

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'I-2' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER  
AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER  
[Through Video Conferencing]**

ITA Nos.5356 & 5357/Del/2017  
Assessment Year: 2010-11 & 2011-12

M/s. Regus Gurgaon Metropolitan Business Centre Pvt. Ltd., Level-4, Augusta Point, DLF Golf Course Road, Sectore-53, Gurugram	<b>Vs.</b>	DCIT, Circle-2, Gurugram
<b>PAN :AADCR7347H</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Sh. Manoneet Dalal, Adv.
Respondent by	Sh. M. Barnwal, Sr.DR

Date of hearing	22.09.2021
Date of pronouncement	11.11.2021

**ORDER**

**PER O.P. KANT, AM:**

These two appeals by the assessee are directed against two separate orders, both dated 08/06/2017, passed by the Learned Commissioner of Income-tax (Appeals)- 2, Gurgaon [in short 'the Ld. CIT(A)'] for assessment year 2010-11 and 2011-12 respectively. Being common grounds raised in both the appeals,

same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

**2.** The grounds raised by the assessee in ITA No. 5356/Del/2017 for assessment year 2010-11, are reproduced as under:

*1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("Ld. AO")/ Ld. CIT(A) is bad in law and void ab-initio.*

**Corporate Tax Grounds**

- 2. That on the facts and circumstances of the case and in law, the Ld. CIT(A) and Ld. AO erred in disallowing the expenditure incurred in relation to regional headquarter charges Rs.32,82,618 and towards shared services amounting to Rs.28,92,091 by alleging that;
  - a. No actual service has been received by the Appellant, and such services are overlapping in nature;*
  - b. Such services are rendered by the respective associate enterprise with intention to exercise overall control over the Appellant;*
  - c. Such services are not required by the Appellant; and*
  - d. Alleging that support services may be covered under the ambit of Royalty payment made by the Appellant to one of the group company.**
- 3. In doing so, the Ld. CIT (A) and Ld. AO has not only disregarded the documentary evidences and submissions made by the Appellant, but has failed to appreciate that such business expenses were incurred entirely for the business purposes.*

**Transfer pricing grounds:**

- 4. That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law in determining the arm's length price of the international transaction of payment of regional/ head quarter charges and regional/ head quarter charges (Shared Service Centre charges) of the Appellant at nil.*
- 5. That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law by benchmarking the international transaction through application of CUP method without furnishing details of price charged in any comparable uncontrolled transaction which is in contravention of the provisions of Rule 10B of the Rules.*
- 6. That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law by not appreciating that payment made is closely linked to the primary business functions of the*

*Appellant and thereby rejecting the Transactional Net Margin Method analysis adopted by the Appellant and by re-computing the arm's length price without undertaking any cogent arm's length analysis.*

7. *The Ld. AO/ Ld. CIT(A) erred in not admitting the additional evidence and erred in not appreciating the economic adjustment on the capacity utilization of the Appellant, which should have been considered because of commercial or business reasons, which were duly demonstrated before tax authorities.*

**General grounds**

8. *That the Ld. AO/ Ld. CIT(A) erred in facts and in law in charging interest under section 234A, 234B, 234C and 234D of the Act.*
9. *That on the facts and circumstances of the case and in law, the Ld. AO/ Ld. CIT(A) has erred in initiating penalty proceedings under section 271(l)(c) of the Act, for disallowances made under section 92CA(3) without recording any adequate reason for such initiation.*

*That the above grounds are independent and without prejudice to each other.*

*The appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the course of the appellate proceedings in the interest of the natural justice.*

**3. Briefly stated facts of the case as culled out from the order of the lower authorities are that:**

- (i) The assessee company (in short 'Regus India') has been constituted on 24/06/2007 as a subsidiary of Regus India Holding Ltd., Mauritius (now known as 'Regus International Holding Ltd.'). During the relevant year, the assessee company was engaged in providing of workplace solutions including providing day offices, meeting rooms, conference rooms, videoconferencing studios and training rooms, for individuals and companies.
- (ii) For the year under consideration, the assessee filed return of income on 14/10/2010, declaring loss of ₹

1,16,24,550/-. The return of income filed by the assessee was selected for scrutiny and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The Assessing Officer observed international transactions carried out by the assessee with its Associated Enterprises (AEs), however, value of the transactions being less than the prescribed limit, matter of determination of the arm's-length price was not referred to the Id. Transfer Pricing Officer (TPO) and he himself determined the arm's-length price.

