

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

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| IT(TP)A No.195/Bang/2022 |
| Assessment year : 2017-18 |

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| Lenovo (India) Private Limited, Ferns Icon, Level 2, Doddenakundi Village, Marathahalli Outer Ring Road, Marathahalli Post, K.R. Puram Hobli, Bangalore – 560 037. PAN: AABCT 3372H | Vs. | The Income Tax Officer, Ward 4(1)(1), Bangalore. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri Padam Chand Khincha, CA |
| Respondent by | : | Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 17.01.2023 |
| Date of Pronouncement | : | 31.01.2023 |

ORDER

Per Padmavathy S., Accountant Member

This appeal is against the order of the Assessing Officer (AO) National Faceless Assessment Centre (NFAC) passed u/s.143(3) r.w.s.144C(13) of the Income Tax Act (the Act) dated 28.01.2022 for the assessment year 2017-18.

2. The assessee is a company incorporated under the Companies Act 1956. The assessee primarily imports Personal Computers ("PCs")

from its Associated Enterprises ("AEs") and resells the same in India via its distribution channels. The assessee also assembles PCs in India using the components it imports from its AEs and subsequently sells them in the Indian market. The assessee filed the return of income filed for the AY 2017-18 on 30.11.2017 declaring a total income of NIL. The case was selected for scrutiny assessment proceedings under CASS and the statutory notices were duly served on the assessee. During the course of the assessment proceedings, the AO made a reference of international transactions entered into by the assessee to the Transfer Pricing Officer ("the Ld. TPO") for determining the Arm's Length Price ("ALP") of such transactions under Section 92CA of the Act. The TPO made a total adjustment of Rs.168,5,82,798 the break up of which is as follows -

- (i) Adjustment to the manufacturing segment – Rs. 57,52,661
- (ii) Adjustment on account of excess AMP expenditure – Rs. 157,19,22,677
- (iii) Administrative and Business Support Services – Rs. 8,44,80,389
- (iv) Sales facilitation services – Rs. 2,34,27,071

3. The AO passed the draft assessment order against which the assessee raised objections before the DRP. The DRP upheld the action of the TPO and confirmed the above adjustment. According the AO passed the final assessment order and the assessee is in appeal against the same before the Tribunal.

4. The assessee raised the following grounds of appeal –

- (i) Ground No.1 to 3 and Ground No.47 to 49 – General

- (ii) Ground No. 4 to 13 – TP adjustment to the manufacturing segment
 - (iii) Ground No.14 to 36 – TP adjustment on account of excess AMP expenditure pertaining to Trading segment
 - (iv) Ground No.37 to 40 – TP adjustment in relation to Administrative and Business Support Services and Sales facilitation services
 - (v) Ground No.42 – Error in considering the assessed income in final assessment order
 - (vi) Ground No.43 – Not granting Brought forward loss
 - (vii) Ground No.44 - Error in considering the Book Profits in final assessment order
 - (viii) Ground No.45 – Not granting appropriate TDS credit
 - (ix) Ground No.46 – Interest u/s.234B
5. Ground No 1 to 3 and Ground No.47 to 49 are general not warranting separate adjudication.

TP adjustment to the manufacturing segment

6. Ground No. 4 to 8 raised are in relation to determination of ALP in respect of import of parts and components from its AE in Manufacturing Segment. During AY 2017-18, the assessee imported certain parts and components from its AEs for purpose of manufacturing of PCs. It also imported parts and components from third parties. The methodology adopted by Lenovo India in relation to the manufacturing segment is as under:

| Nature of international transaction | MAM | Value as per books of accounts | ALP as determined by Appellant | Remarks |
|---|------------|---------------------------------------|---------------------------------------|--|
| Import of parts and components for manufacture of PCs | CUP | 129,43,02,775 | 123,63,72,619 | Suo-moto adjustment of INR 5,79,30,156 is made in the Return of Income for prices not at ALP |

7. As per the TP study which is part of the records submitted by the assessee -

In relation to the manufacturing activity, the assessee assumes most of the risks including market risk, inventory risk, credit and collection risk, forex risk, warranty and idle capacity risk and on the functions and risks performed the assessee is characterized as a “full-fledged manufacturer” for its manufacturing activity. The basis of benchmarking the aforesaid transaction is provided below:

- During the FY 2016-17, Lenovo India imported 402 different varieties of products from its AEs which can be identified on the basis of a distinctive code. Out of 402 products, 262 products were purchased from its AEs exclusively while the rest 140 were purchased from AEs as well as from unrelated third-party vendors.
- To identify internal CUPs, Lenovo India has prepared a list of the products imported from its AEs for the FY 2016-17. This list provides for the weighted average of the prices paid during the year for the products imported from AEs. Each of these parts is identified based on a distinctive product code.
- With respect to the imports from AEs, the Company conducted a search (based on product code) to identify similar products, imported from unrelated vendors for the FY 2016-17. This process resulted in the identification of potential internal comparables for 140 of the products imported. Against each product code, the

average price per unit from unrelated vendor is compared to the price paid to its AEs.

Products imported from AEs only (262 products)

8. With respect to the imports from AEs only, the prices paid by AEs to its third-party vendors were considered as CUP. In this regard:

- Out of the 262 products, 126 products were sold by the AEs on a cost-to-cost basis. Accordingly, the same has been considered to be at ALP.
- On the balance 136 products, the AEs have sold the products to Lenovo India at a price at cost plus 0.5 percent margin. The Company believes that the difference from the ALP is not material and has therefore not undertaken any further analysis for such reasons for differences. With regard to the same, suo-moto adjustment of INR 62,589 is made in the Return of Income.

Products imported from AEs as well as third party vendors (140 products)

With respect to the imports from AEs as well as third parties, the prices paid by Lenovo India to third party vendors were considered as CUP:

- Out of 140 products imported from AEs and third parties, 40 products imported by Lenovo India were at a price lower than the price at which Lenovo India purchased from unrelated parties. Accordingly, the prices paid for these imports have been considered to be at ALP.
- With respect to remaining 100 products that did not fall within the arm's length price, the Company believes that the difference from the ALP is not material and has therefore not undertaken any further analysis for such reasons for differences. With regard to the same, suo-moto adjustment of INR 57,867,567 is made in the Return of Income.

9. The TPO rejected the transaction-wise benchmarking approach adopted by the assessee and proposed to adopt an aggregation approach with the TNMM method as the MAM for benchmarking on segment basis. The TPO did not accept the aforesaid TP analysis for the reasons as given under:

1. Non-availability of reliable data in order to compare the degree of comparability between the international transaction and uncontrolled transactions.
 2. Weighted average rate is not an uncontrolled transaction that can be compared with the purchases made from AEs / Non-AEs since the level of obsolescence in the computer hardware industry is very high
 3. Industry average billing rate cannot be considered in this method by relying on the decision of the Bangalore ITAT in the case of Aztec Software & Technology Services vs ACIT
 4. There is no publicly available information on prices charged in independent transactions of similar or identical nature, so external CUP cannot be applied.
10. Upon rejection of CUP method adopted by the assessee, the TPO applied the Transaction Net Margin Method (TNMM) as the MAM and determined ALP which resulted in an addition of Rs. 57,52,661(Manufacturing Segment) to the returned income.
11. The assessee filed objection to the proposed addition before the Dispute Resolution Panel (DRP) but the DRP upheld the order of the Ld. TPO by accepting the reasons given by the TPO. The DRP also upheld application of TNMM as MAM and methodology adopted to determine ALP under the TNMM by the Ld. TPO.
12. The Id AR submitted that as far as the issue of MAM in the case of the assessee, the objections to each of the reasons put forth by Ld. TPO / DRP for the rejection of CUP as the MAM are as under:

| Sl. No. | The Ld. TPO's reasons for rejection of CUP | Appellant's contention against each of these reasons |
|---------|--|---|
| 1. | Non-availability of reliable data in order to compare the degree of comparability between the international transaction and uncontrolled transactions. | <ul style="list-style-type: none"> • Appellant imported components from both AEs as well as unrelated vendors. • These components have a unique identity and bear serial numbers or codes by which they are identified. • Appellant has documented the comparability analysis in respect of the comparison of the prices for all the components that have been imported from its AEs. |
| 2. | Weighted average rate is not an uncontrolled transaction that can be compared with the purchases made from AEs / Non-AEs since the level of obsolesce in the computer hardware industry is very high | <ul style="list-style-type: none"> • Appellant has procured components throughout the year which indicates that the components are not obsolete and are actively used in the production process. • Where transactions are large in number, it would not be practically possible to compare each and every import transaction. • Components used in the manufacture of PCs are dependent on the quantity imported and therefore it would be more prudent to compare the average prices rather than the transaction price. • Appellant had compared the average price of each product purchased from the AEs throughout the year with the average price of products purchased from unrelated parties. |

| Sl. No. | The Ld. TPO's reasons for rejection of CUP | Appellant's contention against each of these reasons |
|---------|--|--|
| 3. | Industry average billing rate cannot be considered in this method by relying on the decision of the Bangalore ITAT in the case of Aztec Software & Technology Services vs ACIT | <p>Facts in case of Aztec Software and Technology Services Vs ACIT are completely different from Appellant's case:</p> <ul style="list-style-type: none"> • Case law pertains to a taxpayer in the software services industry, which is materially different from Appellant's business, i.e., the hardware manufacturing segment • In the said case law, the rates were dependent on the expertise and technical level of the person performing the function and measurement of such qualitative service can be subjective. However, in the instant case, components have distinctive codes by which they are known in the industry and the measurement of the prices is not subjective. • Case law was based on the fact that the taxpayer had received income from services rendered to its AE and Appellant's transactions in the present case pertains to expenses that have been incurred. • Lastly, in the case law relied upon by the Ld. TPO, the taxpayer relied upon external CUP whereas Appellant has relied upon internal CUP in benchmarking its international |

| Sl. No. | The Ld. TPO's reasons for rejection of CUP | Appellant's contention against each of these reasons |
|---------|---|--|
| | | transaction. |
| 4. | There is no publicly available information on prices charged in independent transactions of similar or identical nature, so external CUP cannot be applied. | <ul style="list-style-type: none"> • In the instant case, Appellant has considered internal CUP and not external CUP. |

13. The Id AR is also submitted that the coordinate bench of the Tribunal in assessee's own case has been consistently holding that the application of CUP Method adopted by the assessee to be the MAM benchmarking the manufacturing segment for AY 2006-07, 2009-10 to 2010-11, and 2012-13 to 2015-16.

14. The Id DR relied on the orders of the lower authorities.

15. We notice that the coordinate bench in assessee's own case for 2014-15 by order date 13.06.22 has considered the same issue and held that –

We refer to the order passed by this Tribunal for A.Y. 2015-16 which is the recent most order wherein this Tribunal decided this issue on identical facts in assessee's own case by observing as under.

"9. Aggrieved by the order of the DRP, the Assessee has raised Grd. No. II before the Tribunal. We shall first take up Gr. No. II sub-grounds 2 to 6 which grounds relate to the contention of the Assessee that CUP should have been accepted as the MAM. We have heard the rival submissions. As far as the issue of MAM in the case of the Assessee in the transaction of import of components is concerned, we have already extracted the reasons assigned by the TPO for rejecting CUP as MAM and the reasons given by the

Assessee as to why the reasons assigned by the TPO are unsustainable.

10. In AY 2006-07, the Tribunal has in its order dated 30-5-2016 in IT (TP) A.No.582/Bang/2015 upheld the DRP's direction that CUP is the MAM to be applied in the case of the Assessee. In AY 2007-08, the DRP upheld CUP as the MAM and the department did not file any appeal against that order of DRP before the Tribunal. In AY 2008-09 the TPO *vide* his order dated 31-10-2011 accept Assessee's adoption of CUP as MAM and also accepted that price paid in the international transaction to the AE is at Arm's Length. In AY 2009-10 in ITA(TP)A.No.74/Bang/2014 order dated 6-7-2018 the Tribunal upheld order of the DRP accepting CUP as MAM. In AY 2010-11 the Tribunal in IT(TP)A No. 580/Bang/2015 order dated 31-3-2017 upheld the order of the DRP upholding CUP as MAM. There are no changes in the facts and circumstances in the present AY and hence the decision of the Tribunal rendered in the past will apply to the present AY 2015-16 also.

11. We are therefore of the view that CUP should be adopted as the MAM. We direct the TPO to apply CUP as the MAM and determine ALP after due opportunity of being afforded to the Assessee. Ground II sub-grounds 2 to 6 are allowed. In view of the above conclusions the other sub-grounds 7 to 11 raised in Ground No. II does not require any adjudication."

Before us, for year under consideration, both Ld.AR as well as Ld. DR raised identical arguments in support of their respective claims as reproduced hereinabove. As the submissions advanced are on identical facts that has already been considered by this Tribunal, for preceding assessment years as well as assessment year 2015-16, respectfully following the above view, we direct the Ld.TPO to replace the TNMM with CUP as most appropriate method.

16. We notice that the assessee had adopted CUP as MAM to benchmark its international transaction of Import of parts and components for manufacture of PCs pertaining to its manufacturing segment and that the functions performed for undertaking its manufacturing activity for all the years i.e., AY 2006-07 to AY 2016-

17 have remained the same. Accordingly respectfully following the decision of the coordinate bench we hold that CUP is to be considered as the MAM for the year under consideration also and we direct the TPO to replace TNMM with CUP. Grounds raised in this regard are allowed for statistical purposes.

TP adjustment on account of excess AMP expenditure

17. The Assessee is engaged in the business of manufacturing and distribution of desktop, laptop, servers, and smartphones. During the relevant previous year, the Assessee incurred expenditure in connection with campaigning, depicting features of new products, providing information to the public about details of product, its specification etc. The aforesaid advertisement and business promotion activities undertaken by the Assessee are specific to the products sold in India. Given that the selling of the products in India is the function of the Assessee, there are no approvals sought by the Assessee in connection with the incurrence of said expenses which influences the volume of sales of the Assessee. The advertisement contents are decided by the Assessee and the said expenses do not require any approval from its AEs. The aforesaid activities are primarily to promote the business of Assessee and the same is done to influence the volume of sales of the Assessee.

18. The TPO held as under in respect of the above AMP adjustment:-

- Assessee has not confined itself to distribution of trading goods but has performed additional functions in the form of AMP. Therefore, the Company needs to be adequately compensated for such additional functions. (Page 216 of Appeal Set)
- RPM analysis carried out by the Assessee in the TP Doc is flawed as AMP is not captured while calculating gross margin. (Page 217 of Appeal Set)
- Ratio of AMP to sales incurred by 14 comparable companies selected by the Assessee for benchmarking trading segment is much lower than the ratio of AMP to sales as incurred by Lenovo India thereby Ld. TPO is of the view that Assessee has incurred much higher AMP expenditure than the industry average. (Page 217 of Appeal Set)
- The excessive AMP expense constitutes an international transaction. This additional function of building marketing intangible for the AE should have been reimbursed by AE to the Assessee with a markup. (Page 218 of Appeal Set)

19. The DRP has upheld the analysis of the TPO stating that the cost of AMP incurred by the Appellant has benefitted AEs and accordingly AMP is an international transaction.

20. The Id DR submitted that the AMP expenses need to be treated as separate international transaction and supported the orders of the lower authorities. Without prejudice the Id DR submitted that the bench marking the trading segment should be considered afresh and accordingly requested for this issue to be remitted back to the TPO.

21. We heard the rival submissions and perused the material on record. For the year under consideration the net profit margin of the assessee in Trading Segment is 1.19% and the net profit margin of the comparable companies in 35th percentile to 65th percentile range is 0.13% to 1.48% (page 2084 of paper book Vol III). Since the margin of the assessee is within this range, the assessee had concluded that the price charged with respect to the Trading Segment is within arm's length. We notice that no adverse inference drawn by the TPO in respect of the Trading segment results in the order passed under section 92CA and has directly proceeded to treat AMP expenses as international transaction. This in our view mean that the TPO has accepted the entity level margins earned by the assessee with respect to Trading Segment but proceeded to make TP adjustment on AMP expenses. The Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India (P.) Ltd. v. CIT [2015] 374 ITR 118 held that once the revenue accepts the entity level margins as per the most appropriate method, it would be inappropriate to treat a particular expenditure as a separate international transaction. It was held that such an exercise would lead to unusual and absurd results. Relevant observations from the above decision in this context are as under:-

“101. However, once the Assessing Officer/TPO accepts and adopts TNM Method, but then chooses to treat a particular expenditure like AMP as a separate international transaction without bifurcation/segregation, it would as noticed above lead to unusual and incongruous results as AMP expenses is the cost or expense and is not diverse. It is factored in the net profit of the inter-linked transaction. This would be also in consonance with Rule 10B(J)(e), which mandates only arriving at the net profit margin by comparing the profits and loss account of the tested party with the comparable. The TNM Method proceeds on the assumption that functions, assets and risk being broadly similar and once suitable adjustments have been made, all things get taken into account and stand reconciled when computing the net profit margin. Once the comparables pass the functional analysis test and adjustments have been made, then the profit margin as declared when matches with the comparables would result in affirmation of the transfer price as the arm's length price. Then to make a comparison of a horizontal item without segregation would be impermissible”

22. We also see merit in the submission of the Id AR that the ratio laid down by the decisions of the coordinate bench of the Tribunal in assessee's own case for AY 2012-13 to 2015-16 is that that if the net profit margin meets the Arm's length price, then no separate addition needs to be made. Considering the fact that no adverse inference is drawn by the TPO in respect of the Trading segment which means that the TPO has accepted the overall margins of the said segment and respectfully following decision of the Hon'ble Delhi Court in the case of Sony Ericsson (supra) and the ratio laid down by the coordinate bench in assessee's own case, we direct the TPO to delete the adjustment made towards the trading segment.

23. Since we have adjudicated the issue of adjustment made towards AMP expenses as above, the other contentions raised in this regard by the assessee with respect to the issue through various grounds have become academic and accordingly left open.

TP adjustment in relation to Administrative and Business Support Services and Sales facilitation services

24. Ground No.37 to 41 raised in this regard read as follows –

37. The Honourable DRP and the learned AO / TPO has erred in law and on facts in making TP adjustment of INR 10,79,07,460 to the returned income of the Assessee and in holding that the international transactions undertaken by the Assessee with its AEs in the Sales Facilitation Service segment and Administrative and Business Support Services segment were not at arm's length.

38. The Honourable DRP and the learned AO/ TPO has erred in not rejecting the following companies despite the same not being comparable to that of the Assessee due to various factors such as functional dissimilarity, extra ordinary events etc.

- a) **Red Baron Integrated Services Pvt Ltd**
- b) **Platinum Advertising Pvt Ltd**
- c) **Majestic Research Services & Solutions Ltd**
- d) **Cheil India Pvt Ltd**
- e) **Lintas India Pvt Ltd**

39. The Honourable DRP and the learned AO / TPO has erred in law and on facts in rejecting the following companies selected by the Assessee in its TP Documentation which are comparable to the Assessee:

- a) **MCI Management (India) Limited**
- b) **Concept Public Relations India Limited**
- c) **Kestone Integrated Marketing Services Private Limited (Segmental)**

d) Adhaan Solutions Pvt Ltd

e) I C R A Management Consulting Services Ltd.

