

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

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

IT(TP)A Nos.701 & 702/Bang/2021
Assessment Years: 2005-06 & 2006-07

M/s. Wipro GE Healthcare Private Ltd. No.4, Kadugodi Industrial Area Whitefield, Bangalore 560 067 (Presently at Prestige Shanthiniketan, 6 th Floor, Crescent 4, ITPI, Whitefield, Bangalore 560 048)	Vs.	ACIT Circle 7(1)(1) Bangalore
PAN No.AAACW1685J		
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Pradeep & Smt. Girija G.P., A.Rs
Respondent by	:	Shri V.S. Chakrapani, D.R.

Date of Hearing	:	21.06.2022
Date of Pronouncement	:	05.08.2022

O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These appeals by assessee are directed against different orders passed u/s 143(3) r.w.s. 254 r.w.s. 144C(13) of the Income-tax Act,1961 [‘the Act’ for short] by Dispute Resolution Panel (“DRP”). Grounds raised by the assessee in both these appeals for the A.Ys 2005-06 & 2006-07 are common and for the sake of convenience, both are heard together, clubbed together and disposed of by this common order for the sake of convenience.

ITA No.701 & 702/Bang/2021 for the AY 2005-06 & 2006-07:-

First we will take up ITA No.701/Bang/2021 for the AY 2005-06:

Grounds in ITA No.701/Bang/2021 for the AY 2005-06:

1. *That the order of the Assessing Officer (AO), Transfer Pricing Officer (TPO), the directions of the Dispute Resolution Panel (DRP) and the order of the transfer pricing officer in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.*
2. *That the total income computed and the total tax computed is hereby disputed.*
3. *That the Order of the authorities below violates the principles of judicial discipline as the binding nature of the orders of the higher appellate authorities have been totally ignored.*
4. *The authorities below erred in not considering the details, evidences and information furnished by the assessee before passing the orders.*
5. *The authorities below erred in making adjustment towards the royalty for use of technology amounting Rs.1,74,04,730/- without determining the comparable transaction in the public domain as prescribed under the Act and Rules.*
6. *The authorities below have erroneously and contrary to Rule 10B(3) have relied on Advanced Micronic Devices Ltd (AMD) as a comparable even after noticing that there was no payment of Royalty by the said AMD.*
7. *The authorities below have deliberately overlooked the binding direction of the ITAT for the impugned year that the Royalty expense should be considered as part of the Distribution/Trading segment.*
8. *The authorities below erred in disallowing the commission expenditure to dealers amounting to Rs.2,42,33,641/- u/s 37 of the Act by holding it as not wholly and exclusively incurred for the purposes of business.*
9. *The above disallowances have been made ignoring the binding principles of natural justice as required under law and the Act.*
10. *The authorities below erred in adopting the assessed income at Rs.46,46,73,880/- without any discussion or providing reason whereas the Assessing Officer in his order dated 04.09.2013 has determined the*

income at Rs.4,33,24,017/-. It is prayed that the assessed income should ...be as per the order dated 04.09.2013 and disallowance/adjustment should be based on the said amount.

- 11. The appellant denies the liability for interest u/s 234B of the Act. Further prays that the interest if any should be levied only on returned income. No opportunity has been given before the levy of interest u/s 234B of the Act.*
- 12. Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant begs for consequential relief in the levy of interest u/s 234B of the Act.*
- 13. For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered.*

2. Ground Nos.1 to 4 are general in nature, which do not require any adjudication.

3. Ground No.5 & 6 are with regard to TP adjustment of Rs.1,74,04,730/- towards royalty payment.

3.1 This issue was considered by this Tribunal on earlier occasion in assessee's own case and this Tribunal in IT(TP)A No.40/Bang/2011 for the assessment 2005-2006 and the Tribunal vide order dated 21.4.2017 set aside this issue to the file of AO/TPO for fresh consideration, of which the TPO/AO sustained addition of Rs.1,74,04,730/-. Against this assessee is in appeal before us.