- (iii) The Assessing Officer observed following international transactions carried out by the assessee:

<i>Sl. No.</i>	<i>Description</i>	<i>Amount (In INR)</i>
1.	<i>Payment of Fees for Services (Payment for royalty)</i>	3,460,579
2.	<i>Regional/Head Quarter Charges</i>	1,584,281
3.	<i>Regional/Head Quarter Charges (shares Service Centre Charges)</i>	900,491
4.	<i>Bank Guarantee</i>	3,737,702
	<b>Total</b>	<b>9,683,053</b>
5.	<i>Cost Allocation</i>	4,910,564
	<b>Total</b>	<b>14,593,617</b>

- (iv) The assessee in its transfer pricing study benchmarked the transactions in aggregated manner, applying Transactional Net Margin Method (TNMM) with Operating Profit/Operating Income (OP/OI) as Profit Level Indicator (PLI). It was contended before the Assessing Officer that PLI of the assessee company

being in line with average PLI of comparable companies (which was worked out to 5.82% ), the international transactions were at arm's-length.

- (v) The Learned CIT(A) in para 4.1.1 has noted that calculation of own PLI (OP/OI) was not submitted before the Assessing Officer. The assessee submitted calculation demonstrating margins of the assessee before the Ld. CIT(A) on 29/05/2017. In the analysis, adjustment was made to the PLI in the form of low capacity utilization, abnormal expenses in the form of rent and depreciation. The Ld. CIT(A) considered this information as additional evidence and in absence of any application in terms of Rule 46A of the Income Tax Rules, 1962 (in short 'the Rules') by the assessee for admitting those evidences, the Ld. CIT(A) upheld the rejection of TNMM as most appropriate method for benchmarking of international transactions.
- (vi) The learned Assessing Officer benchmarked the international transaction using transaction by transaction approach (segregated manner). The Learned Assessing Officer clubbed the transaction of payment of fees for services (Rs. 34,60,579/-), Regional head quarter charges (Rs.15,84,281/-); regional headquarter charges (shared service Centre charges) (Rs.9,00,491/-) bank guarantee charges(Rs. 37,37,702/-) under management fee. Benchmarking of cost allocation (Rs. 49,10,564/- was done separately.

(vii) According to the Assessing Officer, the assessee failed to demonstrate benefit derived from above intergroup services vis-a-vis cost claimed and what amount an independent entity would have paid for each of the supposed services. The finding of the Learned AO in para 9.1 of the assessment order are reproduced as under:

*“9.1 On the basis of the above following are noticed:*

- *The assessee has not been able to demonstrate the benefits that it had derived from the services purportedly provided by the AE. No independent entity would pay for such services without any cost benefit analysis.*
- *The assessee has not furnished any evidence as to the cost benefit analysis with regard to the independent suppliers. No third party would like to avail services without any cost benefit analysis with regard to AE vs. Independent supplied.*
- *The documentation produced by the assessee to support its claim for the receipt of management services is too generic. The invoices from Group Companies produced by assessee are duly self serving evidence with do not substantiate the fact that any services were actually rendered and that too at an Arm's Length Price.*
- *The benchmarking done by the assessee is not conclusive.*

(viii) The Learned Assessing Officer in absence of 'cost benefit analysis' held that no independent party would have made a payment in uncontrolled circumstances and therefore applying Comparable Uncontrolled Price (CUP) method, he determined the arm's-length price of the transaction of management fee and cost allocation at nil and, accordingly, made addition of ₹ 1,45,93,617/-to the returned income.

(ix) On further appeal, the Ld. CIT(A) upheld the segregated manner of benchmarking, however, he is of the opinion

that payment of fee for services (payment for royalty) was allowable both in terms of section 37 of the Act as well as payment being at arm's-length. The Ld. CIT(A) also upheld the transaction of bank guarantee charges at arm's-length subject to certain verifications. The adjustment to transaction of 'Cost Allocation' was deleted by the Ld. CIT(A) on the ground that services were obtained from domestic Associated Enterprises. However, he upheld the adjustment to Regional/headquarter charges and regional/headquarter charges (shared service Centre charges) amounting to Rs 15,84,281/- and Rs. 9,00,491/- respectively.

**4.** Before us, the learned Counsel of the assessee filed paper-books and other documents. The learned Counsel submitted that identical issue of intragroup services in the case of a sister concern of the assessee, namely, **Regus Business Centre Pvt. Ltd in ITA No. 1110/Mum/2017 for assessment year 2012-13**, the Tribunal has rejected 'benefit test' and restored the matter of determination of arm's-length price back to the file of Learned AO/TPO for applying most appropriate method specified in section 92C of the Act. The Learned Counsel submitted that issue in dispute in the instant appeal being identical and is covered by the order of the Tribunal (supra). The learned Counsel also submitted that as far as grounds No. 2 and 3 of the appeal are concerned, the documentary evidences submitted by the assessee have been totally disregarded.

5. The Learned DR, on the other hand, relied on the order of the lower authorities.

6. We have heard rival submission of the parties and perused the relevant material on record. We find that the Ld. CIT(A) referred to the decision of Hon'ble Delhi High Court in the case of **CIT Vs Cushman and Wakefield (India) Pvt. Ltd** (supra) wherein the respective area of the role of the TPO and the Assessing Officer has been demarcated. The Hon'ble High Court has mentioned that the Assessing Officer is permitted to examine, whether the expenses has been incurred for the purpose of business income under section 37 of the Act and the provisions of the Chapter – X, do not debar by the Assessing Officer from conducting examination of the ALP himself. Keeping in view the finding of Hon'ble High Court (supra), the Ld. CIT(A) upheld the adjustment made by the TPO of intragroup services of Regional/Head Quarter Charges and Regional/Head Quarter Charges (Shared service Centre charges) observing as under:

*“7. 1 Regional/Head Quarter Charges and Regional/Head Quarter Charges (Shared service Centre charges) are overlapping in nature and there is no credible evidence to suggest that any services of such kind has been actually provided to the appellant. The nature of services under these two heads is overlapping and there is nothing special about the services which were required to be taken by the appellant from its Associated Enterprise. It has been discussed above that a bouquet of services are provided by associated enterprises to its constituents not for the benefits of the said constituents but with a view to exercise overall control in respect of each transaction of the said constituent. It is in the business interest of the service provider to take control over the activities of its constituent so as to exercise supervisory control. Under arm's length circumstances such checks and controls would not be permitted by the third-party and on the contrary and attempt would be made to keep the secrecy. The alleged services as mentioned above are either not required by the appellant or in case these are required as an operational requirement these are available at minimal cost. It is also*

*pertinent to mention here that the Associated Enterprise of the appellant are charging Service charge for Royalty which also includes providing of support to the appellant. In the set of circumstances, the Assessing Officer is fully justified in not allowing the expense as claimed by the appellant because such kind of expense is disallowable both being not for the purposes of business as well as payment not conforming to the principles of arm's length price. The action of the Assessing Officer justified and upheld.”*

**6.1** Before us, the Learned Counsel of the assessee has referred to the decision of the Tribunal in the case of **Regus Business Centre Private Limited** (supra), i.e., a sister concern of the assessee company, which has availed identical intragroup services from Associated Enterprises. The said company was also engaged in the business of establishing, operating, managing and controlling business centres in India during relevant assessment year. The Learned TPO determined the ALP of such services at nil applying 'benefit test'. The Tribunal rejected the benefit test and restored the matter back to the Learned AO for applying most appropriate method as specified in section 92C of the Act. The relevant finding of the Tribunal (supra) is reproduced as under:

*“6. The first issue in appeal is in respect of adjustment made on account of intra-group services. The assessee has purportedly received support services from its regional headquarter primarily in the areas of management of human resources, sale, debt management and collection, advertisement and marketing, legal services, etc. The TPO applied 'benefit test' on the intra-group services received by the assessee and determined the ALP of such services at 'Nil'. We find that the TPO has failed to properly analyse the support services received by the assessee from its regional headquarter. Further, the settled legal position now is that the ALP of intra group services cannot be determined at 'Nil'. The 'benefit test' analysis which was earlier accepted has now been held to be redundant. The Tribunal in the case of Merck Ltd. Vs. Dy. CIT, 179 TTJ 121 = 2016-TII-189-ITAT-MUM-TP has held the concept of 'benefit test' as irrelevant. The Tribunal held that by applying benefit test ALP of intra-group services cannot be determined at 'Nil'. Thereafter, in various decisions by the Tribunal the application of benefit test analysis has been rejected. Thus, we deem it*

*appropriate to restore the issue back to the file of TPO for fresh adjudication and for determination of ALP of intra-group services by applying most appropriate method specified in section 92C of the Act. Ground No. 1 of the appeal is thus, allowed for statistical purposes.”*

**6.2** We find that the Ld. CIT(A) has upheld the disallowance of expenditure in terms of section 37 of the Act as well as adjustment made under issue transfer pricing provisions. The assessee has before us challenged the disallowance made under section 37 of the Act by way of Ground No. 2 (two) and 3 (three). The assessee has also challenged the adjustment to international transaction by way of raising grounds No. 4 to 7 of the appeal. As far as transfer pricing adjustment is concerned, the dispute involved before us in the instant case is of intragroup services availed by the assessee, which are identical to the case of Regus Business Centre Pvt. Ltd. (supra) and Ld. CIT(A) has upheld the adjustment, which was made by the Assessing Officer applying benefit test. On perusal of the record, we also find that while upholding the disallowance in terms of section 37 of the Act, the evidences submitted by the assessee need to be examined specifically from the angle of section 37 of the Act, however, no such opportunity has been provided by the Ld. CIT(A) to the assessee to rebut the charges levelled. Thus, respectfully following the finding of the Tribunal (supra), the issue in dispute of disallowance of expenses in terms of section 37 of the Act as well as determination of arm's-length price of the international transaction of Regional/Head Quarter Charges and Regional/Head Quarter Charges (Shared service Centre charges) is restored back the file of the Learned Assessing Officer for fresh

adjudication and determination of ALP applying most appropriate method specified in section 92C of the Act. The grounds No. 2 to 7 of the appeal are accordingly allowed for statistical purposes.