40. Further, the Honourable DRP and the learned AO / TPO has erred in law and on facts in not accepting the below company which is comparable and thereby not considering the detailed submissions of the Assessee:

a) Crayon Advertising Limited

41. The Honourable DRP and the learned AO / TPO has erred in law by not granting appropriate favourable economic adjustments (including the working capital adjustment) while calculating the arm's length margin for final set of comparable companies for these segments.

25. Brief note on the nature of services rendered by the assessee to the AEs in these segments is given below –

Provision of Administrative and other business support services

The Assessee has entered into a Support Service arrangement with its AE, with respect to the provision of Administrative support services pursuant to which the Assessee provides administrative support services to Lenovo Group companies such as budgeting, planning and MIS support services and other support services in the nature of coordination, technical support etc.

These services are in the nature of low-end support services and the Assessee is compensated on a cost plus mark-up of 10 percent for the same.

Provision of Sales facilitation services

The Assessee has entered into Sales facilitation agreement with its AE for provision of Sales facilitation services. The nature of services rendered by the Assessee are as under:

- Customer identification;
- Provision of product information to customers;
- Receipt of orders from customers and forwarding them to relevant AEs for acceptance; and
- Advising the AEs on any product related complaints by customers.

These services are in the nature of low-end support services and the Assessee is compensated on a cost-plus mark-up of 10 percent for the same

26. The assessee is compensated with cost plus mark up of 10% towards rendering of the above services to its AEs. The assessee chose 8 comparable companies for both the segments, the 35th percentile profit level indicator was at 6.75% and 65th percentile was at 13.72% and therefore the assessee concluded that the price charged is within arm's length. The TPO conducted a fresh search and the final set of comparables as per the TPO is as given below –

| Sl.No. | Company Name | F.Year wise OP/OC (%) | | | Wt. Average |
|--------|---|-----------------------|---------|---------|-------------|
| | | 2016-17 | 2015-16 | 2014-15 | |
| 1 | Goldmine Advertising Ltd. | 5.71 | 6.12 | 5.21 | 5.68 |
| 2 | Ugam Solutions Pvt. Ltd. | 6.72 | 7.88 | 14.06 | 9.55 |
| 3 | Focus Suites Solutions & Services Ltd. | 19.15 | 19.18 | 4.08 | 15.76 |
| 4 | Axience Consulting Pvt. Ltd. | 18.48 | 24.84 | 8.19 | 17.11 |
| 5 | Pressman Advertising Ltd | 24.95 | 14.96 | 15.93 | 18.62 |
| 6 | Scarecrow Communications Ltd. | 12.10 | 21.21 | 27.34 | 19.53 |
| 7 | Red Baron Integrated Services Pvt Ltd | 34.04 | 18.63 | 23.86 | 25.31 |
| 8 | Lintas India Pvt. Ltd. | 29.89 | 30.53 | 27.15 | 29.89 |
| 9 | Majestic Research Services & Solutions Ltd. | 45.95 | 35.17 | 18.49 | 38.37 |
| 10 | Platinum Advertising Pvt. Ltd. | 39.72 | 73.49 | 53.93 | 55.67 |
| 11 | Cheil India Pvt. Ltd. | 64.59 | 69.85 | 65.21 | 64.86 |

| | | | |
|--|------------------------|--|--------------|
| | 35th Percentile | | 17.11 |
| | Median | | 19.53 |
| | 65th Percentile | | 29.89 |

27. Accordingly the TPO computed the TP adjustment as below –

Administrative and Business Support Services

| | | |
|--|----------------|---------------|
| Taxpayers operating revenue | OR | 975114664 |
| Taxpayers operating cost | OC | 886467877 |
| Taxpayers operating profit | OP | 88,646,787 |
| Taxpayers PLI | $PLI=OP/OC$ | 10.00% |
| 35th Percentile Margin of comparable set | | 17.11% |
| Adjustment Required (if $PLI < 35th$ Percentile) | | Yes |
| Median Margin of comparable set | M | 19.53% |
| Arm's Length Price | $ALP=(1+M)*OC$ | 1059595053 |
| Price Received | OR | 975114664 |
| Shortfall being adjustment | $ALP-OR$ | 8448M9 7 7 |

Sales facilitation services

| | | |
|--|-------------|------------|
| Taxpayers operating revenue | OR | 270406914 |
| Taxpayers operating cost | OC | 245824467 |
| Taxpayers operating profit | OP | 24,582,447 |
| Taxpayers PLI | $PLI=OP/OC$ | 10.00% |
| 35th Percentile Margin of comparable set | | 17.11% |

| | | |
|---|----------------|-----------------|
| Adjustment Required (if PLI< 35th Percentile) | | Yes |
| Median Margin of comparable set | M | 19.53% |
| Arm's Length Price | $ALP=(1+M)*OC$ | 293833985 |
| Price Received | OR | 20406914 |
| Shortfall being adjustment | ALP-OR | 23427071 |

28. The DRP confirmed the adjustment. Aggrieved the assessee is in appeal before the Tribunal.

29. The Id AR made a detailed written submission with regard to each of the comparables for which inclusion / exclusion is sought. The extract of the submissions are as given under –

Exclusions

1. Red Baron Integrated Services Private Limited ('Red Baron')

It is submitted that Red Baron was engaged in the activity of specialized design services. The same is evident from the Annual Report given in page 182 of the Appeal set. It is observed that Red Baron is engaged in the business of branding and design activities for independent parties. Further, there was presence of materials consumed and significant branding expenses as part of its operations. This is not comparable to the activities performed by the Appellant who is in the segment involved, engaged in the business of sales facilitation and business support services.

2. Platinum Advertising Private Limited ("Platinum")

It is submitted that the company does not have a significant asset base and the most significant asset and liability on the balance sheet is trade receivables and trade payables. Further, the major expense in the profit

and loss was “employee benefit expense” which constituted 75% of the total expenses. This indicates an abnormal business model for Platinum as compared to the Appellant.

Further, the company has a very minimal fixed asset base as compared to the Appellant which suggests that the company is not a routine service provider. The relevant extracts from the annual report and detailed submissions are provided at page 183 of the Appeal set.

3. Majestic Research Services & Solutions Limited (“Majestic Research”)

It is submitted that as per the annual report of Majestic Research, the company is engaged in providing customized research solutions which involve study design, ascertaining business objective, collection of data using advanced tools and technology and reporting the same for the use of various stakeholders.

From the extracts available at page 184 of the Appeal set, it is evident that Majestic Research undertakes core research activities which also include pre-product development, its study and feasibility, optimization for market resources and final advertising. Majestic Research also uses the latest technology tools/ resources to gather the required data which includes digital tracking, facial recognition, eye tracker, perception analyzer among other tools.

Further, it is observed that the company had acquired new business and also divested its stake in an existing company in order to leverage further on its existing strengths and credentials.

Majestic Research had acquired 100% stake in Emtee Research and Consultants Private Limited, which was also an independent market research agency. Based on the information available in the annual report of Majestic Research, it can be observed that the acquisition had resulted in synergy of benefits which boosted the operating margins of Majestic Research significantly. A comparison of the margin progression over the past 3 years is provided below:

| Particulars | FY 2016-17 | FY 2015-16 | FY 2014-15 |
|---------------------------------|-------------------|-------------------|-------------------|
| Operating Revenue – A | 2,293.04 | 1112.96 | 550.77 |
| Total Operating expenditure – B | 1,570.97 | 831.92 | 463.76 |
| Operating profit (A-B) | 722.07 | 281.04 | 87.01 |
| Margin on cost | 45.96% | 33.78% | 18.76% |

As seen from the above, there is a significant increase in the operating margins of FY 2015-16 and FY 2016-17 as compared with FY 2014-15. Hence, it is clear that the increase in the operating margins of the company is attributable to the extraordinary events that took place and therefore, Majestic Research is not functionally comparable to the Appellant and ought to be rejected.

Further, in the case of Epson India Private Limited [ITA No. 206/Bang/2021], AY 2016-2017 at Page 23 of the Order, the Hon'ble Bangalore Tribunal has directed the Ld. TPO to exclude Majestic Research Services & Solution Limited from the final list of comparable under the said segment.

4. Cheil India Private Limited (“Cheil India”)

It is submitted that as per the annual report of the company, it was observed that Cheil India was engaged in the activity of market research, planning and consultancy services on an agency model. From the revenue recognition policy of the Annual report given at page 189 of the Appeal set, the revenues earned are in the nature of commission from advertisements and transaction processing. Hence, it is evident that Cheil India is an agency company undertaking to provide services to unrelated third parties on a commission basis unlike the Appellant who undertakes to provide sales facilitation and business support services on a fixed fee model. Further, the Appellant is not an agency to its group company but in turn acts as a representative in India.

The Appellant would like to submit that Cheil India has a major portion of revenue being earned from domestic sources/ customers. This is different to the functional profile of the Appellant who provides services to its group companies, in totality. Hence, there is mismatch in the functional profile of Cheil India in comparison of the Appellant.

5. Lintas India Private Limited (“Lintas”)

It is submitted that as per the annual report of the company, Lintas was engaged in the activity of market research, planning and consultancy services on an agency model. The relevant extracts of the annual report is given at page 190 of the appeal set.

From the revenue recognition policy, the revenues earned are in the nature of commission from advertisements and transaction processing. Hence, it is evident that Lintas is an agency company undertaking to provide services to unrelated third parties on a commission basis unlike

the Appellant who undertakes to provide sales facilitation and business support services on a fixed fee model. Further, the Appellant is not an agency to its group company but in turn acts as a representative in India.

30. We heard the rival submissions and perused the material on record. We notice that the DRP while considering the inclusions / exclusions did not examine the submissions of the assessee based on facts and has rejected the contention by making a cryptic observation that –

“7.1 Panel: The taxpayer has not used appropriate filters and therefore the panel is of the opinion that the TPO has rightly rejected the TP documentation given by the taxpayer. In view of the reason cited by the TPO, we have come to the conclusion that the data used in computation of ALP is neither reliable nor correct. After careful analysis of the facts, it is seen that the filters & measure applied by the TPO has led to selecting the proper comparables. Further, the objections of the taxpayer to the comparables selected by the TPO has been disposed of by the TPO with proper reasoning and functional analysis. Therefore, we find no reason to interfere in the adjustments so proposed by the TPO.”

31. Therefore we are of the considered view that this issue should be remitted back to the DRP with a direction to do consider the submissions of the assessee and examine the facts based on evidences before deciding the inclusion/exclusion in accordance with law. Needless to say that the assessee should be given a reasonable opportunity of being heard. It is ordered accordingly.

32. The TPO is directed to re-compute the arm's length price in accordance with the directions given in this order.

33. The issues contented in ground no 42 to 45 are with respect to error in considering the assessed income in final assessment order, AO not granting brought forward loss, error in considering the Book Profits in final assessment order and the AO not granting appropriate TDS credit. In this regard, we direct the AO to consider the issues afresh based on facts and evidences and decide in accordance with law after giving the opportunity of being heard to the assessee.

34. Ground No.46 with regard to computation of interest u/s.234B is consequential and ground no. 47 to 49 are general. Hence these grounds do not warrant a separate adjudication.

35. In result the appeal of the assessee is partly allowed.

Pronounced in the open court on this 31st day of January, 2023.

Sd/-

Sd/-

(GEORGE GEORGE K.)
JUDICIAL MEMBER

(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,

Dated, the 31st January, 2023.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.