

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.7/Bang/2022
Assessment Year : 2014-15

M/s. Vee Technologies Pvt. Ltd., No.71, Sona Towers, Millers Road, Bengaluru – 560 052. PAN : AABCV 0100 C	Vs.	The Principal Commissioner of Income Tax, Bengaluru – 7, Bengaluru.
APPELLANT		RESPONDENT

IT(TP)A No.2042/Bang/2019
Assessment Year : 2014-15

M/s. Vee Technologies Pvt. Ltd., No.71, Sona Towers, Millers Road, Bengaluru – 560 052. PAN : AABCV 0100 C	Vs.	ITO, Ward – 7[1][2], Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Suresh Muthukrishna, CA
Respondent by	:	Shri. Sumer Singh Meena, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	02.03.2022
Date of Pronouncement	:	07.03.2022

ORDER

Per N. V. Vasudevan, Vice President:

ITA No.7/Bang/2022 : This is an appeal by the assessee against the order dated 26.02.2018 passed by the Pr.CIT, Bengaluru – 7 (CIT) , under section 263 of the Income Tax Act, 1961 (hereinafter called ‘the Act’), in relation to Assessment Year 2014-2015.

2. The assessee is a company that carries on business of back-office services and is a 100% export-oriented unit within the meaning of section 10B of the Act. For Assessment Year 2014-15, the assessee filed return of income declaring a total income of Rs.3,94,66,440/-. An Order of Assessment dated 27.12.2016 was passed under section 143(3) of the Act accepting the return of income.

3. The CIT in exercise of his powers under section 263 of the Act, on perusal of the records of assessment noticed that as early as 08.07.2016, the AO made a reference to the Transfer Pricing Officer (TPO) u/s.92CA of the Act, for determination of Arm's Length Price (ALP) in respect of an international transaction of rendering back-office services by the assessee to its Associated Enterprise (AE). The approval for reference to the TPO was accorded by the Office of the CIT on 18.07.2016 and ultimate reference under section 92CA of the Act was made on 19.07.2016. Even before the AO could receive an order section 92CA from the TPO, the Order of Assessment was passed on 27.12.2016 accepting the income returned by the assessee. The CIT also noticed that consequent to the reference under section 92CA of the Act by the AO to the TPO dated 19.07.2016, the TPO passed an order dated 31.10.2017 wherein he suggested an addition of Rs.14,73,25,254/- to the total income of the assessee on account of determination of ALP. According to the CIT, since the AO passed an Order of Assessment even before an order of reference to the TPO under section 92CA was pending was erroneous and prejudicial to the interest of the Revenue and therefore called for an interference under section 263 of the Act.

4. The CIT, after noticing the reply of the assessee, set aside the order of the AO and directed the AO to make a denovo fresh determination of income after considering the TPO's order under section 92CA of the Act dated 31.10.2017.

5. Aggrieved by the aforesaid order of the CIT under section 263 of the Act, the assessee has preferred the present appeal before the Tribunal. There is a delay of 1348 days in filing this appeal by the assessee. The impugned order as we have already seen of the CIT was passed on 26.02.2018 and was communicated to the assessee on 28.02.2018. The reasons for the delay have been stated in an affidavit filed before us on behalf of the Assessee, as owing to the advice given by Shri. Vijay Bhatia, CA, whereby he advised the assessee to wait for the outcome of the assessment proceedings pursuant to the order passed under section 263 of the Act and no appeal need to be filed before the Tribunal. It has been further stated that in the consequential assessment proceedings under section 143(3) of the Act, pursuant to the order under section 263 of the Act, a draft Order of Assessment was passed on 31.08.2018 and the assessee approached the present Counsel Mr. Suresh Muthukrishna, CA, to file objection before the Dispute Resolution Panel (DRP). The DRP gave its direction on 28.05.2019. Pursuant to the directions of the DRP, the AO passed the final order of assessment dated 26.7.2019 against which the Assessee has filed appeal before the Tribunal which is ITA No.2042/Bang/2019 through Mr. Suresh Muthukrishna, CA. It appears that Mr.Suresh Muthukrishnan, CA also suggested to the assessee that an appeal can also be filed against the order under section 263 of the Act. Thereafter, the present appeal was filed with the delay of 1348 days.

