

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

IT(TP)A No.181/Bang/2019
Assessment year : 2012-13

M/s. Capgemini Technology Services India Ltd., [erstwhile AXA Group Solutions Pvt. Ltd.], No.14, Rajiv Gandhi Infotech Park, Hinjawadi Phase-III, MIDC-SEZ, Village Man, Taluka Mulshi, Pune. PAN: AAFCA 2750H	Vs.	The Assistant Commissioner of Income Tax, Circle 1(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Smt. Priyadarshini Basaganni, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	08.06.2022
Date of Pronouncement	:	17.06.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the order dated 22.11.2018 of the CIT(Appeals), Bangalore-9, Bangalore passed u/s. 143(3) r.w.s. 144C of the Income-tax Act, 1961 [the Act] for the assessment year 2012-13.

2. The assessee is a subsidiary of AXA Group Solutions SA, France (AE). The assessee offers Software Development Services and

Admin Support Services to its AE. The assessee is remunerated on a time cost or fixed price basis for the works assigned by AXA Group. The details of international transaction as per 3CEB is as given below:-

International Transactions as per 3CEB Report

Sl. No.	Transaction	Amount in Rs.
1.	Receipt from contract software development service	45,64,93,898
2.	Payment of management fees	1,52,16,934
4.	Reimbursement received	1,06,13,764
5.	Recharge of expenses	2,28,745

3. As per the TP documentation, for the provision of Software Development Services and Admin Support Services, the assessee has applied Transaction Net Margin Method (TNMM) as the most appropriate method for determining the arm's length price for the services rendered and considered the mark-up on total cost i.e. Operating profit / Total cost as the relevant profit level indicator (PLI). The financial results of the assessee for the year under consideration based on the Profit & Loss account is as under

Particulars	Amount in Rs.
Operating Income (excluding other income)	48,57,14,702
Operating Expenses including Depreciation	36,36,30,583
Operating Profit	12,20,84,119
OP / OC - %	33.5

4. The assessee company filed the return of income for the assessment year 2012-13 on 28.11.2012 declaring an income of Rs.13,58,14,480 showing book profits of Rs.13,33,35,659. Through

CASS the case was selected for scrutiny. The assessing officer (AO) referred the case to Transfer Pricing Office (TPO) u/s.92CA as the assessee had international transactions. The TPO made an adjustment towards ALP of management fees for an amount of Rs.1,52,16,934. The AO passed an assessment order incorporating the TP adjustment and also made other additions / disallowances towards the following:-

- a. Disallowance of software expenses – Rs.1,82,58,070
- b. Disallowance u/s.14A r.w.r.8D – Rs.6,59,213

ALP adjustment of management fees (Ground Nos.1 to 9)

5. The assessee has made a payment of management fees of Rs.15,216,934. This was aggregated with the primary transaction of software development and administrative support services for benchmarking purposes. The assessee submitted before the TPO stating that management fee is paid to the AE towards the charges for AE's employees time spent on providing services in the nature of advise, technical and other assistance in terms of technical operations in terms of agreement entered into by the assessee with its AE and furnished invoices and agreements in support of its claim. The TPO, however, was of the view that international transaction for payment of management fees is a class of its own and the ALP of the transaction cannot be determined using TNMM and proceeded to calculate the ALP in respect of this transaction separately using CUP method. The TPO concluded that the assessee's submissions are nothing more than a description of certain alleged services received by it from its AE and

the documents filed do not prove that the services have been rendered and the assessee has derived tangible substantial and commercial benefit out of such services from its AE. Therefore, the TPO computed the ALP at NIL and made TP adjustment of Rs.1,52,16,934.

6. Aggrieved, the assessee preferred appeal before the CIT(A) with the submission that –

- (a) The assessee had merged with AXA Technologies Shared Services Pvt. Ltd. [AXA-TSSPL] w.e.f. 1.4.2012. and the merged entity AXA-TSSPL that has entered into APA with the CBDT according to which the payment of management fees is part of the operating cost.
- (b) This payment of management fees which was part of the APA continued thereafter.
- (c) As per the APA, the CBDT has accepted that the payment of management fees by AXA-TSSPL to its group entity is closely linked with the primary transaction of provision of services and hence the same should be tested using the combined approach at the entity level for arriving at the arm's length conclusion.
- (d) This principle has also been accepted by the Bangalore ITAT in the case of AXA-TSSPL in IT(TP)A No.659/Bang/2012 for the AY 2007-08.

