

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

IT(TP)A No.588/Bang/2020
Assessment Year : 2008-09

Ms. Yokogawa India Limited Plot No.96, 3 rd Cross, Electronic City, Hosur Road Bangalore 560 100 PAN NO : AAACY0840P	Vs.	ACIT, LTU Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Sri Padam Chand Khincha, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	18.05.2022
Date of Pronouncement	:	08.08.2022

ORDER

PER LAXMI PRASAD SAHU, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of CIT(A)-10, Bangalore, Bangalore dated 10.3.2020 for the assessment year 2008-09. The assessee has raised following grounds of appeal:-

General ground:

1. *The Order of the learned Commissioner of Income Tax (Appeals)-10, Bengaluru (hereinafter referred to as CIT(A)) to the extent prejudicial to the Appellant is bad in law.*

GROUND S RELATING TO TRANSFER PRICING — LEGAL ISSUES

2. *The learned CIT(A) has erred in confirming the action of the AO and TPO in passing the order without considering all the submissions and/or without properly appreciating the facts and circumstances of the case and the law applicable;*
3. *The learned CIT(A) has erred in confirming the action of the Ap and TPO in:*
 - (i) *Making a reference for the determination of the Arm's Length Price of the international transactions to the TPO without demonstrating as to why it was necessary and expedient to do so;*
 - (ii) *Passing the order without demonstrating that the Appellant had any motive of tax evasion;*
 - (iii) *Not appreciating that there is no amendment to the definition of "income" and the charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X and therefore addition made under Chapter X is bad in law;*
 - (iv) *Not appreciating that the provisions of 40A(2) override the provisions of Chapter X and there being no action under section 40A(2) for payment towards management fee, GSMF and after sales service, no adjustment under Chapter X can be made.*

GROUND S RELATING TO MANAGEMENT FEES, GLOBAL SALES AND MARKETING ACTIVITIES FEES ('GSMF') AND AFTER SALES SERVICE FEES

4. *The learned CIT(A) has erred in confirming the action of the AO and TPO in making a transfer pricing adjustment of Rs. 5,66,11,086/-.*
5. *The learned CIT(A) has erred in confirming the action of the AO and TPO in:*
 - (i) *Not appreciating that the Appellant had adopted the TNMM at the segment level, in which process, the management fees, GSMF and after sales service fees were considered as closely linked transaction and*

hence were subsumed into the expenditure and accordingly already considered.

- (ii) Not appreciating that once the net profit margin is tested on the touchstone of arm's length price, it presupposes that the various components of income and expenditure considered in the process of arriving at the net profit are also at arm's length; and*
- (iii) Comparing prices after completing the analysis of comparing margins, which process is unacceptable in 1*

6. The learned CIT(A) has erred in confirming the action of the AO and TPO in:

- (i) Ignoring the business, commercial and industry realities and economic circumstances applicable to the Appellant;*
 - (ii) Doing separate evaluation of the management fees, GSMF and after sales service fees by adopting CUP method without justifying how the same was „most appropriate method.*
 - (iii) Concluding that arm's length price of management fees, GSMF and after sales service fees as NIL without considering any comparable*
 - (iv) Concluding that the Appellant has not been able to demonstrate that the services has' been rendered by the associated enterprises.*
 - (v) Concluding that the taxpayer has not demonstrated that it is getting tangible and substantial commercial benefits from payment of management fees, GSMF and after sales service fees; and*
 - (vi) Concluding that the payment towards management fees, GSMF and after sales service fees is with a view to siphoning off profits.*
- 7. The learned CIT(A) has erred in not appreciating that the intra group services were requisitioned and actually rendered by AE.*
- 8. The learned CIT(A) has erred in ignoring the findings of the TPO in the remand report in relation to Management fees, GSMF and after sales services fees.*

OTHER GROUND

9. *The learned CIT(A) has erred in confirming interest under section 234B. On the facts and circumstances of the case, interest under section 234B is not leviable. The Appellant denies its liability to pay interest under section 234B. The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.*

2. Facts of the case are that the assessee filed its return of income for A.Y. 2008-09 on 30.09.2008 declaring an income of Rs. 38,78,42,262/-. Case was selected for scrutiny by issuance of notice under section 143(2) and 142(1) of the Income-tax Act,1961 ['the Act' for short]. The Assistant Commissioner of Income-Tax LTU, Bangalore (hereinafter referred to as the 'Ld. AO') referred the assessee's case to the TPO u/s 92CA of the Act for determining the arm's length price in respect of international transactions entered into by the assessee. The Ld. AO passed the draft assessment order on 12.12.2011 after receiving the order of the TPO u/s 92CA dated 31.10.2011 determining the total adjustment u/s 92CA at Rs.5,97,12,376/-. The assessee company had not filed objections against the draft assessment order Subsequently, the Ld. AO passed the final assessment order u/s 143(3) read with section 144C of the Act on 23.01.2012 making following adjustments / disallowances / additions:

- Transfer pricing adjustment of Rs 5,97,12,376 under section 92CA of the Act for payments "intra group services" fee;
- 43B Disallowance of Rs 32,70,470/-;

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- Disallowance of Interest relating to FY 2006-07 amounting to Rs 3,06,835/-; and
- Disallowance of expenditure on purchase of software amounting to Rs 5,720/-

3. Against the final assessment order the assessee filed appeal before the CIT (A) he partly allowed the appeal of the assessee.

4. Aggrieved from the order of the order of the CIT(A) the assessee filed appeal before the Income Tax Appellate Tribunal.

5. The Id.AR did not press to the legal issue raised in Ground No. 2 & 3 therefore it is dismissed as not pressed. Further in respect of ground no. 4 to 8 he submitted that the Tribunal has decided this issue in assessee's own case in IT(TP)A No.3369/Bang/2018 dated 25th Nov, 2021 for the assessment year 2014-15 and produced the copy of judgement of ITAT coordinate bench of Bangalore.

6. The Id.DR supported the orders of the lower authorities and has submitted written synopsis which is as under:-

"In the present case filed by the assessee, the Grounds of Appeal as raised by the assessee has been broadly categorised into the following headings for AN: 2008-09 and D.R.submissions thereon.

(1) The Ld.A.O,Ld.TPO, Ld.CIT(A) erred in law in making the transfer pricing adjustments to the arms' length price of the appellant rejecting the Transfer Pricing documentation maintained by the appellant on invoking the provisions of subsection (3) of 92C of the Act contending that the information or data used in the

computation of the arm's length price is not reliable or correct and the Hon'ble DRP erred in upholding the above actions of the Ld.A.O. and Ld.TPO.

Submission: This ground is general in nature. LdTPO is authorised to make adjustments to the ALP u/s 92 CA of the Act. As per the reasons recorded by the Ld.TPO in the order passed under section 92CA(3) of the IT Act, it is noticed that the financial data used for the comparability analysis was not according to Rule 10B(4) of the IT Rules. The Hon'ble DRIP held that Rule 10B(4) makes it mandatory that for comparability analysis only the data relevant to the financial year to be used. Further, the assessee applied inappropriate filters and thereby selected companies which are not functionally comparables with the functions performed by the assessee, which makes it clear that the information or data used in the computation of arm's length price was not reliable and correct and therefore the Ld. Transfer pricing Officer was justified in rejecting the arm's length price determined and proceeding to determine the ALP according to sub-section (3) of section 92C of the IT Act, the objection is therefore not found to be acceptable. I agree with the decision of the Ld.CIT(A) and the assessee's ground may be dismissed.

(2) The Ld.CIT(A) has erred in confirming the action of the AO and TPO in not appreciating that the appellant had adopted the TNMM at the segment level, in which process, the management fees, GSMF and after sales service fees were considered as closely linked transaction and hence were subsumed into the expenditure and accordingly already considered and further erred in evaluating the management fees, GSMF and after sales service fees by adopting CUP method without justifying how the same was most appropriate method and concluding the arm's length price as NIL.

Submission: The Ld.CIT(A) noted that in the scenario of intra-group services between the enterprises of a multinational group, inter-company agreements and invoices raised do not as such have much probative value as they are documents between interested parties. By way of mispricing these transactions through agreement and invoices, profits can be shifted outside with ease.

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Therefore, it becomes essential to examine that the alleged services were actually rendered and were commensurate with benefits availed or with payments made. Primary burden is on the appellant to prove the same through documentation and other evidences. Such a burden is also clearly mandated under rule 10D(d), whereby the enterprise is required to maintain contemporaneous documents.

The Ld.CIT(A) considered the submissions of the assessee and the report of the TPO and after detailed discussion of the matter held that there is no merit in the objections and arguments of the appellant and the same are not accepted. Therefore, under the facts and circumstances, the TPO is justified in making the adjustment of ALP u/s 92CA of the IT Act by treating the arm's length price of Management Fee, Global Sales and Marketing Fees and After Sales Service as NIL under the CUP method and dismissed the grounds of the appellant. I agree with the decision of the Ld.CIT(A) and the same may be upheld.

Other Ground.

(3) The LdCIT(A) has erred in confirming interest under section 234B.

Submission: Charging of interest u/s 234B is consequential in nature and it is automatic and mandatory and it is as per specific provisions of the Act and the same may be retained.

Conclusion

In view of the submissions made above, examination of submissions made by the assessee, the order of the Ld.A.O, the TPO and Ld.CIT(A), Bangalore are not erroneous and not bad in law. The assessee's appeal may be dismissed.

Prayer:

In the wake of the above submissions, it is humbly prayed to dismiss the appeal of the assessee/appellant and any other order as may please your honours."

7. We have heard the rival submissions and carefully considered the same along with the order of the authorities below

as well as the documents referred to and relied on before us during the course of the hearing. The facts in the present assessment year 2008-09 is identical with issue covered by the decision of coordinate bench in the assessee's own case in IT(TP)A No.3369/Bang/2018 for the assessment year 2014-15 cited supra. In the aforesaid order, the Tribunal has held as follows :-

"14. We shall now take up the issue relating to TP adjustment made in respect of payments of Global Sales & Marketing activity fee and Management fee. The assessee did not benchmark these payments made to its AE separately, since it adopted TNM method at entity level. However, the TPO bench marked the same separately and accordingly proposed TP adjustment of Rs.2. 16 crores in respect of payment of Global Sales and Marketing activity fee and Rs.26.52 lakhs in respect of payment of management fee. The Ld DRP also upheld the above said adjustments.

15. The Ld A.R submitted that identical TP adjustments were made in AY 2010-11 and the Tribunal, vide its order dated 09-062017 passed in IT(TP)A No,342/Bang/2015 and IT(TP)A No.464/ Bang/ 2015, has cancelled the same holding that these expenses form part of operating cost. It was further held that these payments have to be allocated in the ratio of turnover of the other international transactions and ALP of the other international transactions has to be determined under TNM method by including them as operating cost.

16. We heard Ld D.R on this issue and perused the record. We notice that the co-ordinate bench has considered an identical issue and has expressed the view as submitted by Ld A.R. For the sake of convenience, we extract below:-

"4. We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. We find that the assessee has carried out multiple and diversified international transactions in different segments. The international transactions of the assessee involve charges for raw material and components sales and manufacturing

goods reimbursement of expenses, payment towards royalty and management fees, charges for raw material and components, sales and manufacturing goods, reimbursement of expenses, payment towards royalty and management fees, charges of capital equipment, payment of infra-goody services, charges of material, commission income, rendering of software services, reimbursement of expenses and Global Sale and Marketing Activity Fees. The TFO has accepted mi/I other transactions except the international transactions regarding Global Sale and Marketing Activity Fees. it is pertinent to note that the international transactions of the assessee are Comprising of revenue receipt from the AE as well as revenue payment to the AE Therefore in these facts and circumstances of the case, we find that when the other international transactions regarding revenue receipt from; the AE are tested under the TNMM analysis then the transaction of fee payment by the assessee towards the services rendered by the AE should not be separately tested but all the international transactions having receipt from the AE and payment to the AE shall be clubbed together and then has to be analysed under TNMM. We further note that the DRP has directed the TPO to determine the ALP in respect of the Global Sale and Marketing Activity Fees instead of considering the ALP at NIL. Therefore in principle we do not find any error or illegality in the directions of the DRP however having regard to the peculiar facts and circumstances of the case wherein the assessee is having multiple and diversified international transactions involving receipt as well as payment, we mire of the considered view that the payment in respect of management fees as well as Global Sale and Marketing Activity Fees shall be considered as operating cost and has to allocated in time ratio of turnover of the other international transactions and then the ALP of the other international transactions has to be determined under TNMM analysis. Hence we set aside the entire issue of determination of ALP and TP Adjustment to the record of the TPO/AO for carrying out fresh exercise of determination of ALP in respect of international transactions by considering the payment in respect of management fees and Global Sale and Marketing Activity Fees as part of the

operating cost and allocating the same in the ratio of the turnover of the other international transactions.

. Following the decision rendered in the assessee's own case in AY 2010-11, we restore these two issues to the file of AO/TPO with similar directions."

8. Respectfully following the aforesaid decision in the assessee's own case for the assessment year 2014-15 and the facts and issues are similar for the impugned assessment year. Accordingly, we set aside this issue to the file of AO/TPO with similar directions.

9. The issue of charging interest u/s 234B is consequential in nature.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 8th August, 2022.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(Laxmi Prasad Sahu)
Accountant Member

Bangalore,
Dated 8th August, 2022.
VMS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr. P. S
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.
14. Dictation note enclosed.....