

आयकर अपीलिय अधिकरण 'डी' न्यायपीठ चेन्नई में।

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं

माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND

HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.2787/Chny/2016**

(निर्धारण वर्ष / **Assessment Year: 2012-13**)

M/s AVO Carbon India (P) Ltd. 25/A2, Dairy Plant Road, SIDCO Industrial Estate, Ambattur, Chennai – 600 098.	बनाम/ Vs.	ACIT, Corporate Range-1, No. 121, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034.
स्थायी लेखा सं./जीआइ आर सं./ PAN/GIR No. AABCM-8697-F		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri S.P. Chidambaram, Advocate – Ld AR
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri S. Palani Kumar, Ld. CIT - DR

सुनवाई की तारीख/ Date of Hearing	:	09-12-2021
घोषणा की तारीख / Date of Pronouncement	:	03-01-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2012-13 is recalled matter since the appeal was dismissed ex-parte qua the assessee vide order dated 09-11-2016. However, upon assessee's application, the order has been recalled vide MP No.149/Mds/2017 order dated 12-01-2018. Accordingly, the appeal has come up for fresh hearing before this bench.

2. This appeal arises out of final assessment order dated 28-07-2016 passed by learned Assessing Officer (AO) u/s 143(3) r.w.s. 144(C) r.w.s. 92CA of the Act pursuant to the directions of learned Dispute Resolution Panel-2, Bangalore u/s. 144C(5) dated 30-05-2016. Though the assessee has raised multiple grounds of appeal, however, in sum and substance, the assessee is aggrieved by downward adjustment of Rs.89.18 Lacs to the value of international Transaction of Finance & General administration related service charges.

3. The Ld. AR, appearing for assessee, raised various arguments to assail the adjustments made by lower authorities and for the same, relied on various judicial pronouncements, the copies of which have been placed on record. The Ld. DR, on the other hand, supported the adjustment so made. Having heard rival submissions and after considering the orders of lower authorities, our adjudication to the subject matter of appeal would be as under.

4.1 The material facts are that the assessee being resident corporate assessee is stated to be engaged in manufacturing of carbon brushes. Since the assessee entered into various international transaction with its Associated Enterprises (AE), the same were referred to Ld. Transfer Pricing Officer 1(1), Chennai [TPO] u/s. 92CA(1) of the Act for determination of Arm's Length Price (ALP). These transactions are detailed in para-4 of Ld. TPO's order. The assessee, in its Transfer Pricing (TP) study report, aggregated all these transactions and benchmarked the same using entity level Transactional Net Margin Method (TNMM). Since assessee's margin was stated to be higher than the mean margin of comparable entities, no TP adjustment was proposed by the assessee.

4.2 One of the transactions carried out by the assessee was payment of Rs.392.53 Lacs paid by the assessee to one of its AE i.e. M/s AVO Carbon Holdings, LLC to procure management services. These services include payment of Rs.89.12 Lacs towards finance and general management / administration services. The services were availed by the assessee under an agreement with its AE. The Ld. TPO proposed to benchmark this transaction separately using Comparable Uncontrolled Price (CUP) method which was opposed by the assessee on the ground that in the absence of comparable data, CUP method could not be applied. Further, these transactions were inter-related and inter-linked and related to manufacturing operations undertaken by the assessee. Therefore, the determination of ALP on TNMM would be most suitable method. However, the same could not convince Ld. TPO. The Ld. TPO also noted that the assessee was required to make payment prior to its receiving of services and the need to avail such service may not arise during the normal course of business of the assessee. Though the other services arising out of same agreement translated into certain benefits to the assessee, however, the assessee could not submit separate evidences as proof of receipt of finance, general management / administration services and therefore, it could not substantiate that the amount paid for these services were commensurate with the services received. Further, the payment of these services reflected substantial increase from Rs.47.81 Lacs in AY 2011-12 to Rs.89.18 Lacs during this year. Also, these services were in the nature of stewardship services. Finally the ALP of this transaction was determined to be Nil and TP adjustment of Rs.89.18 Lacs was proposed which was incorporated by Ld. AO in the draft assessment order.

5. Though the assessee raised objection before Ld. DRP, however, the same could not convince Ld. DRP. The Ld. DRP, vide para-2.6 of the direction, held that the nature of services was part of shareholder's activity which do not justify any charges to be paid to the recipient. Accordingly, ALP was rightly determined as Nil. Pursuant to these directions, final assessment order was passed by Ld. AO incorporating this adjustment. Aggrieved, the assessee is in further appeal before us.

6. Going by the factual matrix as enumerated in preceding paragraphs, it could be seen that the assessee has availed bundle of services from its AE and made payment pursuant to the terms of the agreement. These payments are recurring in nature and are determined by applying specific allocation keys. However, Ld. TPO, while accepting that all the other services benefitted the assessee, termed the services of finance / general management to be in the nature of stewardship services and alleged that the assessee did not submit any evidence of the receipt of services disregarding the fact that these services were emanating from the same agreement. The rendering of services was duly evidenced by the agreement as well as debit notes issued against the assessee. The copies of email / correspondences to support the receipt of services were duly furnished (43 to 88 of paperbook). Another observation of Ld. TPO is that the assessee may not be requiring these services in the normal course of business. The same, in our opinion, is not correct approach since the role of Ld. TPO was limited to determine the ALP of the transactions and not to adjudge the same at the threshold of business needs / requirements of the assessee. Also, though Ld. TPO observed that the transaction was to be benchmarked applying CUP method, however, no effort has been made to determine the ALP of the

transaction using CUP method. Simply determining the ALP to be nil on the basis that the services were not required to be availed and not determining ALP without applying any of the prescribed method is not in accordance with statutory mandate. The TP provisions mandate application of any of the prescribed method to arrive at Arm's Length Price of the international transactions. Our view is duly fortified by the decision of this Tribunal in **Flakt (India) Ltd. V/s DCIT (ITA No.1032/Mds/2014)** wherein it was held that in the absence of any comparison of the transaction with transaction carried out in uncontrolled market, Ld. TPO could not independently come to conclusion that volume and quality of services was disproportionate to the payment made by the assessee. The estimation of the services rendered and costs of such service was outside the scope of transfer pricing adjustment. The Ld. CIT-DR has referred to the decision of Delhi Tribunal in **Bombardier Transportation India Pvt. Ltd. V/s DCIT (ITA No.1626/Del/2015 dated 04-11-2015)** which is factually distinguishable since in that case the assessee could not file sufficient documentary evidences and the adjustment was partially confirmed. Similarly, the case of **Gem Plus India Pvt. Ltd. V/s ACIT (ITA No.352/Bang/2009 dated 21-10-2010)**, as referred to by Ld. CIT-DR is factually distinguishable since in that case Ld. TPO has observed that the terms prescribed in the agreement in respect of payment to be made by the assessee company was independent of the nature and volume of services. These are not the findings here. In fact, all the other services availed by the assessee under the agreement has been accepted to be at Arm's Length Price.

7. Lastly, it is an uncontroverted fact that the assessee has paid for these services in earlier years also which has been accepted by the revenue and this is the first year in which such an adjustment has been proposed. Therefore, the value of impugned transactions, in our considered opinion, could not be taken to be nil in this year.

8. Keeping in view all the above factors, we would hold that the TP adjustment as made by Ld. AO in the final assessment order could not be upheld in the eyes of law. By deleting the same, we allow the appeal.

9. The appeal stand allowed in terms of our above order.

Order pronounced on 03rd January, 2022.

Sd/-

(V. DURGA RAO)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(MANOJ KUMAR AGGARWAL)

लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई / Chennai; दिनांक / Dated : 03-01-2022

JPV

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF