

IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI

BEFORE SHRI B. R. BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.1084/Mum/2021

(निर्धारण वर्ष / Assessment Years: 2016-17)

Ness Digital Engineering (India) Pvt. Ltd. (Formerly known as Ness Technologies (India) Pvt. Ltd. Unit No. 201, 2 nd Office Floor, Building No. 5 & 6, Mindspace SEZ, Thane Belapur Road, Airoli, Navi Mumbai-400708.	बनाम / Vs.	The Addl/Jt./Dy./ACIT/ITO, National e-Assessment Centre, Delhi.
स्थायी लेखा सं. /जीआइआर सं. /PAN/GIR No. : AAACA9649L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Devendra Jain
Revenue by:	Shri Samual Pitta (DR)

सुनवाई की तारीख / Date of Hearing: 03/08/2022

घोषणा की तारीख /Date of Pronouncement: 25/08/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order by the Assessing Officer (AO)/(National e- assessment Central. Delhi) dated 19.04.2021 for the assessment year 2016-17 passed u/s 143(3) r.w.s. 144C(13) read with section 144B of the Income Tax Act, 1961 (hereinafter “the Act”).

2. At the outset, the Ld. AR of the assessee brought to our notice that the sole issue (even though the assessee has raised ground nos. 1 to 8) is against the action of the AO/DRP in confirming the Transfer Pricing Adjustment (TPA) of Rs.73,69,403/- in relation to International Transactions of reimbursement of expenses received by the assessee company from its Associate Enterprises (AE).



ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.

3. Brief facts is that the assessee had filed original return of income on 30.11.2016 declaring the income of Rs.40,37,86,606/- under normal provisions of the Act and at Rs.54,25,53,781/- under the MAT provisions u/s 115JB of the Act. Later, the case was selected for scrutiny and the AO taking note that the assessee had international transaction reported in the Form 3CEB referred the same u/s 92CA(1) to the TPO for determination of Arm's Length Price (ALP) who noted the fact relating to the international transaction during the relevant year, wherein the assessee had recovered only expenses amounting to Rs.7,36,94,031/- from its AEs. And in this regard, the assessee explained that it only recovered from the AE's the expenses incurred by it on behalf of the AE's on cost to cost basis without mark-up. Further the assessee brought to the notice of TPO that these recoveries (actual expenses) were largely in the nature of cost of travel, accommodation, visa, per diem and other day to day expenses. And that the payments towards these expenses were initially made by the assessee only for administrative convenience and that there is no service element involved in the activities/transaction. However, the TPO did not agree even though the assessee filed sample copies of debit notes raised by the assessee on its AEs along with copies of corresponding debit notes raised by the AEs on the end clients which evidenced the one to one correlation between such costs recharged. Further, the assessee also pointed out the relevant paras of the inter-company agreement wherein it was agreed between the parties that all such travel and related expenses shall be separately charged on a cost



*ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.*

to cost basis. Thus, it was contended before the TPO that no mark-up should be levied on such reimbursement/cost recharged. However, the TPO did not agree, according to him the assessee has taken extra pains to provide these services to the AE on the spot by deputing its employees. And thus, there is certainly an element of service involved in the recovering these expenses, for which the AE is not charged any mark-up for these services. And therefore, he was of the opinion that the assessee ought to have earned a mark-up of 10%. Accordingly, a mark-up of 10% was added by him to compensate the AE for its service as well as the cost of provision of service as well as financial cost suffered by the assessee. And thus a sum of Rs.73,69,403/- was proposed to be adjusted u/s 92CA(3) of the Act. On appeal, before the Ld. DRP, the action of the TPO was confirmed. Aggrieved, the assessee is before us.

4. We have heard both the parties and perused the records. At the outset, the Ld. AR of the assessee brought to our notice that similar issue is permeating from earlier years from AY. 2011-12 onwards wherein the assessee's action of recovering expenses from its AEs on cost to cost basis without mark-up was interfered by TPO who had fixed mark-up 10% to compensate the assessee (as in this case) and similarly the DRP also had confirmed the same. And the assessee challenged the action for AY. 2011-12 before this Tribunal and the Tribunal for [ITA. No.696/Mum/2016 & IT(TP) A. No.1006/Mum/2016] by order dated 11.11.2016 was pleased to delete



ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.

the impugned adjustment/addition made by TPO/DRP by holding as under: -

“13.3 We have considered the rival submissions. At the outset, in our considered opinion, it would be appropriate to cull out appropriate facts which are relevant to decide the controversy. Notably, assessee is rendering services to its associated enterprises abroad for which it is to be compensated on a cost plus mark-up basis and such transactions have been separately bench-marked. In the course of rendering such services, assessee also incurred certain costs relating to travel, accommodation, visa, per diem and other day-to-day expenses, which were expended by its personnel. Further, assessee also incurred certain out of pocket expenses on the specific request of its associated enterprises. The responsibility for the aforesaid type of expenses was of the associated enterprises but the payment towards these costs were initially made by the assessee and thereafter, recoveries were made from the associated enterprises. Before the DRP, assessee also pointed out that such expenses, which are recovered by it from its associated enterprises, are in-turn recovered by the associated enterprises from the ultimate clients on a cost to cost basis. In this context, assessee furnished sample copies of debit notes raised by it on its associated enterprises alongwith copies of the corresponding debit notes raised by the associated enterprises on the ultimate clients. The aforesaid was canvassed by the assessee to substantiate that there was one to one correlation and that the entire exercise did not involve any element of profit or mark-up in the hands of the associated enterprises. The aforesaid material is placed at pages 518 to 612 of the Paper Book and which was also before the lower authorities. At the time of hearing, the Ld. Representative for the assessee had also referred to page 613 to 645 of the Paper Book, wherein are placed copies of assessee’s



*ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.*

arrangement with the associated enterprises and also the sample agreements between the associated enterprises and the ultimate clients, which prescribe that all impugned travel and related expenses are separately chargeable on a cost to cost basis. All this material clearly brings out a pertinent feature that in the entire transaction involving payment of expenditure by the assessee, its recovery from the associated enterprises, which-in turn recovers it from the end clients, there is no involvement of any profit-element in the hands of the associated enterprises. Therefore, it would be wrong on the part of the income tax authorities to take a position and infer notionally about recovery of mark-up or profit element in the hands of assessee. It has also been brought out that it is a standard practice in the I.T. Industry to recover out of pocket expenses incurred during the course of providing services for the clients on a cost to cost basis. Under these circumstances, in our view, the Transfer Pricing Officer erred in proceeding to infer a non-existent understanding between assessee and its associated enterprises so as to impute income qua the instant transaction in terms of section 92(1) of the Act. Another pertinent fact which has not been rebutted by the Revenue before us is to the effect that in similar situation, from assessment year 2004-05 to 2010-11, no transfer pricing adjustment has been made by the Assessing Officer in relation to the International Transactions on recovery of expenses.

13.4 Another aspect which emerges from the order of the TPO is as follows. After considering the factual matrix, the TPO has proceeded to determine the arm's length price for the service charges at 10% of the expenses recovered. Ostensibly, the income arising from an international transaction is liable to be computed, having regard to the arm's length price as mandated in section 92(1) of the Act. Section 92C prescribes the manner of determination of the arm's length price and sub-section (1) thereof specifically lays down various methods by



ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.

which the determination of arm's length price has to be made. It is quite clear that there is no adhocism permissible in the manner of computation of arm's length price of an international transaction, whereas the action of the Transfer Pricing Officer in considering the arm's length price @10% of the expenses recovered is not only adhoc but it also does not conform to any of the methods prescribed in section 92C(1) of the Act. On this count itself, the action of the TPO is suspect, even if, it is to be understood that the impugned transaction was an international transaction requiring computation of income having regard to its arm's length price.

13.5 Considered in the aforesaid light, in our considered opinion, the action of the Transfer Pricing Officer/Assessing Officer in making an addition of Rs.3,19,51,284/- deserves to be set-aside. We hold so. Thus, in so far as Ground of Appeal No.22& 23 are concerned, the same are allowed.”

5. Per contra, the Ld. DR relied on the order of the TPO/DRP but could not controvert the aforesaid decision of the Tribunal in assessee's own case for AY. 2011-12 and could not point out any change in facts or law in respect of this AY. 2016-17.

6. After having heard both parties and having carefully gone through the order of the Tribunal in assessee's own case on the issue in hand for AY. 2011-12 which has been followed in subsequent years wherein Tribunal deleted the adjustment/addition made on transfer pricing adjustment by observing that assessee received only the actual reimbursement of expenses and no mark-up as done by the TPO/DRP was warranted. And since the Ld. DR could not point out any change in facts or law in the aforesaid order in assessee's own case for AY.



ITA No.1084/Mum/2021
A.Y. 2016-17
Ness Technologies India Pvt. Ltd.

2011-12 vis-à-vis that of this assessment year AY. 2016-17, we direct the AO to delete the addition made on account of reimbursement expenses of Rs.73,69,403/-.

7. Ground nos. 9 & 10 relate to charging of interest u/s 234B of the Act, which are consequential in nature and does not require any specific adjudication.

8. Ground no. 11 relates to initiation of penalty proceedings u/s 271(1)(c) of the Act, which is premature and is dismissed.

9. In the result, the appeal of the assessee is partly allowed.
Order pronounced in the open court on this 25/08/2022.

Sd/-

(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 25/08/2022.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai