

IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 2078/MUM/2021
(ASSESSMENT YEAR: 2012-13)

DCIT, Circle 4(2)(1), Mumbai,
Room No. 642, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400020

..... Appellant

Vs

M/s Hamon Cooling Systems Private Limited,
3A-8A, Main Frame, Royal Palms Complex,
Goregaon (East), Mumbai - 400065
[PAN: AA ACT2254Q]

..... Respondent

Appearances

For the Appellant/Department : Shri Samruddhi D Hande
For the Respondent/Assessee : Shri Sanjay R Parikh

Date of conclusion of hearing : 21.06.2022
Date of pronouncement of order : 19.09.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Revenue has challenged the order, dated 07.09.2021, passed by the Ld. Commissioner of Income Tax (Appeals)-56, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had allowed the appeal filed by the Assessee against the Assessment Order, dated 12.04.2016 passed under section 143(3) read with Section 144C(3) the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Revenue has raised the following grounds of appeal:

- “1. *Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) is correct in holding that the adjustment on account of the Management fees and payment of R&D expenses be vacated without examining the observations made by the TPO regarding the inadequacy of the documentation submitted by the assessee regarding these services?”*
2. *“Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is correct in holding that the adjustment made by the TPO was not sustainable without examining the facts of the case and the evidences examined by the TPO and only relying on the judgement of the Hon'ble ITAT in a previous year?”*
3. *“Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) is correct in deleting the adjustment made by the TPO relying on the judgement of the Hon'ble ITAT for a previous year, ignoring the basic tenet that the transfer pricing audit is highly facts-intensive and facts-driven and the contemporaneous facts have to be considered and evaluated for every AY independently as dictated by Rule 10B(4) and by taking into account the comparability rules as enshrined in Rule 10B(2)?”*
4. *“Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) is right in ignoring the fact that judgment of Hon'ble ITAT in the same case for AY 2007-08, 10-11 and 11-12 dated 27.05.2020 relied by him and the judgements of the Hon'ble Bombay High Court in the case of CIT Vs Lever India Exports Ltd [(2017) 78 taxmann.com 88 (Bombay) and Hon'ble Delhi Court in the case of CIT Vs Cushman and Wakefield (India) Pvt Ltd ((2014) 367 ITR 730 (Del) relied by the Hon'ble ITAT specially in Transfer pricing adjudication cannot necessarily always be taken as a binding precedent unless facts and circumstances are in parimateria in a case cited before the Court and the applicability of the decisions and*

orders in transfer pricing adjudication can only come after it has been established that relevant facts are identical Transfer Pricing issues, being facts driven, the need and necessity to carefully examine the facts in order to cull out the relevant facts is thus imperative and the conclusion qua the functions performed vis-a-vis the functions assumed would be entirely different?"

3. The Assessee is a private limited company engaged, inter alia, in the business of manufacturing, designing, engineering and supplying of cooling towers. The Assessee is 50:50 joint-venture of HamonD'Hondt Group headquartered in Belgium and Shriram Group of India and was formerly known as Hamon Shriram Cottrell Private Limited.
4. The Assessee filed return for the Assessment Year 2012-13 on 29.11.2012 declaring income of INR 6,59,03,790/-. The case of the Assessee was selected for scrutiny. During the course of assessment proceedings, a reference was made to the Transfer Pricing Officer (TPO). Vide order dated 29.01.2016 passed under section 92 CA(3) of the Act, the TPO accepted the value of all the international transactions to be at arm's length except for the R&D Expenses and Management Fees in respect of which the TPO proposed upwards transfer pricing adjustment of INR 1,72,28,220 and INR 1,43,25,803/-, respectively. The Assessing Officer, vide Assessment Order dated 12.04.2016, passed under Section 143(3) read with section 144C(3) of the Act, made a transfer pricing adjustment of INR 3,15,54,023/- to the returned income to arrive at total assessed income of INR 9,74,57,817/-.
5. Being aggrieved, the Assessee preferred an appeal before CIT(A) which was allowed by the CIT(A) by following the decision

of the Tribunal in the case of the Assessee pertaining to the Assessment Years 2007-08, 2010-11 and 2011-12.

6. Being aggrieved, the Revenue has preferred the present appeal before us.
7. The Learned Departmental Representative appearing before us submitted that the CIT(A) has deleted the transfer pricing additions without examining the observations made by the TPO. He submitted that the CIT(A) has merely followed the decision of the Tribunal in the case of the Assessee without considering or evaluating the relevant facts pertaining to Assessment Year 2012-13. The CIT(A) failed to appreciate that while examining transfer pricing adjustment contemporaneous facts are to be evaluated for every assessment year independently. Contra Learned Authorised Representative for the Assessee submitted that the Assessee had filed sufficient documents to prove rendition of services. In this regard, he relied upon the documents forming part of the paper-book and referred to submission dated 31.03.2021, filed before the CIT(A). He further submitted that the CIT(A), after examining the relevant facts and circumstances noted that the TPO had quantified the transfer pricing adjustment on the ground of non-rendition of services rather than on determination of the arm's length price for such services. The transfer pricing adjustments for the earlier years had been worked out on the same basis and therefore, the CIT(A) deleted the transfer pricing additions by following decision of the Tribunal.
8. We have heard the rival contentions and perused the material on record. During the relevant assessment year the Assessee had claimed deduction for Research & Development Fee of INR

1,72,28,220/- and Management Fee of INR 1,43,25,803/- paid by the Assessee to its Associated Enterprises (AEs) Hamon Thermal Europe (Belgium) SA and Hamon & CIE- Belgium, respectively. The aforesaid transactions were benchmarked by the Assessee using internal comparables. During the assessment proceedings, the TPO observed that the documents furnished by the Assessee neither revealed the actual cost incurred by the AEs on Research & Development, nor provided the head-wise break-up for Management Services Fee. The calculations provided by the Assessee were nothing but cost allocation. Since the Assessee has failed to prove the actual cost incurred for each service, it was not possible to allow any amount in respect of the aforesaid services and therefore, their ALP was considered as 'Nil'. In the case of CIT Vs Lever India Exports Ltd: [2017] 292 CTR 393 (Bombay) it was held by the Hon'ble Bombay High Court that the TPO's jurisdiction was to only determine the Arm's Length Price (ALP) of the International Transaction. It is not part of TPO's jurisdiction to consider whether the expenditure incurred passes the test of Section 37 of the Act and/or genuineness of expenditure. We note that the TPO had accepted that some services forming part of Research & Development Service, and Management Service were rendered to the Assessee. However, since the Assessee had failed to provide the exact cost details and break-up, the ALP of the services as a whole was taken as 'Nil'. In our view, the TPO was under obligations to determine the ALP for the services as held by the Hon'ble Bombay High Court. In identical facts and circumstances, the Tribunal had allowed the appeal preferred by the Assessee for the Assessment Years 2007-08, 2009-10 and

2010-11 by way of common order, dated 27.05.2020 wherein it was held by the Tribunal as under:

“7. The adjustment proposed by the TPO has been on anything but the arm’s length price consideration. As a matter of fact he has not even disputed the arm’s length price for the management services but has suggested the ALP adjustment on the ground that a part of the payment is pertaining to provision for another year. The DRP has confirmed the ALP adjustment by observing that ‘receipt of benefit in lieu of payment of service charges is sine qua non to allow the deduction for such payment to compute the income’. It is also noted that “we also hold that the assessee has failed to explain and justify the allowability of R&D charges of prior years on merits and has also failed to show that it has benefited for such charges in the earlier years though the provision has been made in this year, and also failed to explain why the provision for the same was not made in the respective earlier years”. On tender fees, the ALP is not disputed and yet ALP adjustment is confirmed on the ground that the evidences furnished by the assessee are not sufficient to establish that any services were actually rendered and that the assessee has indeed benefited from these services, and that the expenses pertained to the previous years and that these expenses cannot be disallowed in the present year. What is, however, completely lost sight of is what was before the DRP was an ALP adjustment and that they have, even going by their own words, “enhanced” the ALP adjustments determined by the TPO, on the grounds which are wholly irrelevant for determination of the ALP by the TPO. It is not the case that the DRP has cancelled the ALP adjustments and taken up the matter, on altogether different ground, afresh. They have only approved the action of the TPO and enhanced the quantum of disallowance. While on this subject, it is useful to bear in mind the observations made by Hon’ble jurisdictional High Court, in the case of CIT Vs Lever India Exports Ltd [(2017) 78 taxmann.com 88 (Bombay)], as follows:

.....it must be emphasized that the TPO’s jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine

whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO The jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained.....

8. On a similar note, Hon'ble Delhi High Court, in the case of CIT Vs Cushman and Wakefield (India) Pvt Ltd [(2014) 367 ITR 730 (Del)], and approving the path followed by a decision of Mumbai bench of the Tribunal in the case of Dresser Rand India Pvt Ltd Vs Additional CIT [(2012) 13 ITR (Trib) 422 (Mum)], had observed:

xx xx

9. In the present case, the ALP adjustment has been made by the TPO and the DRP has "enhanced" the same. In the DRP order itself, it has been stated that "the TPO has suggested that the adjustment/ disallowance [Emphasis, by underlining, supplied by us now] of is justified". That, however, is factually incorrect and legally unsustainable in law. Neither the ALP adjustments can be equated with disallowances of expenses, even though effect may be same, nor the TPO has the authority to disallow the expenses. Clearly, the impugned ALP adjustments

are vitiated in law for this short reason alone. In any case, the observations with respect to the lack of evidence in support of the benefits is based on sweeping generalizations and is incapable of sustaining legal scrutiny.

10. In the light of the above discussions, as also bearing in mind entirety of the case, all the three ALP adjustments – namely (a) Research & Development expenses – Rs. 47,72,982/-; (b) Management fees – Rs. 22,52,219/-; and (c) Tender cost – Rs. 28,61,598 stand deleted. The assessee gets the relief accordingly.

11. In the result, the appeal is allowed in the terms indicated above.

12. We will now take up ITA No. 4771/Mum/2016 i.e. appeal of the assessee against the order dated 28th March 2016, passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2010-11.”
(Emphasis Supplied)

9. The above decision of the Tribunal was followed by the Tribunal while allowing the appeal of the Assessee for the Assessment Year 2009-10. The relevant extract of the decision of the Tribunal reads as under:

“5. We find that both these adjustments have been dealt with by coordinate bench of this Tribunal in assessee’s own case for AYS 2007-08, 2010-11 & 2011-12. The bench, inter-alia relying upon the decision of Hon’ble Bombay High Court in CIT V/s Lever India Exports Ltd. (78 Taxmann.com 88), deleted the adjustment vide paragraph 7 to 10 of the order. The relevant findings of the bench were as under: -

xxx xxx

We find that Ld. TPO has primarily relied upon the order of Ld. DRP in AY 2007-08 while proposing similar adjustments in this year. Since the order of Ld. DRP for AY 2007-08 has been reversed by Tribunal and the facts as well as findings of Ld. TPO / Ld. DRP are pari-materia the same, we are inclined to adopt the earlier view of the bench. Accordingly, both these adjustments

stands deleted. The assessee succeeds on both these grounds.”
(Emphasis Supplied)

10. The CIT(A) has allowed appeal of the Assessee for the Assessment Year 2012-13 by following above decision of the Tribunal holding as under:

“5.2 It is noted that similar adjustments/ disallowances have been deleted by the Hon'ble Tribunal in assessee's case vide common order dated 27 05 2020 for AY 2007-08, 2010-11 and 2011-12 The Hon'ble Tribunal has relied on the decisions of Hon'ble jurisdictional High Court. in the case of CIT VS Lever India Exports Ltd [(2017) 78 taxmann.com 88 (Bombay)] and Hon'ble Delhi High Court in the case of CIT VS Cushman and Wakefield (India) Pvt Ltd [(2014) 367 ITR 730 (Del)] The concluding paragraph of decision for AY 2007-08 is reproduced in assessee's submission above. Further, observing that the ALP adjustments in AY 2010-11 and 2011-12 are also quantified by the TPO on the grounds of non rendition of services rather than the arm's length price of the services as in AY 2007-08, the Hon'ble Tribunal has given relief in both years.

5.3 I find from TPO's order that transfer pricing adjustments have been worked out on the same basis as in earlier years Facts being same, respectfully following the orders of the Hon'ble Tribunal I hold that both the transfer pricing adjustments are not sustainable Ground No B and C are allowed accordingly.”
(Emphasis Supplied)

11. Since during the Assessment Year 2012-13 the TPO had adopted the same approach and determined ALP on ad-hoc basis as 'Nil', the CIT(A) was justified in deleting the transfer pricing additions by following the judgment of the Hon'ble Bombay High Court in the case of Lever India Exports Ltd (*supra*) and the decision of the Tribunal in appeals for the preceding assessment years 2007-08/2009-10/2010-11, and 2011-12. We do not find any infirmity in the order passed by the CIT(A). Further, the Assessee had furnished relevant documents/details of the actual

research & development cost vide letter dated 09.11.2015 and 13.01.2016. As regards, failure of the Assessee to provide service wise break-up of management fee, the Assessee had explained that the Assessee was being charged a lump sum fee for the management services and therefore, was not able to furnish the service-wise break up. However, the TPO failed to take the same into consideration.

12. In view of the above, Ground No. 1 to 5 raised by the Revenue are dismissed.

13. In result, the appeal preferred by the Revenue is dismissed.

Order pronounced on 19.09.2022.

Sd/-

(B.R. Baskaran)
Accountant Member

Sd/-

(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 19.09.2022
Alindra, 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