

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : “1-2” NEW DELHI]
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA. No. 2333/Del/2019
(Assessment Year : 2012-13)

Tupperware India Pvt. Limited, 204–206, Tolstoy House, 15–Tolstoy Marg, Con. Place, New Delhi – 110 001. PAN: AA ACT3770D (Appellant)	Vs.	ACIT, Circle : 25 (2), New Delhi. (Respondent)
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Assessee by :	Shri Tarandeep Singh, Advocate;
Department by :	Shri M. Baranwal, Sr. D. R.;
Date of Hearing :	25/10/2021
Date of pronouncement :	24/11/2021

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of the Id CIT(A)-44, New Delhi dated 31.12.2018 for Assessment Year 2012-13. By this appellate order the appeal filed by the assessee against the assessment order passed by the Id ACIT, Circle-25(2), New Delhi passed u/s 143(3) read with section 144C of the Act dated 27.05.2016 was partly allowed.
2. The assessee has raised the following grounds of appeal:-
 - “1. That the Learned Commissioner of Income Tax (Appeals) [“Ld. CIT(A)”], Learned Assistant Commissioner of Income Tax, Circle 25(2) (“Ld. AO”) and Learned Deputy Commissioner of Income Tax, Transfer Pricing Officer 3(2)(1) (“Ld. TPO”), erred on facts and circumstances of the case and in law by enhancing the income of the Appellant by INR 9,049,787 on account of transfer pricing (“TP”) issues.
 2. That the Ld. CIT(A)/Ld. AO/Ld. TPO have erred on facts and in law, by holding that the international transaction related to payment of management service fee does not satisfy the arm’s length principle envisaged under the Income Tax Act, 1961 (“the Act”). In doing so, Ld. CIT(A)/Ld. AO/Ld. TPO have grossly erred in:
 - 2.1 rejecting the TP documentation maintained by the Appellant in respect of payment of management service fee and arbitrarily determining ALP as 'Nil' by applying Comparable Uncontrolled Price Method (“CUP”) Method. In doing so, Ld. CIT (A) / Ld. AO / Ld. TPO erred by:
 - 2.1.1 ignoring/rejecting the economic analysis undertaken by the Appellant without providing any cogent reasons for the same;

- 2.1.2 *disregarding the documentary evidences submitted by the Appellant during the course of assessment proceedings to demonstrate the actual receipt of management services and the benefits arising thereof; and*
 - 2.1.3 *not giving cognizance to the detailed cost benefit analysis submitted by the Appellant and concluding the same to be vague and inconsequential;*
 - 2.2 *arbitrarily holding, without appreciating the exact nature of services, the management service fee to be design and development fees and based on presumptions holding that the services had zero or no value;*
 - 2.3 *challenging the commercial/business wisdom of the Appellant in relation to payment of management service fee, while proposing the impugned adjustment;*
 - 2.4 *disregarding the additional evidence submitted by the Appellant before Ld. CIT(A) during the course of appellate proceedings to demonstrate the actual receipt of management services;*
 - 2.5 *not appreciating the detailed submission furnished by the Appellant against remand report issued by the Ld. TPO; and*
 - 2.6 *disregarding various judicial pronouncements of the Hon'ble High Court and Hon'ble Income Tax Appellate Tribunal while determining the impugned adjustment.*
 3. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying interest under section 234A, 234B, 234C and 234D of the Act.*
 4. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.”*
3. The only issue involved in this appeal is that the Id AO has made an adjustment based on the order of the Id TPO with respect to the international transaction entered into by the assessee of Rs. 90,49,787/- with respect to management services fees paid by the assessee to its Associated enterprises, Arms' length price of the same is determined by the Id TPO at Rs. Nil as assessee failed to satisfy Need test, benefit Test, Rendition test etc. the Id CIT(A) confirmed it.
 4. The brief facts of the case shows that the assessee is a company engaged in the business of trading and manufacturing of plastic kitchenware. It filed its return of income on 30.11.2012 at Rs. 54,81,85,970/-. During the year it was found that the assessee has entered into an international transaction with its associated enterprises for payment of management service fees amounting to Rs. 90,49,878/- along with other transaction. The assessee aggregated those transactions and adopted transaction net margin method as the most appropriate method. The Id TPO noted that the assessee has made a payment of management service fees of Rs. 90,49,787/- and asked to justify the same. The assessee submitted that it has entered into a service agreement with Dart Industries incorporation USA and has received various services such as environment and safety/ quality audits, human resources, finance, preparation of MIS, accounting, financial analysis, treasury and insurance and information

technology. It was stated that it has received services on new product marketing and related strategic planning. The assessee also stated it has received the benefit of service by specialized experts. The assessee was asked to provide the need for such service against which the assessee could not submit anything except the service agreement. The assessee has merely submitted a write up and the Id AO directed the assessee to show whether such services were actually required or not. The Id TPO was not convinced with respect to the need test, benefit test, rendition test, duplicative service test, share holder activity. He held that no justifiable documentation has been provided to support its claim for receipt of such services. Accordingly, he held that no 3rd party under uncontrolled situation would pay such fees. He determined of such services at Rs. Nil. The Id AO on 27.05.2016 passed the assessment order determining the total income of the assessee of Rs. 55,72,35,757/- against the return income of Rs. 54,81,85,970/-.