- (e) The transfer pricing methodology in the APA is to be applied to treat the transaction as at arm's length.

7. The CIT(A) rejected the argument of the assessee that the APA signed by the erstwhile AXA Tech does not apply to AXA GS transactions. The contention of the assessee that the payment of management fees has to be determined on composite transaction basis was also rejected on the ground that the Tribunal in earlier years had set aside this issue to the TPO. The CIT(Appeals) also observed that the assessee failed to controvert the findings of the TPO with evidence in support of its claim. The CIT(Appeals) thus upheld the order of the TPO.

8. The Id. AR reiterated its submissions before the revenue authorities and submitted that the Tribunal by order dated 30.5.2022 in the assessee's own case in ITA Nos. 555/Bang/2017 & 3279/Bang/2018 for the AYs 2010-11 & 2011-12 respectively in the appeals filed by the revenue, had held that for the purposes of ALP, the management fees is to be considered on a composite transaction basis.

9. The Id. DR relied on the order of the CIT(Appeals) and submitted that the Tribunal for the AYs 2010-11 & 2011-12 (*supra*) had set aside the issue to the TPO.

10. We find that this issue came up for consideration before this Tribunal in the appeals filed by the revenue in the assessee own case in ITA Nos. 555/Bang/2017 & 3279/Bang/2018 for the AYs 2010-11 &

2011-12 respectively. The Tribunal by order dated 30.5.2022 observed that for the purposes of ALP, the management fees is to be considered on a composite transaction basis. Since the AO/TPO had not considered the management fees as part of operating cost for the purpose of determining the ALP, the Tribunal remanded the issue to the AO/TPO for fresh consideration. The relevant observations of the Tribunal are as follows:-

“10. We have considered the rival submissions and perused the material on record. ‘Operating Expenses’ in the APA has been defined in clause 1(d) as under:-

“(d) "operating expense" means the costs incurred in the previous year by the Applicant in relation to the covered transaction during the course of its normal operations including net foreign exchange difference (if loss) (includes mark to market loss on forward contracts), reimbursement of employee cost, depreciation and amortization expenses relating to the assets used by the Applicant, but does not include the following namely: –

- (i) interest expense;
- (ii) provision for unascertained liabilities;
- (iii) pre-operating expenses;
- (iv) extra-ordinary expenses;
- (v) loss on transfer of assets or investments;
- (vi) expense on account of income-tax; and
- (vii) other expenses not relating to normal operations of the Applicant.

The operating expense includes:

- (i) Expenses and/or depreciation in regard to the assets including third party software licenses provided by the AEs to the Applicant free of cost;
- (ii) Costs in regard to the employee stock option plan (ESOP) or similar scheme granted by the AEs to the

employees of the Applicant as and when incurred by the AEs and whether or not recovered from the Applicant;

(iii) Costs in regard to any stock based compensation/incentive paid to its employees by the Applicant;

(iv) Any reimbursement of expenses by the Applicant to the AEs(which the AEs have incurred on behalf of the Applicant);

(v) Inter-company charges as defined in section 3; and

(vi) Any recovery of expenses by the Applicant from the AEs (which the Applicant has incurred on behalf of the AEs). Recovery of expenses by the Applicant from AEs includes travel, accommodation and any other related expenses of the Applicant's employees travelling overseas to AEs' locations incurred by the Applicant on behalf of the overseas AEs at the request of the AEs.”

9. The assessee has paid management fees amounting to Rs.2,17,38,508 to AXA GS SA during the year under consideration. This management fees is charged by the AE for services rendered towards the following:-

(i) Technical and operational expertise in the nature of advise and technical assistance for delivery of customer services based on the best practices.

(ii) Administration, Human Resources and Corporate Communication services regarding the implementation and coordination of general policy and remuneration practices, data processing systems, technological watch on the evolution of remuneration and training methods

(iii) Advise and technical assistance on development of consistent audit methods

(iv) Assistance regarding the consolidation of financial results, accounts planning and accounting norms implementation.

- (v) Legal advice regarding contract drafting and negotiation assistance in corporate legal matters.

These are intra-group services and the fee is charged by the AE as per the agreement entered into with the assessee. The contention of the assessee is that these services are rendered with an object to bring consistency of operating policies, standardization of business procedures to bring in efficiency and the assessee is benefitted from both economic and commercial perspective.

11. The assessee has merged with AXA Tech with effect from 1st April 2012 and the merged entity AXA Technologies Shared Services Private Ltd., has entered into an Advance Pricing Agreement (APA) with CBDT commencing from the previous year 2013-14 to previous year 2017-18 (relevant to AY 2014-15 to 2018-19) and also applicable to consecutive four rollback years from previous year 2009-10 to 2012-13. Though as per the term of agreement (page 6 of APA) the international transactions of the assessee is not covered roll back years the previous years beginning from previous year 2013-14, the international transactions of the assessee are covered from the previous year 2013-14 to previous year 2017-18 (relevant to AY 2014-15 to 2018-19).

12. In the APA agreement, the impugned payment i.e., Management fee is considered as part of operating expenses (page 14 of the APA). It was the contention of the assessee that the CBDT has accepted that the payments of management fees by AXA Tech to its group entity as closely linked with primary transaction of provision of services and to be tested using the combined approach at entity level. Though as per the term of agreement (page 6 of APA) the international transactions of the assessee is not covered roll back years, it is inferred from the APA that the principle of management fees being part of the operating expenses and be tested at entity level. The APA is entered into by CBDT after the thorough verification of the nature of transaction of the assessee and therefore in our considered view, the principle inferred can be applied for the year under consideration also. We also notice that the coordinate bench of the Tribunal in the case of AXA Technologies Shared Services Private Limited [IT(TP)A/659/Bang/2012] for the

assessment 2007-08 has considered the same issue and has remanded the issue back to AO/TPO for fresh adjudication considering management fees payment to AE to be tested at an entity level using the combined approach. The relevant extract of the decision of Hon'ble Tribunal is reproduced below :-

“9. We have considered the rival submissions as well as the relevant material on record. We find that the assessee bench marked its international transactions by computing the operating margin at entity level which is not as per the provisions of Transfer Pricing because the international transactions has to be tested by comparing with uncontrolled and unrelated price. When the assessee earns the revenue of more than 50% from the non-AE clients then the bench marking of the international transactions by taking the results at entity levels is not appropriate therefore we do not approve such methodology applied by the assessee in bench marking the international transactions. However the TPO has segregated the ITES from management fees and found that the international transactions of ITES exclusive of management fees at arm's length. The action of the TPO in determining the ALP of management fees at NIL is not justified because the assessee has paid the management fees under the agreement wherein the services provided by the AE has been enlisted. Therefore, without giving a finding that the assessee has also incurred expenditure in respect of the same services over and above the management fees paid to the AE it cannot be said that the assessee has not received the alleged management services. Thus only when it is found that the assessee has also incurred the expenditure on account of the same services and also paid the management fees to the AE then the TPO/A.O may come to the conclusion that the assessee has paid the management fees without availing the services from the AE. Even otherwise when the management fees paid under the agreement and there is no finding by the authorities below that the same services also availed by the assessee separately from 3rd party and booked the expenditure in the profit and loss account then determination of the ALP at NIL is not acceptable. The assessee has filed the agreement under which the management fees was paid to the AE along with the relevant record and the department has accepted the management fees along with ITES under the Advance

Pricing Agreement dt.28.3.2016 then making a separate adjustment by the TPO by determining the ALP of management fees at Nil is contrary to the stand of the department itself while agreeing to the advance pricing agreement. We find in the Advance Pricing Agreement dt.28.3.2016, the department has accepted the international transactions recorded in Clause 3 at arm's length as under :

"3. Covered Transaction.

The international transactions of provision of Information Technology Infrastructure and IT support services. Intercompany charges including -

- Payment of management fees
- Payment of business consultancy charges
- Payment of guarantee commission
- Payment of other expenses such as communication expenses, contractor expenses, repairs and maintenance and transversal charges
- Payment towards people soft maintenance
- Payments towards internet charges and software expenses
- Training expenses
- Software expenses
- Payments towards service charges
- Payments towards web hosting and maintenance
- Any other inter-company charge of similar nature

Between the appellant and its AEs, as described in Appendix I, shall be the covered transactions for the Agreement and the Agreement shall apply only to these international transactions."