3.2 The assessee has paid royalty of Rs.1,74,04,730/-. Royalty has been paid having regard to the support services by the Group company. The assessee is in the business of advanced diagnostic equipment. After sales support becomes a critical component for the equipment sold. The assessee's group affiliates have extended a unique condition wherein the equipment is under constant monitoring through the network of satellites. The advantage of such a system is that it allows remote

monitoring besides remote maintenance. The assessee is a beneficiary of such facility. It would have cost hundreds of millions of dollars to have an own exclusive facility besides the assessee also does not have such technology to put up the facility. It would not have made any economic sense to facilitate such facility independently. Thus, the payment of royalty enhances the commercial value for the business of the assessee.

3.3 The Tribunal for AY 2005-06 and 2006-07 in IT(TP)A 40/B/11 & 1647/B/13 dt.21.04.2017 has set aside the issue of royalty to the file of the TPO/AO for reconsideration in the light of the directions of the Tribunal for the AY's 2002-03 to 2004-05. The Tribunal has dealt with the issue in para 16 to 18 of the order. Relevant portion is extracted as under:

''18. Since the issue was already set aside to the file of the Assessing Officer for choosing the proper comparable therefore in view of the earlier year of this Tribunal, we set aside this issue to the record of the TPO/AO for reconsideration of the same in the light of the directions of the Tribunal for the Assessment years 2002-03 to 2004-05 (supra). Further in case no comparable is found in respect of royalty payment by the assessee then the TPO/AO may consider the royalty payment as part of the international transactions under trading segment and then determine the ALP by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment.''

3.4 During the set aside proceedings, the assessee vide reply dt.05.06.2019 submitted that by considering royalty payment as part of the international transaction under trading segment, the margin of the assessee is higher than that of the comparable company. However, the TPO in para 4.5 & 4.6 has stated as follows:

''4.5 During the set aside proceedings, the taxpayer has not identified any comparable in respect of the royalty payment. Since the TPO has chosen the company, M/s Advanced Micronic Devices Ltd., as a comparable to the taxpayer, in the trading segment, the same is considered as comparable for the royalty transaction also.''

4.6 The R&D expenses of the comparable & royalty over net sale is considered as per the annual report for the current year is:

<i>Sl No</i>	<i>Company name</i>	<i>R&D Exp</i>	<i>Royalty/ trademark</i>	<i>Net sale</i>	<i>Margin over sale</i>
1	Advanced Micronic Devices Ltd.	0	0	2684.75 lakhs	0%
	Average				0%

The computation of ALP of the royalty payment is made using CUP/CUT method using the above-mentioned comparable as follows:"

3.5 From the above, it can be seen that the AO has chosen M/s Advanced Micronic Devices Ltd as a comparable which has not incurred any royalty payment as the company has no trademark licensed to it. Due to lack of comparable transaction, ex-facie the company cannot be considered as a comparable with the assessee. The adoption of CUP method is also not as per law in the absence of comparable transaction. Hence in the impugned case, there is no comparable identified as required in law by the TPO. In the absence of comparable transaction, the Tribunal has held as extracted supra that the royalty payment be considered as operating cost in the trading segment. The TPO has adopted M/s Advanced Micronic Devices Ltd as a comparable in the trading segment. By applying the same, the assessee in its reply dt.05.06.2019 has worked out the margin by considering royalty as part of the trading segment. The margin of the assessee in the trading segment works out to 39.49% after considering royalty as operating cost as against the margin of the comparable M/s Advanced Micronic Devices Ltd being 28.06%. Since the margin of the assessee is higher than that of the comparable, the transaction is at arm's length and consequently the addition requires to be deleted.

3.6. The Ld. D.R. submitted that there is no proof of any services having actually been rendered by the A.E. The facts of issue shows that the services, even if any, rendered by the A.E. were mere duplication of the functions being carried out by the tax payer on its own and independently. The assessee did not get any economic value from the alleged trade mark/trade name fee paid. The ALP of the so-called trade mark/trade name for charges so paid by the assessee was determined as nil and he prayed that the same to be confirmed.

3.7 We have heard the rival submissions and perused the materials available on record. In earlier occasion, assessee came in appeal before this Tribunal. The Tribunal remitted the issue with the directions in IT(TP)(A) No.40/Bang/2011 & 1647/Bang/203 dated 21.4.2017 as discussed in para 3.3 of this order.

3.8 On set aside assessment, the TPO repeated the same what he has done on earlier occasion without considering the direction of the Tribunal where the Tribunal given a direction that in case comparable is not found in respect of payment of royalty by the assessee, then the TPO/AO may consider the royalty payment on part of the international transaction under trading segment and determine the ALP by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment. Before us, Ld. A.R. submitted that if it is considered as operating cost, then the margin of the assessee is higher than the margin of comparable i.e. M/s. Advance Micronic Devices Ltd. In our opinion, the AO has to consider this royalty payment as an operating cost and has to verify whether the margin of assessee is higher than the margin declared by the comparable company i.e. M/s. Advance Micronic Devices Ltd. and decide accordingly. In view of this, the issue in dispute is set aside to the file of AO/TPO for the limited purpose for comparison of margins with the comparable company and decide accordingly.

4. Next ground No.8 is with regard to sustaining addition of Rs.2,42,33,641/- u/s 37 of the Act by holding that it was wholly and exclusively incurred for the purpose of business. Facts of this case are that this issue has been set aside by the Tribunal vide order cited (supra) for reconsideration by the AO/TPO. On set aside assessment the addition has been sustained by AO. Since the assessee has not substantiated those expenses as incurred wholly and exclusively for the purpose of business. Hence, the assessee once again in appeal before us.

4.1. The Ld. A.R. submitted that the impugned issue was set aside by the Tribunal in IT(TP)A 40/B/11 dt.21.04.2017 to the AO for reconsideration and adjudication. The AO vide his notice dt.11.11.2019 sought details of dealer commission. The assessee vide replies dt.27.11.2019 & 11.12.2019 submitted the party wise details of provision and payments along with the details of deduction of TDS and prayed that the same should be allowed as business expenditure. However, rejecting the details and information provided and the practice consistently followed by the assessee, the AO has disallowed the dealer commission as not incurred wholly and exclusively for the purposes of business and disallowed the same u/s 37 of the Act.

4.2 The assessee disagrees with the findings of the AO as he has erred in wrongly interpreting the facts, submissions, method of accounting and the practice consistently followed by the assessee. The sales are booked by various dealers appointed by the assessee and commission is paid on the sales made by them, however, the actual payment is made upon realization of the sales proceeds and on fulfilling other concomitant services / obligations. At the time of booking sales, the quantification of

commission to each dealer is uncertain in nature, hence the amount of dealer commission expense is not booked against particular dealer account, but carried in the books under "Other Liabilities" account. Once the dealer fulfils the conditions related to the sales, he becomes eligible to claim the commission. Then, the commission will be moved from "Other liabilities" account to respective dealer account, and paid immediately after deducting TDS on the same. This practice is followed consistently and TDS is deducted where ever applicable. Hence it is prayed that the dealer commission incurred be allowed in the interests of justice as the same has been wholly and exclusively incurred for the purposes of its business.

4.3. The Ld. D.R. submitted that Ld. DRP in his order observed that the assessee is not in a position to furnish the particulars (name, address, evidence of deduction of TDS, etc.) in respect of persons to whom commission amounting to Rs.2,42,33,641/- have been paid pertaining to AY 2005-06. Therefore, he is not in a position to prove identity of the payee, genuineness of expenses incurred and substantiate that expenses are incurred wholly and exclusively for the purpose of business. The assessee's claim of following the practice of accounting also could not be substantiated as the assessee is unable to discharge the primary onus of establishing the identity and the genuineness of the transaction. In view of the circumstances, Ld. DRP held that the assessing officer has correctly held that the dealer commission amounting to Rs.2,42,33,641/- has not been incurred wholly and exclusively for the purpose of business.

4.4. We have heard the rival submissions and perused the materials available on record. The assessee claimed that it has paid a sum of Rs.2,42,33,641/- towards commission to dealers and according to the assessee, it is wholly and exclusively incurred for the purpose of

business. Further, assessee submitted the list of payments made to various parties and also furnished the details of deductions of TDS at the time of payment of commission to various dealers. It was also noted that in the case of receipt of this commission by those parties, the department has accepted it. However, in the hands of assessee it was treated as not incurred by the assessee, which is incorrect. Further, the books of accounts of the assessee is not rejected by challenging the entries in the books of accounts. On this point also, we are of the opinion that the claim of assessee is to be allowed as genuine. Accordingly, we allow this ground of appeal taken by the assessee.

4.5 In the result, the appeal of the assessee in ITA No.701/Bang/2021 is partly allowed for statistical purposes.

ITA No.702/Bang/2021 for AY 2006-07:-

Grounds:-

5. Now we will take up ITA No.702/Bang/2021 for the AY 2006-07. Ground Nos.1, 2 & 3 are general in nature, which require no adjudication.

1. *“That the Order of the Assessing Officer (AO), Transfer Pricing Officer (TPO), the directions of the Dispute Resolution Panel (DRP) and the order of the transfer pricing officer in so far as it is against the appellant is against the law, facts, circumstances, natural justice, equity, without jurisdiction, bad in law and all other known principles of law.*
2. *That the total income computed and the total tax computed is hereby disputed.*
3. *That the Order of the authorities below violates the principles of judicial discipline as the binding nature of the orders of the higher appellate authorities have been totally ignored.*
4. *The authorities below erred in making adjustment towards the royalty for use of technology amounting Rs.2,76,52,064/- without determining the*

comparable transaction in the public domain as prescribed under the Act and Rules.

5. *The authorities below have erroneously and contrary to Rule 10B(3) have relied on Advanced Micronic Devices Ltd (AMD) as a comparable even after noticing that there was no payment of Royalty by the said AMD.*
6. *The authorities below have deliberately overlooked the binding direction of the ITAT for the impugned year that the Royalty expense should be considered as part of the Distribution/Trading segment.*
7. *The authorities below erred in adopting the assessed income at Rs.41,56,51,579/- instead of the returned income which was Nil. All the additions have been deleted and the only issue remaining is the aforesaid Royalty adjustment. Hence the assessed income computed is erroneous.*
8. *The appellant denies the liability for interest u/s 234B & 234D of the Act. Further prays that the interest if any should be levied only on returned income. No opportunity has been given before the levy of interest u/s 234B & 234D of the Act.*
9. *Without prejudice to the appellant's right of seeking waiver before appropriate authority the appellant begs for consequential relief in the levy of interest u/s 234B & 234D of the Act.*
10. *For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the assessee requests that the appeal be allowed as prayed and justice be rendered."*

5.1 With regard to ground Nos.4 to 6 the facts of the case are as follows:-

5.2 The addition proposed in the draft assessment order on which the assessee has filed its objections are hereunder:

a) Adjustment u/s 92CA (Arm's length price difference in royalty payment) – Rs. 2,76,52,064/-

5.3 The assessee has paid royalty of Rs.2,76,52,064/- as in A.Y. 2005-06. Facts are also similar in this A.Y. as in A.Y. 2005-06.

5.4 In this assessment year 2006-07 also, the Tribunal set aside this issue in ITA No.1647/2013 on similar line as in AY 2005-06. As this issue was remitted to AO/TPO by us in earlier para of this order in A.Y 2005-2006, accordingly, this ground in this appeal is remitted to AO/TPO as in ITA No. 701/Bang/2021 on similar directions. This appeal of the assessee in ITA No.702/B/2021 is partly allowed for statistical purposes. The other grounds of appeal are consequential in nature and do not require any adjudication.

5.5 In the result, the appeal of the assessee in ITA No.702/Bang/2021 is partly allowed for statistical purposes.

6. In the result, the appeals filed by the assessee in ITA Nos.701 & 702/Bang/2021 are partly allowed for statistical purposes.

Order pronounced in the open court on 5th Aug, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 5th Aug, 2022.
VG/SPS

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.**