shared services. For determining the arm's length price of international transaction of receipt of shared services by the assessee the following considerations are of prime importance: 1) Whether services were received or not?

2) Whether services were beneficial to the recipient or not?

The quantum of share services are decided as per agreement entered into with the AEs. Though agreement exists but still the same cannot lead to the conclusion that the services were in fact received for which the payment has been made such a conclusion would be a presumption in the absence of evidence of rendering of services. Receipt of service is essential for allowance of payment either under Income-tax Act or under the Transfer Pricing Provisions. The difference being, if the services are received, benefit arising from the services cannot be questioned u/s.37(1), whereas benefit test is one of the pre-requisites under Transfer Pricing provisions for the service transactions." Also during the course of the assessment proceedings, assessee did not file any of the specific details to support that how these payments have been derived at. Under these circumstances and facts of the case, it is not possible to determine as to whether the expenses amounting to Rs.71,67,037/- have been incurred wholly and exclusively of the purpose of the business. Therefore, the said expenses are hereby not allowed u/s.37(1) of the I.T. Act, 1961. Alternatively, they shall also stand disallowed u/s.40A(2)(b) of the Act as the assessee failed to establish both before the TPO and the undersigned during the course of the assessment proceedings, to furnish any specific details which could determine whether the expenses so made are not excessive and reasonable.

6. The Assessing Officer in this regard referring to the TPO's order concluded as under :-
"7.2 The assessee has not raised any objection against the above proposed addition/disallowance. However, since the TPO has taken the ALP of the said transaction at NIL, and effectively there has been an upward adjustment of Rs.71,67,037/-, which has also been upheld by the Hon'ble DRP, therefore, the said expenses after being not

allowed u/s.37(1) and/or u/s.40A(2)(b) of the Act, are not added back to the total income of the assessee, as the same may result into the double taxation of the said amount.”

7. The DRP upheld the action of the Transfer Pricing officer on the ground that the format of the agreement was not appropriate, the details are not available and that benefit test was not complied.

8. Against the above order assessee is in appeal before us. We have heard the learned departmental representative. None appeared on behalf of the assessee despite notice.

9. Upon careful consideration we find that the Transfer Pricing officer has determined the arm's-length price of the intra group services at nil without applying any method of benchmarking the arms length price. Without applying proper method of benchmarking of the arms length price of the international transaction in accordance with the method prescribed in the act the Transfer Pricing adjustment is not sustainable as held by honourable jurisdictional High Court in the case of CIT Vs. Johnson and Johnson Ltd. (247 Taxman 136)

10. Furthermore as held by jurisdictional High Court in the case of CIT Vs. Lever India Exports Ltd. (146 Taxman 133) the benefit test is not to be applied by the Transfer Pricing officer.

11. Furthermore while applying the benefit test the assessing officer himself has contradicted himself that the issue is not of benefit under section 37(1) but that of documentation.

12. Hence in the present case we find that the authorities below have erred in not appreciating the documents submitted by the assessee. While the TPO has not adopted any of the methods prescribed for benchmarking the international transaction, he has erred in applying the benefit test. On the other hand the assessing officer while purporting to invoke section 37(1) contradicted himself by stating that that he is not applying the benefit test, rather by raising issues of the documentation he has stepped into the shoes of the Transfer Pricing officer. The DRP has also erred in holding that the agreement should have been entered into by the parties in a particular manner by incorporating several other clauses. In our considered opinion here the dispute resolution panel exceeded its jurisdiction on this account. The format of agreement between the parties is not a subject matter of decision of DRP. The dispute resolution panel further erred in agreeing with the Transfer Pricing officer for application of benefit test for computing the arms length price of the international transaction. Accordingly in our considered opinion the Transfer Pricing adjustment is liable to be set aside as appropriate method of benchmarking the arms length price of international transaction as per the statute has not been adopted as held by the honourable jurisdictional High Court in the case of Johnson & Johnson (supra). Furthermore invoking of benefit test in transfer pricing adjustment is also against the ratio laid down by honourable Bombay High Court in the case of Lever India Exports Ltd. (supra). Hence in the background of aforesaid discussion and precedent from honourable jurisdictional High Court we set aside the orders of authorities below and decide the issue in favour of assessee.”

10. We find that in aforesaid order , the ITAT had decided the issue in favour of the assessee. ITAT has inter alia held that TPO has erred in applying the benefit test. That the AO has contradicted himself that he is not

applying the benefit test. We find that the proposition of ITAT in the above order are applicable to the facts in the present case to the extent ITAT has inter alia set aside the order, DRP observation that the agreement should have been entered into by the parties in a particular manner by incorporating several other clauses. This observation is duly applicable to this year also. However, since the AO has noted that assessee has not supplied the relevant documentary evidence and Ld. Counsel of the assessee has agreed that documents may be examined by the AO, we remit the issue to the file of AO only to examine the documents in this regard. Thereafter, AO shall decide as per law keeping in mind ITAT order in assessee's own case as above and our observations hereinabove.

11. In the result, this appeal by the assessee stands allowed for statistical purpose.

Pronounced in the open court on 24 .09.2021.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 24/09/2021
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai