IN THE INCOME TAX APPELLATE TRIBUNAL
" " BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.2580/Bang/2017
Assessment year : 2013-14

Societe General Global Solution Centre Pvt. Ltd., 10th floor, "Voyager", Building, ITPL, Whitefield Road, Bangalore -560 066. **PAN: AAECS 6764L**	Vs.	The Deputy Commissioner of Income Tax, Circle 6(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayana, Sr. Counsel
Respondent by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	13.01.2022
Date of Pronouncement	:	21.01.2022

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of the Assessing Officer passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] dated 26.9.2017 for the assessment year 2013-14 on the following grounds of appeal:-

"The grounds stated hereunder are independent of, and without prejudice to one another. The Appellant submits as under:

1. **The Assessment Order issued by the Assessing Officer, Directions issued by the Dispute Resolution Panel and**

the Transfer Pricing Order issued by the Transfer Pricing Officer are bad in law

(a) The Ld. Deputy Commissioner of Income-tax, Circle 6(1)(2) (`Ld. AO'), the Ld. Dispute Resolution Panel (id. Panel') and Ld. Deputy Commissioner of Income Tax (Transfer Pricing) — 2(2)(2) (`Ld. TPO') erred on facts and in law in making an addition of INR 15,224,686 to the total income of the Appellant on account of adjustment to the arm's length price pertaining to recovery of expenses.

(b) The draft / assessment order issued by the Ld. AO, is bad on facts and in law, and is in violation of the principles of natural justice

2 **Mark-up on recovery transactions**

(a) The Ld. TPO erred in facts and circumstances of the case and in law, in determining the transfer pricing adjustment after charging mark-up on recovery transactions entered with associated enterprise without appreciating the submissions filed by the Appellant that these were mere pass through transactions. The Ld. Panel/ AO has not taken cognizance of the submissions filed by the Appellant and erred in upholding the actions of the Ld. TPO.

(b) Although the TPO has proposed to establish an arm's length mark-up on the recovery transaction of the Assessee by comparing the same to the net operating margin of certain companies engaged in tours and travel agent services, no such average net operating margin were given in the show cause notice issued by the TPO. Further, the net operating margins stated in the TP Order for AY 2013-14 are same as the net operating margins arrived at in the TP Order for AY 2012-13;

3 **Reduction in deduction under section 10AA of the Act**

3.1 The Ld. AO has erred in computing the deduction under section 10AA of the Act at Rs. 532,218,898.

3.2 The Ld. AO has erred in reducing travelling and conveyance expenses of Rs. 119,519,890 and other expenditure incurred in foreign currency of Rs. 26,687,328 from the 'export turnover', while computing the deduction under section 10AA of the Act.

3.3 Having reduced the above-mentioned expenditure from the 'export turnover', the Ld. AO erred in not making a corresponding reduction in the 'total turnover'.

The Ld. AO erred, *inter alia,* in not following the decision of the Jurisdictional Karnataka High Court decision in the Company's own case in support of the above contention.

4 **Short grant of MAT credit under section 115JAA of the Act**

The Ld. AO erred in not granting appropriate MAT credit under section 115JAA of the Act.

5 **Directions issued by the Ld. DRP**

The Ld. DRP has erred in law and on facts in not taking cognizance of the objections filed by the Appellant in relation to the draft assessment order issued by the Ld. AO TP order and confirming the draft order of the Ld. AO.

6 **Penalty proceedings**

The Appellant submits that based on the facts and circumstances of the case, the penalty proceedings initiated by the Ld. AO under Section 274 read with Section 271 of the Act is without basis and bad in law.

7 **Relief**

8 The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.

9 The Appellant submits that the above grounds are independent and without prejudice to one another."

2. The assessee has raised the following additional grounds:-

2(c). That the lower authorities ought to have appreciated that the transaction is merely a reimbursement of costs paid by the Appellant to third parties, and therefore is not required to be benchmarked.

2(d). That without prejudice, since the reimbursement is in connection with and integral to the rendering of software development services and information technology enabled services by the Appellant to its Associated Enterprises, the same ought to be aggregated with the principal transactions, and ought not to be treated as an independent international transaction.

2(e). That the action of the TPO in comparing the Appellant with companies in tours and travel industry is erroneous in as much as the functions performed, assets employed and risks assumed by the Appellant are different from that of companies in tours and travel industry."

3. In the petition for admission of the above additional grounds, the assessee has explained that it has challenged the adjustment vide ground No.1(a), a specific ground was not raised challenging the adjustment on the basis that the transaction is a mere reimbursement of costs incurred by the assessee and therefore it need not be benchmarked. It has challenged the action of the TPO proposing to determine the arm's length mark-up on the basis of the margin earned by companies in tours and travel industry without providing any such margin, but had not specifically challenged the TPO's action in comparing the assessee with the said companies. The

assessee had challenged the functional comparability of the said companies before the TPO and the Dispute Resolution Panel. Subsequently on noting that specific grounds in that regard were not raised, the assessee was advised to file an application for raising the same as additional grounds. Therefore the Appellant is filing the above application seeking to raise the additional grounds mentioned above.

4. It is submitted that the consideration of the aforesaid additional grounds will not require examination of any additional evidence and further, it is entitled to raise the said grounds. Since this Hon'ble Tribunal is the last fact-finding authority, the assessee ought to be permitted to raise the additional grounds. The omission in raising the said grounds in the memorandum of appeal is due to a bona fide reason stated above and not with any intention to protract the proceedings. The assessee is therefore seeking to urge the grounds mentioned above as additional grounds in continuation of the grounds raised in its memorandum of appeal.

5. We have both the parties on the admission of the above additional grounds. We are of the opinion that there was bonafide reasons for not raising these grounds earlier and *following the Hon'ble* Supreme Court judgment in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, the additional grounds are admitted for adjudication.

6. The assessee is engaged in the services of the firm to prepare the transfer pricing memorandum documenting the review of the arm's length nature of its international transactions with its AE during the year under consideration from an Indian transfer pricing perspective. It also provides software development services and IT enabled Services to the group companies which comprises of various functions such as vendor invoices management, management reporting, payment processing, etc. and the

assessee has entered into a service agreement with Societe General group companies to provide IT enabled services.

7. Ground No.2 is with regard to grant of mark-up on recovery transactions. An amount of Rs.30.45 crores has been incurred as pass through costs out of which Rs.24.86 crores is travel cost and Rs.5.58 crores is other expenses. The assessee argued before the lower authorities that there was mark-up on these expenses which are incurred at the instance and behest of the AE and expenses by the assessee for administrative convenience are recovered on a cost to cost basis. However, the TPO observed that as per the OECD guidelines the mark=-up should be done at a value lower than that of comparable companies having similar FAR. Accordingly, he made a mark-up of 5% on services rendered by the assessee to the AE in respect of travel expenses and other expenses as stated above. Against this, the assessee's objection of the assessee before the DRP is also declined and the TPO order upheld. Against this, the assessee is in appeal before us.

8. At the time of hearing, the ld. AR alternatively argued the additional grounds stating that as per OECD guidelines and Indian Transfer Pricing provisions, aggregation of transactions could be made. For this purpose, he relied on the order of the Tribunal in the case of *Cummins India Ltd. v. Addl. CIT, 53 taxmann.com 53 (Pune Trib.).*

9. The ld. DR relied on the orders of the lower authorities.

10. We have heard both the parties and perused the material on record. In our opinion, we do not find any merit in the main ground of the assessee, However, considering the alternative submissions of the ld. AR, the issue is covered by the Pune Bench of the Tribunal in the case of *Cummins India Ltd. (supra)* wherein it was held as under:-

"24. The first issue arising in the present appeal is whether in view of the OECD guidelines and the Indian Transfer Pricing provisions, aggregation of transactions could be made or not. We find that Pune Bench of the Tribunal in Demag Cranes & Components (India) (P.) Ltd. (supra) had elaborately considered the OECD guidelines under Chapter – III and also the guidance Notes issued by the Institute of Chartered Accountants of India on transfer pricing in para 13.7 and had held as under:—

'30. We have carefully considered the rival submissions. Section 92B of the Act provides the meaning of expression "international transaction" as a transaction between two or more associated enterprises. Rule 10A(d) of the Rules explains the meaning of the expression "transaction" for the purposes of computation of ALP as to include a number of closely linked transactions. Rule 10B of the Rules prescribes the manner in which the ALP in relation to an international transaction is to be determined by following any of the methods prescribed. Shorn of other details, it would suffice to observe that on a combined reading of Rule 10A(d) and 10B of the Rules, a number of transactions can be aggregated and construed as a single 'transaction' for the purposes of determining the ALP, provided of course that such transactions are 'closely linked'. Ostensibly the rationale of aggregating 'closely linked' transactions to facilitate determination of ALP envisaged a situation where it would be inappropriate to analyse the transactions individually. The proposition that a number of individual transactions can be aggregated and construed as a composite transaction in order to compute ALP also finds an echo in the OECD guidelines under Chapter III wherein the following extract is relevant:-

"Ideally, in order to arrive at the most precise approximation of arm's length conditions, the arm's length principle should be applied on a transaction-by-transaction basis. However, there are often situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis. Examples may include 1. Some long term contracts for the supply of commodities or services; 2. Rights to use intangible property; and 3. Pricing a range of closely linked

> products (e.g. in a product line) when it is impractical to determine pricing for each individual product or transaction. Another example would be the licensing of manufacturing know-how and the supply of vital components to an associated manufacturer; it may be more reasonable to access the arm's length terms for the two items together rather than individually. Such transactions should be evaluated together using the most appropriate arm's length method. A further example would be the routing of a transaction through another associated enterprise; it may be more appropriate to consider the transaction of which the routing is a part in its entirety, rather than consider the individual transactions on a separate basis."

31. In this background, considering the legislative intent manifested by way of Rule 10A(d) read with Rule 10B of the Rules, it clearly emerges that in appropriate circumstances where closely linked transactions exist, the same should be treated as one composite transaction and a common transfer pricing analysis be performed for such transactions by adopting the most appropriate method. In other words, in a given case where a number of closely linked transactions are sought to be aggregated for the purposes of bench marking with comparable uncontrolled transactions, such an approach can be said to be well established in the transfer pricing regulation having regard to Rule 10A(d) of the Rules. Though it is not feasible to define the parameters in a water tight compartment as to what transactions can be considered as 'closely linked', since the same would depend on facts and circumstances of each case. So however, as per an example noted by the Institute of Chartered Accountants of India (in short the 'ICAI') in its Guidance Notes on transfer pricing in para 13.7, it is stated that two or more transactions can be said to be 'closely linked', if they emanate from a common source, being an order or contract or an agreement or an arrangement, and the nature, characteristic and terms of such transactions substantially flow from the said common source. The following extract from the said Guidance Notes is worthy of notice:-

"13.7 The factors referred to above are to be applied cumulatively in selecting the most appropriate method. The reference therein to the terms 'best suited' and 'most reliable measure' indicates that the most appropriate method will have to be selected after a meticulous appraisal of the facts and circumstances of the international transaction. Further, the selection of the most appropriate method shall be for each particular international transaction. The term 'transaction' itself is defined in rule 10A(d) to include a number of closely linked transactions. Therefore, though the reference is to apply the most appropriate method to each particular transaction, keeping in view, the definition of the term 'transaction', the most appropriate method may be chosen for a group of closely linked transactions Two or more transactions can be said to be linked when these transactions emanate from a common source being an order or a contract or an agreement or an arrangement and the nature, characteristics and terms of these transactions are substantially flowing from the said common source. For example, a master purchase order is issued stating the various terms and conditions and subsequently individuals orders are released for specific quantities. The various purchase transactions are closely linked transactions.

13.8 It may be noted that in order to be closely linked transactions, it is not necessary that the transactions need be identical or even similar. For example, a collaboration agreement may provide for import of raw materials, sale of finished goods, provision of technical services and payment of royalty. Different methods may be chosen as the most appropriate methods for each of the above transactions when considered on a standalone basis. However, under particular circumstances, one single method maybe chosen as the most appropriate method covering all the above transactions as the same are closely linked." (Underlined for emphasis by us).

32. In this background, we may now examine the facts of the present case. The primary activity of the assessee is to manufacture material handling equipments viz. cranes and hoists. It is seen from the documents placed in the Paper Book that the assessee enters into a single negotiation with the customers, which, inter-alia, includes manufacturing and supply of the material handling equipment, provision of commissioning and installation services, etc. Though the assessee raises different invoices for supply of equipments and separately for erection and commissioning charges, however, it is evident that the negotiations for the same are carried on at one go. In fact, at the time of hearing, it was specifically queried from the learned counsel as to whether the assessee is undertaking installation/commissioning activities independent of its own-supplied material handling equipments. It was clarified that the servicing and commissioning charges are earned only in relation to services performed for own–supplied manufacture/assembled material handling equipments. The aforesaid factual assertion is not disputed. Factually, it is the activity of manufacturing/assembling of cranes etc. done by the assessee and sales thereof, which brings into play the activities of installation and commissioning of such products. Therefore, it is quite evident that such services are not independent but in-effect are as a result of manufacturing of material handling equipment undertaken by the assessee and as a they arise from a single negotiation with the customers, the source of all such transactions is also to be understood as common.

33. The TPO in this regard has observed that assessee has invoiced separately for such activities and therefore, they have to be understood as different transactions. The TPO has also observed in his order that in a case where profits of each individual transaction can be segregated then the aggregation of transaction is not intended by the transfer pricing regulations. The learned TPO has also referred to the segmental profitability in this regard computed by the assessee during the course of transfer pricing proceedings before him. In our considered opinion, the point made out by the learned TPO is not justified, inasmuch as, separate invoicing of an activity, flowing from a singular contract/ negotiation, would not ipso facto lead to an inference that they are individual/independent transactions. In-fact, it is

the nature and characteristic of the activities which would be required to be analyzed having regard to the facts and circumstances of each case as to whether they can be considered as individual/independent transactions or a single transaction for the purpose of transfer pricing regulation. In the present case, as we have noted earlier, it is only on account of the manufacturing activity that the activity of commissioning and installation of the equipment arises and pertinently all the aforesaid activities are negotiated and contracted for at one instance. With regard to the segmental profitability referred by the Assessing Officer, the position has been clarified by the assessee. According to the assessee, in the financial statements affirmed by the Auditors, the activities have been clubbed together in accordance with the Accounting Standards prescribed by the ICAI. It was clarified that the segmental profits were worked out by the assessee only at the asking of the TPO during the proceedings before him. The learned counsel pointed out with reference to the chart in this regard placed in the Paper Book and submitted that the segmental profitability was not computed on the basis of any separately maintained records viz. books of account or vouchers but was computed by undertaking a statistical exercise. The costs were allocated as a proportion of sales/revenues and not an actual basis. In view of the aforesaid fact situation, we do not find that the availability of separate segmental profits in the present case can be a justifiable ground for the TPO to say that the transactions are not 'closely linked' within the meaning of Rule 10A(d) of the Rules. Thus, the activity of installation and commissioning/engineering services is 'closely linked' with the manufacturing activity and deserves to be aggregated and construed as a single transaction for the purposes of determining the ALP as per the method adopted.

34. In view of the aforesaid discussion, in our opinion, the approach of the TPO, in out-rightly rejecting the aggregation of all the transactions itemized at 1 to 7 in para 7 is flawed having regard to the facts and circumstances of the case. Further, it is noticed from the tabulation in para 7 of this order, that the assessee is also rendering marketing services, technical know-how and professional services, etc., which have also been aggregated. For such activities no specific point has been

> made out by the assessee as to why they can be classified as 'closely linked' transactions for the purposes of Rule 10A(d) of the Rules. Considering the entirety of the facts and circumstances, we are of the opinion that the issue be revisited by the AO/TPO in the light of our aforesaid discussion. The AO/TPO shall take into consideration the pleas and the material sought to be placed by the assessee in the light of the aforesaid discussion and thereafter adopt a combined transaction approach after considering each of the transaction itemized at 1 to 7 as to whether the same are to be bench marked after aggregation or not. Needless to say, the Assessing Officer shall allow the assessee a reasonable opportunity to put forth material and submissions in support of its stand and only thereafter the Assessing Officer shall pass an order afresh on the above aspect in accordance with law. Thus, on this Ground, assessee succeeds for statistical purposes.'

25. Similar principle has been laid down by the Delhi Bench of the Tribunal in Panasonic India (P.) Ltd. (supra) and Intimate Fashions (India) (P.) Ltd. (supra).

26. In view of the ratio laid down by Pune Bench of the Tribunal in Demag Cranes & Components (India) (P.) Ltd. (supra), it is held that where number of transactions are closely linked transactions, then the same can be aggregated and construed as a single transaction for the purpose of determining the arm's length price. In case, there is close link exists between the different transactions, the same should be treated as composite transaction and appropriate method should be applied to work out the transfer pricing analysis. Where two or more transactions emanate from common source being an order or contract or an agreement or an arrangement, then such transactions could be said to be closely linked as the nature, characteristic and terms of such transaction substantially flow from the said common source.

27. In the above said background, we analyse the different international transactions entered into by the assessee as pointed out by us in the paras hereinabove. The business of the assessee company was to provide aftermarket support to IC engines sold, in the form of sale of spare parts and rendering of after sales service including warranty administration. The assessee is thus, providing after sales support for engines sold by Cummins India

Ltd., Cummins INC, etc. which were under warranty period and also post warranty period. The servicing, repair and annual maintenance contract, warranty period and for post warranty period were the services provided by the assessee for carrying out most of the above said activities. The sale of spare parts was claimed to be the principal activity of the assessee. The repair & maintenance and the warranty administration including services of the IC engines requires the support of the spare parts which were sold by the assessee. Where the assessee was engaged in aftermarket support of engines manufactured and sold by Cummins entities, the question arises whether the sale of spare parts could be categorized separately as a trading activity engaged in by the assessee, which in turn is separate from the activity of doing servicing of the IC engines, their repair and maintenance and also warranty administration i.e. support during the warranty period and also annual maintenance contracts and services during post warranty periods. Another activity engaged in by the assessee was payment for customized parts catalogue, which was also aggregated by the assessee company as part of its international transactions, which were claimed to be linked to the sale of spare parts carried on by the assessee.

28. The assessee during the year under consideration had made exports to its associated enterprises on account of the said spare parts totalling Rs.87,48,479/-. The assessee had also made exports to third parties during the financial year totalling Rs.4,16,326/-. The break-up of the exports to associated enterprises and third parties are enlisted at pages 200 to 204 of the Paper Book. Admittedly, there was significant difference in the value of exports made to associated enterprises and the exports made to third parties. The explanation of the assessee in this regard was that the exports made to the associated enterprises were on regular basis and were being made to its associated enterprises, which in turn were supplying to the dealers and through them, to the customers. However, the exports to third parties were directly made to the consumers who could select the spares through the catalogue and order the same to the assessee, who was engaged in providing aftermarket support to the IC engines sold worldwide. Further, the claim of the assessee was that the export to third parties was made on urgent basis and hence, the premium was charged and further, the frequency of

such transactions was low and consequently, higher margins of profits. The first major activity carried on by the assessee was of import of spare parts to Rs.29.45 crores as against which, the export of spare parts was only Rs.0.87 crores. The payment for IT support received from associated enterprises was Rs.1.09 crores and the payment for access to customized part catalogues was Rs.0.02 crores. Further, the assessee had received Rs.0.76 crores against warranty administration. All these international transactions are linked to the main business being carried on by the assessee and such closely linked transactions are to be analysed in aggregate to determine the arm's length price. The aggregation of the import of spare parts, export of spare parts, IT support services, access to customized parts catalogue and amount received for warranty consideration are inter-related transactions, which were the sourcing activities of the assessee company and have to be aggregated in order to benchmark the international transactions. The assessee had benchmarked the arm's length price of all the transactions by comparing results of the comparable companies which were found to be at arm's length price. The assessee had also furnished the segmental Profit & Loss Account for the exports to associated enterprises and as compared to the export to third parties and percentage of services over total sales in respect of export to associated enterprises works out to 0.2069% and in respect of exports to third parties works out to 0.0098%.

29. The plea of the assessee in this regard was that besides difference in the value of exports to third parties and to associated enterprises, the spare parts exported to third parties and to associated enterprises were different in nature. Further, the export value was less and these parties were one of customers and therefore, the risk involved was high. Further, the frequency of such transactions was very low. In view of the above facts and circumstances, the comparison between the export to associated enterprises and export to third parties would not provide accurate results as economic value of the transactions, risk involved were different. We find merit in the plea of the assessee in this regard. We uphold the aggregation of transactions in the TP study carried on by the assessee where the said transactions after benchmark were at arm's length price, no adjustment was to be made. In view thereof, we find no merit in the analysis carried out by the TPO

> by benchmarking the transactions of exports to third parties with exports to associated enterprises resulting in addition of Rs.22.49 lakhs. In view of our discussion herein above, we delete the addition of Rs.22.49 lakhs. The grounds of appeal raised by the assessee are thus, allowed."

11. In view of the above order of the Tribunal, we are inclined to allow the alternative ground raised by the assessee on this issue.

12. The third ground is reduction in deduction u/s. 10AA of the Act of the travelling and conveyance expenses and other expenditure incurred in foreign currency from the export turnover while computing the deduction u/s. 10AA of the Act and making a corresponding reduction in the total turnover.

13. After hearing both the parties, this issue is covered in favour of the assessee by the Hon'ble Supreme Court in the case of *CIT v. HCL Technologies Ltd. 404 ITR 719 (SC)* wherein it was held that when object of formula in section 10A for computation of deduction is to arrive at profit from export business, expenses excluded from export turnover have to be excluded from total turnover also; otherwise, any other interpretation makes formula unworkable and absurd and hence, such deduction shall be allowed from total turnover in same proportion as well. Hence this issue is decided in favour of the assessee and against the revenue.

14. Ground No.4 is regarding short grant of MAT credit u/s. 115JAA of the Act. The AO is directed to give appropriate tax credit.

15. Ground Nos.5 & 6 are general in nature and do not require any adjudication.

16. In the result, the assessee's appeal is partly allowed.

Pronounced in the open court on this 21st day of January, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 21st January, 2022.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.