6. We have considered the reasons given in the affidavit for condonation of delay in filing of the appeal and are of the view that the facts and circumstances of the present case for the delay cannot be accepted as a reasonable cause. The impugned order was passed on 26.02.2018. Consequently, the Assessment Order was passed on 31.08.2018 and the DRP gave its directions on the objections of the assessee on 26.07.2019. Pursuant to the directions of the DRP, the AO passed the final order of assessment dated 26.7.2019 against which the Assessee has filed appeal before the Tribunal which is ITA No.2042/Bang/2019 through Mr. Suresh Muthukrishna, CA on 23.9.2019. The present appeal has been filed on 05.01.2022. It is no doubt true that the advice of the erstwhile CA and the client's action or inaction on the basis of the advice of an erstwhile Counsel can afford the reasonable ground for condoning delay, but in the present facts and circumstances, the subsequent Counsel Mr. Suresh Muthukrishna, CA, was approached by the assessee after the draft assessment order dated 31.08.2018 was passed. In fact, he filed the objections against the draft assessment order before the DRP and the DRP gave its directions on 26.07.2019. Pursuant to the directions of the DRP, the AO passed the final order of assessment dated 26.07.2019 against which the Assessee has filed appeal before the Tribunal which is ITA No.2042/Bang/2019 through Mr. Suresh Muthukrishna, CA on 23.09.2019. Therefore, the earliest point of time at which Mr. Suresh Muthukrishna, CA, could have applied his mind is the period between 26.02.2018 and 28.05.2019. The present appeal has however been filed as already stated only on 05.01.2022. There is therefore lack of explanation for the delay in filing the appeal after 28.05.2019 (at best). We therefore refuse to condone the delay in filing the appeal. In our view, filing of the appeal is purely an afterthought. The assessee cannot seek

condonation of delay on the basis of advice of a Counsel when action based on the advice is taken after a considerable lapse of time. The appeal in ITA No.7/Bang/2022 is therefore dismissed.

7. IT(TP) No.2042/Bang/2019: As we have already seen this appeal out of the order passed under section 263 of the Act, which we have discussed while deciding ITA No.7/Bang/2022. As directed in the order under section 263 of the Act, the TPO to whom an order of reference was made by the AO issued a notice dated 02.02.2017 calling for documentation maintained as prescribed under section 92D(3) of the Act, the assessee did not give any reply. The TPO therefore proceeded to determine the ALP on the basis of facts available on record. The TPO noticed that the assessee is a leading global business process management company. The assessee provides Information Technology enabled Services (ITeS) to its AE. The assessee also had transactions in ITeS with unrelated parties. The breakup of the services of income from related parties and unrelated parties is as follows:

Particulars	Basis of Allocation	Domestic Transactions	International transaction		Total
			Related Parties	Others	
Revenue from Operations(Gross)		4,27,23,164.00	14,42,12,112.00	32,56,93,611.00	51,26,28,887.00
Other Income		2,48,647.00	3,39,07,529.00	13,25,982.00	3,54,82,158.00
Total Revenue - I		4,29,71,811.00	17,81,19,641.00	32,70,19,593.00	54,81,11,045.00
Expenses:					
Changes in Inventories of Finished goods, Work-in-progress and stock-in-trade	Actual	- 4,40,890.00			- 4,40,890.00
Employee benefit expenses	Actual	2,55,56,817.00	10,08,81,430.00	26,52,27,652.00	39,16,65,899.00
Other Expenses	Actual/ Turnover	1,51,27,443.00	4,33,61,334.00	3,89,85,185.00	9,74,73,962.00
Total Expenses- II		4,02,43,370.00	14,42,42,764.00	30,42,12,837.00	48,86,98,971.00

Earning before Interest, Depreciation, Exceptional Items and Tax- III=(I-II)		27,28,441.00	3,38,76,877.00	2,28,06,756.00	5,94,12,074.00
Less: Financial costs- IV	Turnover	11,59,903.00	38,75,263.00	87,52,027.00	1,37,87,193.00
Earning before Depreciation, Exceptional Items & Tax- V=(III-IV)		15,68,538.00	3,00,01,614.00	1,40,54,729.00	4,56,24,881.00
Less: Depreciation and amortisation- VI	Turnover	14,73,935.00	49,75,271.00	34,44,340.00	98,93,546.00
Earning before Exceptional Items & Tax- VII=(V-VI)		94,603.00	2,50,26,343.00	1,06,10,389.00	3,57,31,335.00
Less: Exceptional items- VIII	Actual	11,69,690.00			11,69,690.00
Earning before Taxes- XI=(VII-VIII)		- 10,75,087.00	2,50,26,343.00	1,06,10,389.00	3,45,61,645.00
Operating Profit - A - (IX+IV)		84,816.00	2,89,01,606.00	1,93,62,416.00	4,83,48,838.00
Operating Cost - B - (II+VI)		4,17,17,305.00	14,92,18,035.00	30,76,57,177.00	49,85,92,517.00
Operating Profit Margin (Operating margin/Operating cost)- C - (A/B)		0.20%	19.37%	6.29%	9.70%

8. The TPO selected the following comparable companies:

<i>Sl. No.</i>	<i>Company Name</i>	<i>OP/OC (in %)</i>
1	<i>Infosys BPO Ltd.,</i>	<i>27.43%</i>
2	<i>Microgenetic Systems Ltd.,</i>	<i>18.06%</i>
3	<i>Microland Ltd.,</i>	<i>20.07%</i>
4	<i>Exlerx Services Ltd.,</i>	<i>70.26%</i>
5	<i>B N R Udyog Ltd., (Seg)</i>	<i>24.85%</i>
6	<i>Cross domain Solutions Pvt. Ltd.,</i>	<i>21.05%</i>

9. The TPO ultimately computed the ALP and the consequent addition to be made to the total income of the assessee as follows:

“9.4. Computation of Arm's Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure A for details of computation of PLI of the comparable. Based on this, the arm's length price of the services rendered by the taxpayer to its AE(s) is computed as under:

ITES

<i>Arm's Length Mean Margin on cost</i>	<i>30.29%-</i>
<i>Operating Cost</i>	<i>50,29,16,286</i>
<i>Arms Length Price(ALP)</i>	<i>65,52,49,629</i>
<i>130.29%</i> of <i>Operating Cost</i>	
<i>Price Received</i>	<i>58,78,62,399</i>
<i>Variation in Price</i>	<i>10,73,57,230</i>
<i>Shortfall being adjustment</i>	<i>10,73,57,230</i>

The above shortfall of Rs.10,73,57,230 is treated as transfer pricing adjustment u/s 92CA in respect of ITES segment of the taxpayer's international transactions.”

10. Aggrieved by the aforesaid addition suggested by the TPO which was incorporated in the draft Order of Assessment by the AO, the assessee filed objections before the DRP. The DRP excluded BNR Udyog Ltd., from the list of comparable companies and confirmed the order of the AO in so far as it relates to the other comparables and other aspects of determination of ALP. The AO passed the final Order of Assessment dated 26.07.2019 incorporating the addition as suggested in the order of the DRP. The TPO suggested addition of Rs.10,73,87,230/-. But pursuant to the DRP's direction, the savings stood enhanced to Rs.11,28,18,726/-. Aggrieved by the aforesaid final Order of Assessment, assessee has preferred the present appeal before the Tribunal.

11. The learned Counsel for the assessee has prayed for exclusion of 3 out of the 5 comparable companies that remain after the order of the DRP viz.,

Infosys BPO Ltd., Eclerx Services Ltd., and Crossdomain Solutions Pvt. Ltd. As far as the plea for exclusion of the aforesaid companies from the list of comparable companies is concerned, learned Counsel for the assessee has filed before us a copy of the decision of the ITAT, Bengaluru Bench, rendered in the case of EMC Software and Services Pvt. Ltd. Vs. JCIT 115 taxmann.com 293. The aforesaid decision which also relates to Assessment Year 2014-15 and which was rendered in the context of a company providing ITeS such as the assessee and in whose case also the very same comparable companies that were chosen in the case of the assessee in this appeal was chosen as a comparable company, the Tribunal directed to be excluded Infosys BPO Ltd., Eclerx Services Ltd., and Crossdomain Solutions Pvt. Ltd., as comparable companies for the following reasons:

On exclusion of Infosys BPO Ltd., the Tribunal held as follows:

“7.4.1 We have considered the rival contentions/submissions and perused the material on record; including the judicial decisions cited. We find from a perusal of the Annual Report at page 14 thereof, under the head 'Managements Discussion and Analysis', it has been stated that this company-provides services to both horizontal and vertical focus areas. The Horizontal focus areas are Sourcing and Procurement (S & P), Customer Services (CS), Finance and Accounting (F & A), Legal Process Outsourcing (TPO), Sales and Fulfillment (S & F), Analytics (AT). Business Platlbrrm (BP). Business Transformation Services (BTS), Human Resources Outsourcing (HRO) and Technology Solution Optimization (TSO). The Vertical focus areas of services are Financial Services &, Insurance (FSI) Manufacturing (MfG), Energy, Utilities Communication & Services (ECS) and Retail, Consumer Packaged Koods, Logistics &: Life Services (RCL). From the above, it is clear that 'Infosys' offers a gamut of different and diversified services which cannot be compared with routine back office services provided by the assessee. In fact, it is mentioned at page 14 of the Annual Report that the company 'Infosys' provides business process management services which are different from routine back office services. It is also seen that this company enjoys significant brand value and owns

intangible assets which clearly establish that Infosys is different from the assessee in the case on hand.

7.4.1 We also further observe that this company, 'Infosys' has consistently been rejected as a comparable to companies rendering routine back office services in various judicial pronouncements of the Tribunal; including the two decisions cited by the assessee (supra). In the case of CGI Information Systems & Management Consultants (P.) Ltd. (supra) cited by the assessee, this company 'Infosys' has been excluded from the List of comparables for the reason that it has brand value which had an impact on its pricing and margins. As the facts of the year under consideration are similar, the decision rendered in the earlier year would apply to the year under consideration as well. In this factual view of the matter, we hold that Infosys DPO Ltd., stands on a totally different footing from a company engaged in rendering routine back office ITES; being both functionally different and having brand value and therefore is to be excluded from the final set of comparables. We hold and direct accordingly.

We find the judicial decisions, applicable for the Assessment Year 2014-15 and based on the observations of the co-ordinate Bench, we consider the company Infosys BPO Limited comparable has to be excluded and accordingly direct the TPO to exclude this company from the final list of comparables.

E-Clerx Services Ltd., was excluded for the following reasons:

(ii) E-Clerx Services Limited has a margin of 70.26% and engaged in both rendering KPO and BPO services and no segmental information is available and the company has acquired entire share holding of Agilyst Inc. The company was excluded for the Assessment Year 2014-15 in the case of Hyundai Motor India Engineering (P.) Ltd. v. ACIT [2019] 109 taxmann.com 429 (Hyd - Trib) at para 32 which read as under:

“32. Thus, on a comparison of the functions of the and other companies reproduced above. we find that E-Clerx Ltd is not only into ITeS services, but is also rendering KPO services and therefore, it cannot be compared to the assessee. In the decisions of the ITAT where it has been held to be a comparable to the assessee. we find that ITAT has held that the services provided by the assessee company and E-Clerx Ltd are similar and that the

extra-ordinary event of winding up of the subsidiary company has not been proved to have any bearing on the assessee's profits and that super normal profit may not be a basis for exclusion of this company. However, we find that the ' Coordinate Benches of the Tribunal nor the Revenue Officers have not brought out functions which are similar to both the companies. The decision of the ITAT for year AY 2011-12 was followed in the AY 2012-13, Therefore, we are of the opinion that these decisions cannot exactly be binding on this Tribunal for the relevant AY, where the AO/TPO have considered the assessee as an ITcS service provider and not as a KPO. Further, as pointed out by the Id Counsel for the assessee, The TPO has himself has not taken E-Clerx Ltd as a comparable for the AY 2013-14. Therefore, we direct the TPO/AO to exclude this company from the final list of comparables to the assessee,

We found the decision of the co-ordinate Bench of Tribunal where the said comparable is in KPO services and accordingly we direct the TPO to exclude the comparable from the final list of comparables for determination of ALP."

Cross Domain Solutions Pvt.Ltd., was excluded for the following reasons:

(iii) Cross Domain Solutions Pvt. Ltd., the company margin is 21.07% and has to be excluded as the company is providing value based quality services in the fields of HF, Finance, Administration, tax process etc and falls within the ambit of KPO services and dissimilar to ITES. The KPO service provider cannot be compared to the ITES provider and has to be excluded. The company was excluded in the co-ordinate Bench decision in the case of Symphony Marketing Solutions India (P.) Ltd. v. ITO [2013] 38 taxmann.com 55 (Bang - Trib) at paras 18 & 19 held as under :

'18. This company was considered as a comparable and listed at Sl.No.8 of the comparables chosen by the TPO. It is the stand of the assessee that this company is not functionally comparable. As observed in the case of Coral Hubs Ltd., the TPO rejected the plea of the assessee on the basis of a non-existent TP order passed for the A.Y. 2007-08. It is seen that the business profile of this company is re-engineered payroll service. This company is

also engaged in the development of information systems. These activities are totally different from the activities of the assessee which perform very limited/low end functions back office services. The review and business functions of Cross Domain is as follows:

"With a decade of experience in Payroll Outsourcing, Crossdomain has created a re-engineered payroll service EFFIPAY - that processes and delivers accurate payroll to clients with headcount up to 1000 employees in just 4 hours. With Effipay Lite and Effipay Lite Plus, our bouquet of services cover end to end payroll, retrials, reimbursement, tax proof verifications upto issue of Form 16 for employees of our clients across different industry verticals. Our processes are highly scalable and provide end to end payroll solutions to clients with headcount ranging from 5 to 65,000."

"Crossdomain's IT knowledge and domain competence has provided the edge to develop information systems to implement process innovation and continuously increase efficiency and turn-around-time for business critical processes."

As can be seen from the above, the business of Cross Domain ranges from high end KPO services, development of product suites and routine low end ITES service. However, there is no bifurcation available for such verticals of services. Therefore the assessee contends that Cross Domain cannot be compared to a routine ITES service provider.

19. We are of the view that in the absence of any reasons given to the contrary either by the TPO or the DRP for regarding this company as a comparable, this company should be excluded from the list of comparables, accepting the plea of the Assessee. We hold accordingly." Also in the case of PCIT v. BNY Mellon International Operations (India) (P.) Ltd. [2018] 93 taxmann.com 363/255 Taxman 397 (Bom) the Hon'ble Bombay High Court has held the comparable Cross Domain Solutions (P.) Ltd. is in the nature of KPO and observed at paras 3 to 8 as under :

"3. The impugned order of the Tribunal held that the following entities mentioned at nos.(i) to (iv) above are not Comparables to the

Respondent. This by following the decision of its Co-ordinate Bench in PTC Software (India) (P.) Ltd. v. Dy. CIT [2014] 52 taxmann.com 351/[2015] 67 SOT 138 (URO) (Punj. - Trib).

4. Mr. Suresh Kumar teamed counsel appearing for the Revenue very fairly pointed out that being aggrieved by the decision of the Tribunal in PTC Software (I) (P.) Ltd. (supra), the Revenue had preferred an appeal to this Court being IT Appeal No. 598 of 2016 - Pr. CST v. PTC Software (I) (P.) Ltd. This Court dismissed the Revenue's above appeal on 16 April 2018 upholding the view of the Tribunal. The Revenue does not dispute that the above decision in PTC Software (I) (P.) Ltd. (supra) of this Court rendered on 16 April 2018 would apply to this case.

5. Therefore for the reasons indicated in our order dated 16 April 2018 in case of PTC Software (I) (P.) Ltd. (supra) the entities listed at serial nos.(i) to (iv) cannot be held to be comparable to the Respondent-Assessee.

6. So far as the entity listed at serial no.(v) above, namely Crossdomain Solutions Limited, is concerned the impugned order of the Tribunal has excluded it from the list of comparables. This by following its decision in Dy. CIT v. Wills Processing Services (India) (P.) Ltd. vide ITA No.2152/Mum/2014, dated 10-10-2014, Mr. Suresh Kumar learned counsel appearing for the Revenue states that in spite of his best efforts, the Revenue is unable to instruct him whether or not an appeal has been preferred against the order of the Tribunal dated 10 October 2014. in the case of Wills Processing Services under (P.) Ltd. (supra).

7. In the above view we proceed on the basis that no appeal from the order passed in Wills Processing Services under (P.) Ltd. (supra) has been filed by the Revenue. We further note that the impugned order records that the services provided by Crossdomain Solutions is in the nature of KPO ^Knowledge Process Outsourcing).

8. It is an agreed position between the parties that the entity at Sl. no.(v) above was a subject matter of consideration by this Court in the Revenue's appeal being Pr. CIT v. Aptara Technology (P.) Ltd. [2018] 92 taxmann.com 240. In the aforesaid case, this Court

recorded the fact that M/s Crossdomain Solutions Ltd. was engaged in distinct activities such as payroll activity. 'Knowledge Process Outsourcing'(KPO) service, development of products and routine IT services. Thus, it was found not comparable with an entity which was rendering E-learning services, In the present case also the Respondent provides BPO services which is not with KPO services."

Further the learned Authorised Representative substantiated his argument with Annual Report of comparable and we consider it proper to direct the TPO to exclude the comparable from the list of comparables for determination of ALP”

12. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid 3 companies from the list of comparable companies.

13. Learned Counsel for the assessee also submitted that the TPO while determining the ALP has considered the entire turnover of the assessee and made an adjustment under section 92 of the Act whereas in law, an adjustment should be restricted only to the transactions with AE. In this regard, we notice that the total revenue of the assessee which is a sum of Rs.51,26,28,887/- out of which income from services other than ITeS is a sum of Rs.32,56,93,611/-. The value of ITeS transaction with a related party is only a sum of Rs.14,42,12,112/-. The law is well settled that the addition on account of determination of ALP should be restricted only to the transactions with AE and it cannot be made in respect of transactions with non-AE. The Hon'ble Mumbai Tribunal in the case of Thyssen Krupp Industries India Pvt. Ltd. [ITA No. 7032/Mum/2011] held that the ALP can only be determined on the value of international transaction alone and not on the entire turnover of the assessee at entity level. This decision was further

upheld by the Hon'ble Bombay High Court in the case of Thyssen Krupp Industries India Pvt. Ltd. [ITA No. 2201 of 2013], which held as below:-

"2.

(a) Whether on facts and the circumstances of the case and law, the Tribunal was justified in law in restricting the Transfer Pricing (TP) adjustment only to the transaction between the Associated Enterprises (AEs.)?

3.

.....

(e) We find that in terms of Chapter X of the Act, re- determination of the consideration is to be done only with regard to income arising from International Transactions on determination of ALP. The adjustment which is mandated is only in respect of International Transaction and not transactions entered into by assessee with independent unrelated third parties. This is particularly so as there is no issue of avoidance of tax requiring adjustment in the valuation in respect of transactions entered into with independent third parties. The adjustment as proposed by the Revenue if allowed would result in increasing the profit in respect of transactions entered to with non-AE. This adjustment is beyond the scope and ambit of Chapter X of the Act.

5. In the above view, as the provisions of the Act in respect of transfer pricing are self evidence, Question No.(a) as proposed does not give rise to any substantial question of law. Thus not entertained."

14. The Hon'ble Bombay High Court in the case of Phoenix Mecano (India) Private Limited [ITA No. 1182 of 2014], had to deal with the following question of law suggested by the revenue:-

6.1 Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in directing the AO to restrict the determination of the ALP to transactions with the AE rather than on the entire turnover of the Company.

6.2 Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was correct while issuing the above directions without appreciating the observations of the DRP that there was no segmental audit of the transactions of AE and non AE and

therefore there was no method whereby the AO could come to a fair determination of ALP by only restricting to transactions with AE."

The Hon'ble Bombay High Court on the above questions of law held as follows:-

"5. With the assistance of the learned counsel for respective parties, we have considered the submissions and the judgment of the Tribunal. The Tribunal in para 7 of its order has observed as under:-

"7. We have heard both the parties and their contention have carefully been considered. So far it relates to grievance of the assessee that the TP adjustment can only be applied to international transactions of the assessee with the AE and it cannot be applied at entity level, the issue is found to be covered by the aforementioned decision of the Tribunal in the case of Thyssen Krupp Industries India Pvt. Ltd. (supra). Therefore, we hold that determination of arms length price should be restricted only to international transaction of the assessee with its AE. It was pointed out that the figures are available with the AO, details of which has also been filed before us at page 170 of the paperbook. Therefore, we direct the AO to take only the international transactions of the assessee with its AE for the purpose of determining arms length price. We direct accordingly."

6. The Tribunal has held that the figures are available with the Assessing Officer, the details of which has also been filed with the Tribunal at page 170 of the paperbook. It would be clear that the details of the international transaction are specifically made available and therefore the apprehension of the department as such is misplaced.

.....

7. Considering the provisions of Section 92 of the Income Tax Act, so also the reasoning adopted by the Tribunal suggesting that separate figures of international transaction are available, so also the order referred above. No substantial question of law arises for consideration. As such the appeal is dismissed with no costs."

15. In a similar case before the coordinated Bench of the ITAT Bangalore in the case of Kirloskar Toyota Textile Machinery Pvt. Ltd. v. ACIT [IT(TP)A No.1401/Bang/2010 held as under:-

"Taking into consideration of these factors, we accept the first fold of submission made by the learned counsel for the assessee and direct the Assessing Officer to confine the adjustment, qua the purchases made by the assessee from the AE. To be more specific, the adjustment is to be made only to the purchases made from the AE

16. The ITAT Bangalore, in the case of IKA India Pvt Ltd, Bangalore Vs DCIT IT(TP)A No.2192/Bang/2017, order dated 17.09.2018, took a same view relying on the various judgments quoted above and held as follows:

"53. The CIT(A) in exercise of his powers of enhancement of income took the view that the ALP has to be determined on the basis of the entire sales in the finished goods segment including transactions with Non-AE also. The reasoning adopted by the CIT(A) for doing so was as follows:-

"10.0 While examining the working of ALP in the case of appellant, it was observed that the TPO has reduced the adjustment proportionately by holding that only 8.46% of revenue of the appellant is from AE. She accordingly adopted 8.46% of the operating revenue and 8.46% of the Operating cost for purpose of the determination of ALP. However, this method is not the correct approach as the ALP determination should have been based on the entire operating revenue and entire operating cost. Since this change in method would have amounted to enhancement of the income of the appellant, so opportunity of being heard was given to the appellant vide order sheet entry dated 11.08.2017, as to why the proportionate reduction done by the TPO should not be disregarded. The appellant sought time to file written submissions and the same was allowed. The appellant filed written submissions vide letter dt 29.08.2017. The same have duly been considered and the issue is being decided as follows:

10.1 In the case under consideration, the appellant is selling its product to AE as well as to non AEs, for the manufacture of which, part purchases are from AEs and remaining from the non AEs. The

TPO has considered OP/OR for purpose of computation of the ALP as the quantum of sales to AE are lesser than the purchase from AE and thus lesser controlled. When a product is sold, only overall profit margin is recorded without any data as to what would be the profit in relation to purchases from AE. So this cannot be presumed that the profit percentage earned in relation to costs related to AE transactions as well as non-AE transactions was same. Since costs are common to the products ultimately sold by the appellant, and the same includes AE transactions, so it is always possible that the margin of profit percentage vis-a-vis costs related to AE transaction is not the same as profit margin on costs related to non-AE transactions but ultimately overall certain profits are being shown. Further, the transactions with non-AEs can be presumed to be at arm's length as there is no reason to earn lesser profit. But in case of transactions with AEs, there is always a likelihood of earning lesser profits as transactions are controlled and decisions are influenced by AE. Thus the overall profits on account of transactions with AE as well as non-AE gets suppressed."

54. We have heard the rival submissions. The ld. counsel for the assessee reiterated submissions made before the CIT(A) that transaction with non-AE cannot be subject matter of determination of ALP because section 92 clearly speaks of determination of ALP only in respect of transactions with AE. He also referred to certain decisions of the Tribunal for the proposition that section 92 of the Act is not applicable to non-AE transactions. These decisions have already been extracted in the earlier paragraphs. The ld. DR relied on the order of the CIT(Appeals).

55. We have considered the rival submissions. The reasoning of the CIT(A) for considering the entire sales in manufactured finished goods segment for determination of ALP is that certain components and raw materials used in manufacture of finished goods are also sourced from AE and there is a possibility of the cost of such component having been bargained at a price which is not at arm's length. This presumption of the CIT(Appeals) is without any basis. He has not demonstrated with actual figures as to how there would be impact on profit margin on sale of finished products to AE because of purchases of some components from AE. He has given examples which are imaginary figures. Apart from this, the TPO has accepted that purchase of raw material and components by the assessee from its AE is at arm's length. Therefore,

the basis on which the CIT(A) proceeded to apply the ALP test for transactions with non-AE is neither correct on facts nor permissible in law. As rightly contended by the assessee, section 92 of the Act can be applied only in respect of international transactions i.e., transactions with AE.

56. In view of the above transfer pricing provisions and various judicial precedents, we hold that the transfer pricing adjustment should be restricted only to the AE related transactions of the assessee.”

17. In the light of the decisions referred to above, we hold that section 92 of the Act can be applied only in respect of international transactions i.e., transactions with AE and the transfer pricing adjustment should be restricted only to the AE related transactions of the assessee. The TPO/AO is directed to compute the ALP in the light of the directions as given above, after affording assessee opportunity of being heard.

18. In the result, appeal of the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(N. V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated : 07.03.2022.
/NS/*

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Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.