5. The assessee preferred an appeal before the Id CIT(A). The Id CIT(A) after considering the detailed written submission made by the assessee and also considering the additional evidence filed on 10.09.2018 and after obtaining the remand report of the Id AO after granting the opportunity to the assessee to submit the rejoinder held that the assessee has not submitted the evidence with respect to the specific relation to the services rendered. The hotel bills and airline ticket cannot be accepted as a proof of rendering management services. She further held that appellant has not furnished contemporaneous information on the basis of which such rendition of service cannot be determined. Thus, the adjustment of Rs. 90,49,787/- was confirmed. Now the assessee is aggrieved with the above order of the Id CIT(A) and is in appeal before us.
6. The ground No. 1 is the main ground wherein, the assessee challenges the main addition and with respect to ground No. 2 the various facets of the addition. Ground Nos. 3 and 4 are consequential in nature. Thus, ground No. 3 and 4 are dismissed.
7. With respect to ground No. 1 and 2 the assessee has submitted the only dispute of determination of ALP of Management services, he referred to Paper Book-II and shows us the various kinds of services covered in the management service agreement. He referred to Appendix-K which is page No. 133A of the transfer pricing study report where the type of services rendered and received by the assessee is shown along with basis of the allocation, details of services availed, manner in which services rendered and details of benefit derived is mentioned. He further referred to page No. 250 of the paper book which are bills for the services availed by the assessee. He referred to Page No. 251 of whereby complete details are submitted of the services received. In view of this, he submitted that the addition confirmed by the Id CIT(A) deserves to be deleted.

8. The Id DR submitted that if in a service any 3rd party would make a payment then such services should satisfy the following test. Firstly such services should be required. Such services should also be rendered, such services should also be having the same benefit to the assessee and those services should not be duplicative in nature. He submitted that the assessee has failed to show any evidence with respect to the receipt of services by the assessee. He submitted that the agreement is a document where both party agree to perform in a particular manner. It does not show actual performance. Further, in absence of actual performance according to that agreement the Id TPO has correctly decided the ALP at Rs. Nil. He supported the orders of the lower authorities.
9. We have carefully considered the rival contentions and perused orders of the lower authorities. In the present case the assessee has made a payment of Rs. 90,49,787/- to its associated enterprises. The assessee benchmarked the same under the Transactions Net Margin Method clubbing the same with other transactions. The Id TPO accepted the arms length price of the other international transactions however, the question the assessee with respect to the management services charges paid by the assessee. The assessee could merely show the agreement as well as copies of the bills. Copy of the management services agreement is not at all disputed by the lower authorities. The copy of the existence of the bill is also not disputed. The only objection of the Id TPO which is threshold of examination of any services rendered is only whether the services have been rendered or not. We agree with the Id DR that the some agreement as well as the mere production of the bill do not show that services have been rendered to the assessee. Coming to the argument, we have perused page No. 133A of the Paper Book. On perusal of the same we find that these are mere methodology without showing actual evidence of the rendition of the services. Coming to the bills produced by the assessee at page No. 250 of the paper book we find that the same is supported by Annexure from Page No. 251 to 258. The Annexures shows that it has the names of the certain persons who have been deputed and have allegedly performed certain services. The details of number of test is devoid by them is also tabulated and same is multiplied by the rate of services each day. This is the supporting attached with the bills of services. Coming to the agreement which is placed at page No. 242 to 249 of the Paper Book. The clause NO. 2 shows that the rate of compensation which would be @ times spent by the service provider employed in rendering the service. It has also given the charge out rate as per annexure B. However, as the charge out rate are attached for the period April 2002 to March 2006. No such charge out rates are available for FY 2011-12. In view of this the supporting of rendition of the service at page No. 251 to 260 required verification along with rates for this year. Further, it was also not known whether the services are rendered from

Hong Kong or from US. This, is so because the rate of the employees are different for this region. Further, merely the annexure at page No. 252 onwards does not show evidence of the rendition of the services, it is merely a breakup of the invoice. In view of this fact, we set aside the whole issue back to the file of the Id TPO with a direction to the assessee to show the actual data, person involved, actual rate as per agreement, rate paid by the assessee as per invoices, technological competence of the persons rendering services to show that services were actually rendered and benefit derived by the assessee. The assessee is also required to show that 3rd party would pay for such services and they are not duplicative in nature. On assessee providing all these details, the Id TPO is directed to examine the same and decide the arms length price of such transaction afresh. The need and benefit test should be left to the wisdom of the assessee. In the result ground No. 1 and 2 of the appeal are allowed with above direction.

10. In the result appeal of the assessee is partly allowed for statistical purposes.
Order pronounced in the open court on 24/11/2021.

-Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 24/11/2021.
AKKEOT

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

ASSISTANT REGISTRAR
ITAT, New Delhi