Though the price accepted by the department under said agreement are not applicable for the year under consideration however, on principle the management fees is accepted along with the other service and the ALP for ITES as well as other services including the payment of management fees has to be determined on composite transaction basis. The TPO has not examined the matter by considering the management fees as part of the operating cost for the purpose of testing the ITES as per provisions of section 92 of the Act. Accordingly, we set aside the matter to

the record of the TPO/A.O for reconsideration of the same afresh in terms of the above observations.”

13. From the above it becomes clear that the principle laid down by the Tribunal is that though the terms of APA agreement is not applicable for the year under consideration, the payment of management fees has to be determined on composite transaction basis.

14. The other contention of the revenue is that that the assessee has not proved that the services have actually been rendered by the AE and that the assessee had a tangible, substantial and commercial benefit out of the said services. We notice that the assessee during the course proceedings before the TPO and CIT(A) has shared the invoices, agreement copies etc. The TPO has rejected these documents and proceeded to assess the ALP at NIL without calling for any further details from the assessee to substantiate that the assessee has derived substantial and commercial benefit out of the services rendered by the AE.

In view of the above discussion and following the principle laid down by the coordinate bench of the Tribunal in the case of AXA Technologies Shared Services Private Limited (supra) in our considered view for the purpose of ALP the management fees is to be considered on a composite transaction basis. Since the AO/TPO has not considered management fees as part of operating cost for the purpose of testing ALP, it is only appropriate to remand the issue back to the AO/TPO to examine the issue afresh in accordance with the law after giving reasonable opportunity of being heard to the assessee. The assessee is directed to cooperate with the proceedings by producing the relevant documents as and when called for. This issue raised by the revenue is dismissed and allowed in favour of the assessee for statistical purposes for both the year under appeal.”

11. The facts being identical for the assessment year under consideration, respectfully following the above order of the Tribunal in assessee's own case, we remand this issue to the AO/TPO for fresh

consideration and decision in accordance with law with similar directions as in AYs 2010-11 & 2011-12.

Disallowance of software expenses – Rs.1,82,58,070 (Ground 10)

12. The next issue for consideration is with regard to treatment of software expenditure as capital in nature by the AO. The assessee had debited amount of Rs.2,60,82,958 being expenses towards “IT support & Software Cost”. Before the AO the assessee submitted that these payments were for application software that needed to be upgraded on a regular basis and the payments did not result in acquisition of any capital asset. The assessee relied on Praga Tools Ltd., vs CIT [(1980) 123 ITR 773], IBM India Ltd., vs CIT [(2006) 290 ITR 183] in this regard. However, the AO proceeded to make the disallowance on the ground that as per Income Tax Rules computers including computer software is to be classified under a separate Block of Assets and held that the computer software is capital in nature. The AO allowed the depreciation @ 30% to the tune of Rs. 78,24,887 which resulted in the net disallowance of Rs.1,82,58,070.

13. The CIT(A) confirmed the treatment of software expenditure as capital in nature. He, however, directed the AO to work out the depreciation on the software expenses so capitalized and allow the depreciation based on the number of days the asset is being put to use. The assessee is in appeal aggrieved by the order of the CIT(Appeals).

14. The Id AR submitted that this issue is also covered by the decision of the coordinate bench of the Tribunal in assessee's own case (supra) and the Id. DR supported the decision of the lower authorities.

15. We have heard both the parties and perused the material on record. The assessee has submitted the breakup of the "IT support & Software cost" as per table below

Particulars	Amount in Rs.
AXA Tech service charges	2,60,78,095
Software maintenance and expenses	4,862
Total	2,60,82,958

16. The assessee submitted before the AO that the amount of Rs.4,862 was spent towards purchase of upgraded license of software that was required to be renewed every year and the balance of Rs.2,60,78,095 was spent on a host of other services provided by another AXA entity. The AO has not looked into this aspect of the submission of the assessee and proceeded to treat it as capital in nature quoting the Income Tax Rules. The CIT(A) also did not go into the merits and confirmed the treatment of the aforesaid expenses as capital in nature though directed the AO to allow depreciation in accordance with law. In view of this we remand the issue back to the AO to analyse the nature of expenditure based on the details / evidences submitted by the assessee and decide the issue afresh in accordance

with law after giving reasonable opportunity of being heard to the assessee.

Disallowance u/s.14A r.w.r.8D – Rs.6,59,213 (Ground No.11)

17. During the year under consideration, the assessee had earned a dividend of Rs.95,39,278. The AO noticed that the assessee has not debited any amount to earn tax free dividend income and made disallowance of Rs.6,59,213 u/s. 14A of the Act r.w. Rule 8D as follows:-

(i)	the amount of expenditure directly relating to income which does not form part of total income	NIL
(ii)	Interest expenses not directly attributable to any particular income or receipt, then $A \times B / C^*$	87,218
(iii)	$\frac{1}{2}$ % of the average of the value of investments, income from which does not or shall not form part of the total income ($\frac{1}{2}$ % pf Rs.11.43.97,016)	5,71,935
	Disallowance as per Rule 8D	6,59,213

* Where A = amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred during the previous year:
(Rs.2,36,455)

B = the average of value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;
[(Rs.13,31,67,302 + Rs.9,56,06,729) / 2] = Rs.11,43,87,016.

C = the average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;
[Rs.36,43,26,860 + Rs.25,54,71,507/2] = Rs.30,98,99,184.

18. The CIT(Appeals) confirmed the disallowance by relying on various judicial pronouncements and CBDT circular No.5/2014 dated 11/02/2014. Aggrieved, the assessee is in appeal before the Tribunal.

19. We have considered the rival submissions and perused the material on record. It is noticed that the AO has made a disallowance of Rs.87,218 under Rule 8D(2)(ii) and Rs.5,71,935 under Rule 8D(2)(iii). With regard to disallowance under Rule 8D(2)(ii) the ld AR submitted that the assessee does not have any borrowed funds and that the assessee is a debt free company. The ld AR further submitted that the AO has considered the Bank Charges debited to the profit and loss account as interest cost and has calculated the disallowance under rule 8D(2)(ii). We see merit in the argument of the ld AR since as per the financial statements per the financial statement of the assessee (page 113 of paper book) the assessee does not have any borrowings. Further we notice that as per Note 23 in page 125 of the paper book Rs.2,36,455 is shown as the bank charges which is the amount considered by the AO as finance cost for arriving at the disallowance under rule 8D(2)(ii). In the light of the facts and evidences perused we are of the considered view that no disallowance under rule 8D(2)(ii) is warranted when the assessee does not have any borrowings and that there is no finance cost debited to the P&L account. The disallowance made under rule 8D(2)(ii) for Rs.82,218 is hereby deleted.

20. As regards disallowance Rule 8D(2)(iii), the ld. AR contended that the AO did not record any satisfaction before making the disallowance and relied on the decision of the Hon'ble High Court of Karnataka in the case of Essilor India (P.) Ltd. v. DCIT in ITA No.1001 of 2017, judgment dated 28.01.2022.

21. In the given case we notice that the assessee has not made disallowance under section 14A. Considering the amount of investment as reflected in the financials of the assessee and that the assessee has earned substantial amount of dividend income, there is no merit in the contention of the Id AR that no expenditure is incurred towards earning the exempt income and that how NIL expenditure is towards earning the dividend income is arrived. The AO has invoked the provisions of section 14A read with rule 8D taking note of the fact that the assessee has earning a dividend income of Rs.95,39,278 and had stated that that it was not possible to earn the income without any corresponding expenses. This in our considered view can be inferred as recording of satisfaction by the AO. Given that the assessee has not made any suo moto disallowance us/.14A inspite of earning substantial amount of exempt income and had not submitted anything to substantiate that the NIL expenditure is incurred towards the exempt income, we see no reason to interfere with the decision of the AO / CIT(A). The disallowance of Rs.5,71,935 is hereby confirmed and the ground raised is partially allowed in favour of the assessee.

22. Ground No 12 is consequential and does not warrant separate adjudication.

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

Pronounced in the open court on this 17th day of June, 2022..

Sd/-

Sd/-

(GEORGE GEORGE K.)
JUDICIAL MEMBER

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 17th June 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.