**6.3** The grounds No. 8 and 9 being general in nature, we are not required to adjudicate upon specifically. Thus, same are dismissed as infructuous.

**7.** The grounds raised in ITA No. 5357/Del/2017 for assessment year 2011-12 are reproduced as under:

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("Ld. AO")/ Ld. CIT(A) is bad in law and void ab-initio.*

**Corporate tax grounds**

2. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) and Ld. AO erred in disallowing the expenditure incurred in relation to regional headquarter charges INR 15,84,281 and towards shared services amounting to INR 9,00,491 by alleging that;*
  - a. *No actual service has been received by the Appellant, and such services are overlapping in nature;*
  - b. *Such services are rendered by the respective associate enterprise with intention to exercise overall control over the Appellant;*
  - c. *Such services are not required by the Appellant; and*
  - d. *Alleging that support services may be covered under the ambit of Royalty payment made by the Appellant to one of the group company.*
3. *In doing so, the Ld. CIT (A) and Ld. AO has not only disregarded the documentary evidences and submissions made by the Appellant, but has failed to appreciate that such business expenses were incurred entirely for the business purposes.*
4. *The Ld. CIT (A) erred by not passing a speaking order in regard to allocation of bank guarantee fee/ commission.*

**Transfer pricing grounds**

5. *That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law in determining the arm's length price of the international transaction of payment of regional/ head*

- quarter charges and regional/ head quarter charges (Shared Service Centre charges) of the Appellant at nil.*
6. *That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law by benchmarking the international transaction through application of CUP method without furnishing details of price charged in any comparable uncontrolled transaction which is in contravention of the provisions of Rule 10B of the Rules.*
  7. *That on the facts and circumstances of the case, the Ld. AO/ Ld. CIT(A) erred on facts and in law by not appreciating that payment made is closely linked to the primary business functions of the Appellant and thereby rejecting the Transactional Net Margin Method analysis adopted by the Appellant and by re-computing the arm's length price without undertaking any cogent arm's length analysis*
  8. *The Ld. CIT(A) erred by remanding back the matter to Ld. AO in regard to domestic cost allocation for verification that these allocation are without any markup.*

**General grounds**

9. *That the Ld. AO/ Ld. CIT(A) erred in facts and in law in charging interest under section 234A, 234B, 234C and 234D of the Act*
10. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(l)(c) of the Act, for disallowances made under section 92CA(3) without recording any adequate reason for such initiation. That the above grounds are independent and without prejudice to each other.*

**7.1** Both parties agreed that the Grounds No. 2, 3 and 5 to 8 of the year under consideration are identical to grounds raised in assessment year 2010-11. Thus, respectfully following our finding in assessment year 2010-11, the relevant grounds are allowed for statistical purposes and the issue-in-dispute is restored to the file of the Assessing Officer/TPO for deciding afresh, with identical direction, which we have given in assessment year 2010-11. In ground No. 4, the assessee has raised issue that allocation of bank guarantee fee/commission has not been adjudicated by way of a speaking order. We find that Ld. CIT(A) in para 4.2 of the impugned order has referred to the issue of bank guarantee fee

allowed in assessment year 2010-11, however, in para 4.3 of the impugned order for the year under consideration, he has not given a specific finding. Before us, the learned Counsel submitted that in assessment year 2010-11, the Ld. CIT(A) has allowed relief on the issue of the bank guarantee fee and no appeal has been filed by the Department against this ground. The Learned DR also did not dispute this position. In normal circumstances, this issue should have been restored to the file of the Ld. CIT(A), however, to avoid proceedings simultaneously at multiple levels, we feel it appropriate to restore this issue also to the file of the Assessing Officer with the direction to adjudicate the issue keeping in view the finding of the Ld. CIT(A) in assessment year 2010-11, as the issue of adjustment in respect of other services has been restored to the file of the Assessing Officer.

**8.** In the result, both the appeals of the assessee are allowed for statistical purposes.

***Order pronounced in the open court on 11<sup>th</sup> November, 2021***

***Sd/-***  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

***Sd/-***  
**(O.P. KANT)**  
**ACCOUNTANT MEMBER**

Dated: 11<sup>th</sup> November, 2021.

RK/-(DTPC)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi