

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH “K”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.2213/M/2017  
Assessment Year: 2012-13**

M/s. Aker Powergas Pvt. Ltd., Powergas House, 83, I Think Techon Campus, Kanjurmarg (E), Mumbai – 400 042 <b>PAN: AAACD1981E</b>	Vs.	The Dy. Commissioner of Income Tax, Range – 15(1)(1), Room No.470, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Ketan Ved, A.R.  
Shri Ninad A Patade, A.R.  
Ms. Shraddha Jain, A.R.

Revenue by : Ms. Samruddhi Dhananjay Hande, D.R.

Date of Hearing : 20 . 10 . 2022

Date of Pronouncement : 31 . 10 . 2022

**ORDER**

**Per : Kuldip Singh, Judicial Member:**

Appellant M/s. Aker Powergas Pvt. Ltd. (hereinafter referred to as ‘tax payer) by filing the present appeal sought to set aside the impugned order dated 31.01.2012 passed by the Assessing Officer (AO) inconsonance with the order passed by the Dispute Resolution Panel (DRP) dated 23.12.2016 and order passed by Transfer Pricing Officer (TPO) under section 92CA(3) dated 31.01.2017 under

section 143(3) read with section 144C(3) read with section 144B of the Income Tax Act, 1961 (for short 'the Act') qua the assessment year 2012-13 on the grounds inter-alia that :-

***“1.1 The learned DCIT / Dispute Resolution Panel ("DRP") has erred in upholding an adjustment of Rs. 45,600,001 in law and on facts, by determining the arm's length price ('ALP') of the international transaction pertaining to payment of management charges ("Area Management Cost / Corporate Management Cost") made to the associated enterprise ("AE") at NIL.***

***1.2 The learned DCIT / DRP has failed to appreciate the fact that though APA signed between the appellant and CBDT pertains to subsequent financial years, it has a persuasive value and can be considered for the year under consideration.***

***1.3 The learned DCIT / DRP has erred in not understanding the contention of the appellant for submission of the documents by the appellant as per the Advance Pricing Agreement ('APA') entered into by the appellant with the Central Board of Direct Taxes CCBDT).***

***1.4 The learned DCIT / DRP has erred in rejecting Transactional Net Margin Method ("TNMM") selected by the Appellant in its transfer pricing study report for benchmarking the transaction of payment of management charges and failed to appreciate that the management charges was incurred in connection to the main business activity of the assessee i.e. engineering design services. Further, the learned DCIT / DRP has erred in taking a different view from the view taken by the CBDT in the APA signed with the appellant.***

***1.5 The learned DCIT / DRP has failed to appreciate the fact the in subsequent year i.e. in FY 2012-13, the transfer pricing officer has accepted the international transaction of management charge at ALP.***

***1.6 The learned DCIT / DRP has erred in considering comparable uncontrolled price ("CUP") method as most appropriate method without using any comparable uncontrolled transaction for benchmarking the transaction of payment of management charge to its associate enterprise ("AE"). Further, in the absence of comparable uncontrolled transaction, the learned DCIT / DRP has erred in determining the arm's length price as NIL.***

***1.7 The learned DCIT / DRP has erred in not considering the cost allocation certificate provided by external auditor in correct perspective.***

**1.8** *The learned DRP has erred in upholding the action of the TPO to verify the existence-? of se-vices rendered and the benefits derived from the same, which was the prerogative of the DCIT end which was beyond the authority of the TPO.*

**1.9** *Without prejudice to the above ground, the learned DCIT / DRP, based on documentary evidences submitted, failed to understand and appreciate that services were rendered and benefits were derived by the appellant which were primarily intangible in nature.*

**1.10** *The learned DCIT / DRP did not take into account appellant's submissions regarding reliance placed on Indian and international jurisprudence for justification on payment for availing management services.*

## **2. Disallowance of software expenses**

**2.1** *The learned DCIT/DRP erred in disallowing computer software expenses of Rs.14,74,19,626 which are revenue expenses, by treating the same as capital in nature.*

**2.2** *The learned DCIT/DRP erred in observing that since the usage of software is for more than two years it can be called a capital asset, without appreciating that the contract with clients spans over a year but the fees for software license were charged to the appellant for actual usage during the year or for a period of less than one year. There was no acquisition of software but the payments were for actual usage during the year.*

**2.3** *The learned DCIT/DRP erred in not following the order of the Hon'ble Income-tax Appellate Tribunal [ITAT] in the appellant's own case for assessment year 2009-10 wherein based on similar facts, the Hon'ble ITAT had held that software expenses should be allowed as revenue expenditure.*

## **3. Effect to directions issued by the Hon'ble DRP**

**3.1** *The learned DCIT erred in not giving effect to the following directions of the DRP passed on 23 December 2016:*

- **Negative turnover and prior period expense of Rs. 15.34.411**  
**Para 4.3.1 at page no. 23 of the DRP directions -**

*"Since, there is no change in fact in this year regarding the prior period expense, respectfully following the directions of this panel in AY 2009-10, AY 2010-11 and AY 2011-12, the objection is accepted and the AO is directed to allow the deduction of Rs. 15,34,411 to the assessee."*

- **Disallowance of Rs. 72,23,445 under section 14A read with rule 8P of the Income-tax Rules, 1962**

*Para 5.3 at page no. 32 of the DRP directions -*

*"...However, we are in agreement with the claim of the assessee that investment in Growth mutual funds and taxable bonds of Rural Electrification Corporation Ltd. should be excluded from the list of investment for earning exempt income. The AO is directed to recalculate the amount of disallowance accordingly."*

**4. Initiation of penalty proceedings**

*The learned DCIT erred in initiating penalty proceedings under section 271(l)(c) against the appellant."*

2. Briefly stated facts necessary for adjudication of the issues at hand are: the tax payer is engaged in the business of engineering consultancy. It carries out detailed design engineering for chemical and petrochemical plants, ferrous and non ferrous metal products, and turnkey projects. The services are inextricable linked with the setting up of plants/projects of their clients, though the tax payer does not physically render construction services it is responsible for the successful completion and commissioning of the plant which are normally built on the basis of detailed drawings and designs provided by the tax payer company.

3. During the year under consideration the tax payer entered into international transaction with its Associated Enterprises (AEs) exceeding Rs.15,00,00,000/- and as such transactions referred in form No.3CEB to the TPO to determine the arms length price. The Ld. TPO passed the order under section 92CA(3) dated 28.01.2016 by making adjustment to the arms length price by Rs.7,60,41,287/- qua the international transactions entered into between the tax payer company and its AEs. AO also made addition of Rs.5,89,67,850/-

by way of disallowance on account of software expenses claimed by the tax payer. The AO also made addition of Rs.78,62,075/- under section 14A read with rule 8D and thereby framed the assessment at the total income of Rs.1,14,24,12,474/- and book profit under section 115JB of the Act at Rs.1,14,24,12,470/- under section 143(3) read with section 144C(13) of the Act. Pursuant to the order passed by the Ld. TPO/Ld. DRP, AO made addition of Rs.76,04,127/- on account of transfer pricing adjustment. Feeling aggrieved with the order passed by the AO/TPO/DRP tax payer has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

### **Transfer Pricing Grounds**

#### **Ground No.1.1 to 1.10**

5. At the very outset, the Ld. A.R. for the tax payer contended that he has raised a specific ground before Ld. DRP that though Advance Pricing Agreement (APA) signed between the tax payer and Central Board of Direct Taxes (CBDT) pertains to the subsequent financial years, it has a persuasive value and can be considered for the year under consideration. But Ld. DRP has erred in appreciating this fact. The Ld. A.R. for the tax payer relied upon the order passed by co-ordinate Bench of the Tribunal in case of FIS Global Business Solutions India Pvt. Ltd. vs. DCIT in ITA No.422/Del/2019 & ors order dated 18.06.2020.

6. On the other hand, the Ld. D.R. for the Revenue contended that since every year is to be decided separately on the basis of facts and circumstances of the case APA, if any, entered into between the tax payer and the CBDT cannot be applied to the year under consideration.

7. Undisputedly, for the subsequent years tax payer entered into APA with CBDT qua the identical TP grounds raised in this appeal. It is also not in dispute that business model of the tax payer has not undertaken any change vis-à-vis subsequent financial years. We are of the considered view that when TP issues are identical and there is absolutely no change in the business model of the tax payer during the year under consideration vis-à-vis subsequent financial years in which APA has already been entered into and complied with, the same APA may be applied to decide the transfer pricing issue in this case. The Ld. A.R. for the tax payer also relied upon the decision of co-ordinate Bench of the Tribunal in assessee's own case in ITA No.1766/M?2014 & ors. for A.Y. 2009-10 order dated 06.04.2016 and the decision of the Hon'ble Bombay High Court in case of PCIT vs. Aker Powergas Pvt. Ltd. in Income Tax Appeal (IT) No.1276 of 2017 order dated January 20, 2020.

8. Identical issue has been decided by the co-ordinate Bench of the Tribunal in case of FIS Global Business Solutions India Pvt. Ltd. (supra) by returning following findings:

***“22. We are of the considered view that contention raised by the ld. DR is not tenable for the reason that when undisputedly there is no change in the FAR of the taxpayer in the year under assessment vis-à-vis years covered under APA and consolidated margin (OP/OC) computed as per APA at 19.26% is much more than the consolidated margin agreed***

*upon between the taxpayer and the CBDT for the years covered under APA at 16.60% for both the segments, APA though not specifically applicable to the year under assessment, is having persuasive value to the dispute between the parties for other years.*

*23. Hon'ble Delhi High Court in the case of PCIT vs. Ameriprise India Pvt. Ltd. (supra) held that when under the APA entered into between the taxpayer and the CBDT under section 92CC aforementioned cost plus pricing methodology has been implicitly accepted, the APA has persuasive value to the dispute in question for other years.*

*24. Coordinate Bench of the Tribunal in the case of 3I India Private Ltd. vs. DCIT (supra) also relied upon APA entered into between the taxpayer and the CBDT for the subsequent years and has held as under:-*

*“18 Whence, on similar functions and the transactions the Arm's length price has been agreed at 21% which if compared with the margin of 20% in this year, then same is not at variance, therefore, it can be held that the assessee's margin of 20% for the functions performed are at Arm's Length Price. Accordingly, we hold that upward adjustment of Rs.8,83,93,866/- is without any basis and is directed to be deleted.”*

*25. Coordinate Bench of the Tribunal in another case tilted as Spencer Stuart (India) Pvt. Ltd. vs. ACIT (supra) also decided the identical issue in favour of the taxpayer in the similar facts and circumstances by relying upon the APA which was for subsequent years by observing as under :-*

*“13. We have considered rival contentions and carefully gone through the orders of the authorities below, APA dated 30th August 2016, as well as the order passed by the Tribunal dated 01/06/2018 in case of assessee's AE. We found that APA has laid down the application of most appropriate transfer pricing method and the arm's length price for these transactions. We also found that after having a great discussion, the Functions performed, assets employed and risk undertaken by the assessee and its associated enterprises was found to be reasonable. Accordingly, we allow assessee to withdraw these grounds for the A.Y.2008-09 and 2009-10 in so far as these grounds are covered by the APA, the principle laid down in the APA for benchmarking analysis in respect of the international transactions being guidance value since there is no change in the said assessment years in the nature of international transactions. We also direct the Department to pass an order giving effect u/s.92 CD (5) of the Act in the A.Y. 2010-11 & 2011-12. Whereas for A.Y.2008-09 and A.Y.2009-10, we observe that the principles laid down in the APA for*

*benchmarking/ comparability analysis in respect of the international transactions shall have a guidance value since there is no change in the said Assessment Years in the nature of the international transactions, functional, Asset and Risk ('FAR') profile of the assessee and the AEs. We direct accordingly."*

*26. So, in view of what has been discussed above and following the orders (supra) passed by the coordinate Bench of the Tribunal, we are of the considered view that when in the APA entered into between the taxpayer and the CBDT though for the roll back years and subsequent years, application of most appropriate transfer pricing method and arm's length price of these transactions have already been agreed upon between the taxpayer and CBDT and there is no change in the FAR and nature of international transactions entered into during the year under consideration vis-à-vis earlier years and subsequent years, principle laid down in the APA for benchmarking the international transactions in question shall have a guidance value. Moreso these days, it is endeavour of the Union of India to stop avoidable litigations and this case falls in the category of cases where litigation can be minimized."*

9. The Ld. A.R. for the tax payer also relied upon the decision rendered by Hon'ble Delhi High Court in case of PCIT vs. Ameriprise India Pvt. Ltd. in ITA No.206/2016 and the order passed by the co-ordinate Bench of the Tribunal in case of co-ordinate Bench of the Tribunal in case of Spenser Staurt (India) Pvt. Ltd. vs. ACIT in ITA Nos.7117/M/2012, 1680/M/2014, 922/M/2015 & 1832/M/2016 and 31 India Pvt. Ltd. vs. DCIT in ITA No.581/M/2015.

10. In view of the matter, we are of the considered view that when in the APA entered into between the tax payer and the CBDT though for the subsequent years, application of most appropriate transfer pricing method and arms length price of these transactions have already been agreed upon between the tax payer and CBDT and there is no change in the FAR and nature of the international transactions entered into during the year under consideration vis-à-

vis subsequent years, principle laid down in the APA for benchmarking the international transactions in question shall have a guidance value. Moreover, in these days it is endeavor of the Union of India to stop multiplicity of the litigation and this case falls in the category of cases where litigation can be minimized. Consequently, we are of the considered view that APA already entered into between the tax payer and CBDT has the persuasive value so the matter is remitted back to the TPO to decide afresh in the light of the APA already entered into by providing opportunity of being heard to the tax payer. So aforesaid grounds 1.1 to 1.10 are determined in favour of the assessee for statistical purposes.

### **Corporate Grounds:**

#### **Ground No.2**

11. TPO/DRP have disallowed computer software expenses of Rs.14,74,19,626/- by treating the same as capital in nature, which are under challenge before the Tribunal. Ld. A.R. for the assessee contended that this issue has already been decided in favour of the assessee by the co-ordinate Bench of the Tribunal which has already been confirmed by Hon'ble Bombay High Court vide order dated 20.01.2020 in ITA No.1276 of 2017. This fact is not disputed as DRP in para 3.2.1 has already admitted this fact by returning following findings:

*“3.2.1 The assessee has pointed out that the issue has been decided in its favour by the ITAT, Mumbai for A.Y.2009 - 10, vide order dated 6/04/2016 in ITA No.1355/Mum/2014. However, the assessee has failed to demonstrate as to whether the Department has accepted the decision of the ITAT or not. Since there is a change in the provisions of IT Act and the decisions of DRP are no longer appealable by the Department, to keep the issue alive and to protect the interest of the*

*revenue, the decision of the ITAT is not followed and the decision of the DRP in preceding years is being followed.”*

12. This issue has already been decided in assessee's own case by the co-ordinate Bench of the Tribunal which has since been confirmed by the Hon'ble Bombay High Court by treating the software expenses as revenue expenditure. The AO is directed to treat the computer software expenses claimed by the assessee as revenue expenses. Resultantly, ground No.2 is allowed in favour of the assessee.

**Ground No.3**

13. The Ld. A.R. for the assessee contended that Ld. DRP has issued directions to the AO qua the grounds raised by the assessee but same has not been complied with. When specific directions have been given by the Ld. DRP in para 4.3.1 at page No.23 and para 5.3 at page 32 of the DRP directions to the AO the same are required to be complied with. We direct the AO to comply with the said directions within 2 months.

14. Resultantly, appeal filed by the assessee is allowed for statistical purposes.

**Order pronounced in the open court on 31.10.2022.**

**Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 31.10.2022.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

*//True Copy//*

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.