

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

<b>IT(TP)A No. 381/Bang/2022</b>
<b>Assessment Year : 2017-18</b>

M/s. Mersen India Pvt. Ltd., No. 5, Bommasandra Industrial Area, Bangalore – 560 099. <b>PAN: AAACE3191K</b>	<b>Vs.</b>	The Joint Commissioner of Income Tax (OSD), Circle – 4 (1)(2), Bangalore.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Smt. Ramya Nayak, CA
Revenue by	:	Shri Sumer Singh Meena, CIT DR-1

Date of Hearing	:	04-08-2022
Date of Pronouncement	:	08-08-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against assessment order dated 22/03/2022 by the National Faceless Assessment Centre, Delhi for A.Y. 2017-18 on following grounds of appeal:

*“The grounds mentioned hereinafter are without prejudice to one another.*

*Transfer Pricing*

*1. The Transfer Pricing officer ("TPO"), the Assessing Officer ("AO") and the Dispute Resolution Panel, Bangalore ("DRP") have grossly erred in law and facts of the case in determining the Arm's length price ("ALP") of the Human resource services as NIL.*

*2. The learned TPO/ AO/DRP has erred in not considered the fact that the Human Resource services is as per the arm's length price adopting the transaction net margin method (" TNMM")*

3. *The finding of the learned TPO/ AO/ DRP that the Assessee has failed to substantiate receipt of human resource service with evidence for receipt of services is erroneous and against the facts of the case.*

4. *The learned TPO/AO/DRP has failed to appreciate the e-mails, policies and other documents submitted by the Assessee as evidence for receipt of the services.*

5. *The learned TPO/ AO/DRP has erred in questioning the benefits derived from the services when this cannot be challenged.*

*The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.*

*For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”*

2. The Ld.AR at the outset submitted that the issues raised by assessee hereinabove have been remanded by *Coordinate Bench of this Tribunal* in assessee's own case in *IT(TP)A Nos. 118 to 122/Bang/2018* by order dated 05/05/2022 by observing as under:

*“3. The assessee is engaged in the business of manufacture and sale of Carbon Blocks and brushes, fuses and heat exchangers and also trading in fuses. The assessee was formerly known as Carbon Lorraine India P Ltd and it is subsidiary of Le Carbone Lorraine S.A, France. The assessee has entered into several international transactions with its AE in all these years. We are concerned with the Management fee paid by the assessee to its AE. The assessee had paid to its AE for eight different types of services. The TPO, applying benefit test, determined the ALP of payment of management services as NIL. The conclusions of TPO given in AY 2009-10 are extracted below:-*

*“8.1 The taxpayer has not shown that the alleged services received from its AE for which payment of management fee amounting to Rs.91,51,375/- has been made, are required for the taxpayer's business and also that the taxpayer is not capable of getting these services locally or on its own.*

*8.2 The taxpayer did not prove with evidences that the services have been actually rendered by the AE for which said payment of management/maintenance fees have been made. At arm's length, the parties dealing in similar circumstances would have such evidences in possession.*

*8.3 No cost benefit analysis has been furnished by the taxpayer to show that, the taxpayer has benefitted out of*

*the alleged services and the payment is commensurate to the benefit received.*

*8.4 The taxpayer has also not furnished any details and evidences to show how the alleged services rendered by the AE are quantified at an arm's length condition. This shows that these management fees are not linked with actual services but a way to siphon of the profits with minimum incidence of tax.*

*8.5 The taxpayer did not show what is the tangible and substantial commercial benefit derived by the taxpayer from the alleged services and consequent payment of management/maintenance fees of Rs.91,51,375/- and consequently did not prove the arm's length nature of management fees paid to its AE."*

*4. The Ld CIT(A) accepted Arm's Length Price in respect of five items and confirmed the decision of TPO in respect of remaining three items. It is pertinent to note that the revenue has not filed appeals challenging the relief granted by Ld CIT(A) in respect of all the five years and hence the said issue has attained finality. The assessee is contesting the transfer pricing adjustment confirmed by the Ld CIT(A) in respect of following three items in all the five years:-*

<i>Assessment year</i>	<i>Strategy &amp; General management (Rs.)</i>	<i>Marketing, &amp; Commercial &amp; International relationship services (Rs.)</i>	<i>Human Resources Services ("HR Services") (Rs.)</i>
<i>2009-10</i>	<i>12,21,868/-</i>	<i>13,80,433/-</i>	<i>17,04,348/-</i>
<i>2010-11</i>	<i>15,28,642/-</i>	<i>13,32,855/-</i>	<i>20,30,936/-</i>
<i>2011-12</i>	<i>18,77,187/-</i>	<i>13,55,433/-</i>	<i>18,92,768/-</i>
<i>2012-13</i>	<i>13,39,049/-</i>	<i>8,40,840/-</i>	<i>10,76,714/-</i>
<i>2013-14</i>	<i>12,14,847/-</i>	<i>10,67,857/-</i>	<i>29,56,967/-</i>

*5. The Ld A.R submitted that*

*(i) the TPO is not justified in applying benefit test in determining the ALP of the international transactions.*

*(ii) the TPO, having accepted the ALP of international transactions at entity level under TNM method and also on noticing that the management fee formed part of operating expenses, could not have made adjustment separately for payment of management expenses.*

*(iii) the TPO was not justified in not determining ALP by following one of the prescribed methods in accordance with sec.92C(3) of the Act, since his role is determination of ALP only and nothing else. Hence determination of ALP at NIL by applying benefit test is not in accordance with the provisions of Chapter X of the Act and also beyond his jurisdiction.*

*(iv) the TPO has erred in failing to appreciate that the AAR, in the assessee's own case reported as Mersen AAR (2012) 208 Taxman 486 (AAR) has upheld, on identical set of facts, the argument of the revenue that the associated enterprises is not only rendering managerial and consultancy services to the assessee, but also is making available to technical knowledge to the assessee. Hence the revenue could not have taken a different stand in the years under consideration.*

*(v) the Ld CIT(A) was not justified in confirming the action of the TPO in respect of above said three services.*

*In support of above said contentions, the Ld A.R placed his reliance on host of case laws.*

*6. We heard Ld D.R and perused the record. We notice that the TPO has accepted that the international transactions at "entity level" is at arm's length. We also notice that the management fee paid by the assessee formed part of operative expenses. Hence the Ld A.R has contended that the TPO could not have benchmarked management fee paid by the assessee separately. We also notice that the TPO has determined ALP of management fee payment by applying benefit test. The Ld AR also contended that the ALP of international transactions should be determined by TPO under one of the prescribed methods only. It is also submitted by the ld A.R that the revenue has taken stand before AAR in the assessee's own case that the AEs are not only rendering managerial and consultancy services to the assessee, but also is making available to technical knowledge to the assessee. Accordingly he contended that the TPO could not have taken different view in these years.*

*7. It is well settled proposition of law that the ALP of international transactions could be determined by TPO under one of the prescribed methods only. However, in the instant case, the TPO has applied benefit test and determined ALP of payment of management services as NIL. Hence the approach of the TPO is not in accordance with the mandate of law. The Ld A.R has also raised two other contentions*

*(i) with regard to the necessity of segregating this transaction, when the ALP had been determined at entity level aggregating the payment of management fee and*

*(ii) with regard to not following the decision rendered by AAR in the assessee's own case in an earlier year.*

*We notice that the Ld CIT(A) has held that the principle of res-judicata cannot be applied in income tax proceedings and accordingly refused to follow the decision rendered by AAR. We are unable to agree with the view so expressed by Ld CIT(A). When the assessee is making identical payment every year for identical services provided by AE and the revenue*

*has taken a particular stand with regard to the services so provided by the AE, in our view, there is no scope for applying the principle of res-judicata in other years for this matter for taking different stand in others for the identical payments made by the assessee. However, it is not clear as to whether the decision rendered by AAR against the assessee has attained finality or not.*

*8. Accordingly, on a conspectus of the matter, we are of the view that the issue relating to transfer pricing adjustment in respect of three types payments referred in the table issue needs to be examined in the light of contentions of the assessee discussed supra at the end of TPO/AO. The tax authorities should first examine the contention of the assessee that there is no requirement of making separate bench marking for these services, when they are aggregated and the ALP of international transactions were accepted to be at arm's length. The AO/TPO should also take into consideration the decision rendered by AAR in the assessee's own case, if it has attained finality. After carrying out these exercises, if the AO/TPO comes to the conclusion that the bench marking is still required to be made, then the TPO shall determine ALP of these transactions under one of the prescribed methods only. The assessee shall be given adequate opportunity of being heard."*

3. Admittedly, the Ld.DR did not object for the remand of the issues to the Ld.AO/TPO for *denovo* verification. Considering the submissions by both sides, we remit the entire issue alleged by assessee in the present appeal to the Ld.AO/TPO to be considered in accordance with the directions given by *Coordinate Bench of this Tribunal* in assessee's own case (supra).

**In the result, the appeal filed by the assessee stands partly allowed for statistical purposes.**

**Order pronounced in the open court on 08<sup>th</sup> August, 2022.**

Sd/-  
(CHANDRA POOJARI)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 08<sup>th</sup> August, 2022.  
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore