IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

Before Sh. C. N. Prasad, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 478/Del/2022 : Asstt. Year : 2017-18
ITA No. 562/Del/2022 : Asstt. Year : 2018-19

BMW India Financial Services Pvt. Ltd., 1st Floor, Building No. 11, the Oberoi Corporate Tower, DLF Cyber City, Phase-2, Gurgaon, Haryana-122002	Vs	DCIT, Circle-10(1), Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AADCB8986G		

Assessee by : Sh. Ajit Jain, CA
Revenue by : Sh. Rajesh Kumar, CIT DR

Date of Hearing: 01.02.2023		**Date of Pronouncement: 03.02.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders dated 18.01.2022 and 09.03.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Since, the issues involved in both the appeals are identical, they were heard together and being adjudicated by a common order.

3. In ITA No. 478/Del/2022, following grounds have been raised by the assessee:

> *"1. On the facts and circumstances of the case and in law, the Honourable Dispute Resolution Panel ('Hon'ble DRP'), the Learned Transfer Pricing Officer ('Ld. TPO') and the National Faceless Assessment Centre / Assessing Officer*

(hereinafter collectively to be referred as "Revenue") erred in making an adjustment of INR 63,67,777 to the total income of the Appellant on account of the difference in the arm's length price ('ALP') of its international related party transactions under the provisions of Section 92CA(4) of the Act.

2. On the facts and circumstances of the case, the Revenue has grossly erred in disallowing mark-up charged by the associated enterprise ("AE") in providing intra group services to the Appellant without providing any cogent reason thereof. In doing so, the Revenue has erred in:

2.1 Concluding that 88% of the cost incurred by the AE is third party cost which entirely contradicts the fact that 98% of the cost incurred by the AE is incurred in-house.

2.2 holding that indirect costs forming part of the total cost base as profit mark-up and disallowing the same without providing any cogent reasons thereof.

2.3 Disallowing profit mark-up charged by the Appellant's AE assuming no value addition by the AE in providing services and disregarding comprehensive documentary evidence furnished by the Appellant demonstrating such value addition. In doing so, the Revenue erred in concluding that entire cost is third party cost whereas approx. 98% cost is the in-house costs incurred by the AE.

2.4 Disregarding the fact that based on the economic and commercial circumstances, no independent third party would agree to provide such services without keeping an arm's length profit element over and above cost of services.

2.5 Disregarding the comprehensive benchmarking analysis undertaken by the Appellant, without demonstrating the inadequacy or infirmity in the analysis so conducted by the Appellant.

3. On the facts and circumstances of the case, the Revenue has grossly erred in applying Other Method to benchmark the international transaction without citing any comparable uncontrolled transaction/ situation.

4. On the facts and circumstances of the case and in law, the revenue has erred in violating the mandatory provisions of section 92C of the Act read with Rule 10AB

of the Income Tax Rules, 1962, thereby the Transfer Pricing adjustment deserves to be quashed.

5. The Revenue erred in not appreciating that the pricing of such services including the mark-up paid thereof has been accepted by the Revenue in all of the past years (AYs 2010-11 to 2016-17) in the Appellant's own case and there being no change in the facts and circumstances of the case in AY 2017-18 vis-a-vis the aforesaid years.

6. On a without prejudice basis, on the facts and circumstances of the case, the Revenue has incorrectly computed the transfer pricing adjustment as INR 6,367,777 amounting to INR 5,685,515.

Pertaining to Corporate Tax Matters

7 On the facts and circumstances of the case, the Ld. AO has grossly erred in computing the total income of INR 95,78,78,570 (as against INR 94,35,93,680) in the Final assessment order dated 18 January 2022 by considering the following adjustments made in the intimation issued under section 143(1)(a) of the Act:

6.1 Inconsistency in amount disallowed under section 43 B in any preceding previous year but allowable during the previous year amounting to INR 4,66,481.

6.2 Inconsistency in amount disallowable under section 40a(ia) on account of non- compliance with the provisions of Chapter XVII-B amounting to INR 56,27,220.

6.3 Disallowance on account of delayed credit of employee contribution to any provident fund or superannuation funder or any fund set up under ESI Act on or before the due date amounting to INR 8,96,920.
8. The Ld. AO has grossly erred in disregarding the rectification application filed against the erroneous adjustments proposed in the intimation under section 143(1)(a) and in not providing any opportunity to the Appellant to submit further submission/ details and explanations in this regard.

9. On the facts and circumstances of the case, Ld. AO has grossly erred in granting short deduction under section 80G of INR 9,62,500.

10. On the facts and circumstances of the case, Ld. AO has grossly erred in granting short deduction of taxes deducted at source of INR 5,25,600.

General

11 On facts and in law, the Ld. AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income."

4. In ITA No. 562/Del/2022, following grounds have been raised by the assessee:

"1. On the facts and circumstances of the case and in law, the Honourable Dispute Resolution Panel ('Hon'ble DRP), the Learned Transfer Pricing Officer ('Ld. TPO') and the National Faceless Assessment Centre / Assessing Officer (hereinafter collectively to be referred as "Revenue") erred in making an adjustment of INR 12,603,272 to the total income of the Appellant on account of the difference in the arm's length price ('ALP') of its international related party transactions under the provisions of Section 92CA(4) of the Act.

2. On the facts and circumstances of the case, the Revenue has grossly erred in disallowing mark-up charged by the associated enterprise ("AE") in providing intra group services to the Appellant without providing any cogent reason thereof. In doing so, the Revenue has erred in:

2.1 Concluding that 88% of the cost incurred by the AE is third party cost which entirely contradicts the fact that 98% of the cost incurred by the AE is incurred in-house.

2.2 holding that indirect costs forming part of the total cost base as profit mark-up and disallowing the same without providing any cogent reasons thereof.

2.3 Disallowing profit mark-up charged by the Appellant's AE assuming no value addition by the AE in providing services and disregarding comprehensive documentary evidence furnished by the Appellant demonstrating such value addition. In doing so, the Revenue erred in concluding that entire cost is third party cost whereas approx. 98% cost is the in-house costs incurred by the AE.

2.4 Disregarding the fact that based on the economic and commercial circumstances, no independent third party would agree to provide such services without keeping an arm's length profit element over and above cost of services.

2.5 Disregarding the comprehensive benchmarking analysis undertaken by the Appellant, without demonstrating the inadequacy or infirmity in the analysis so conducted by the Appellant.

3. On the facts and circumstances of the case, the Revenue has grossly erred in applying Other Method to benchmark the international transaction without citing any comparable uncontrolled transaction/ situation.

4. On the facts and circumstances of the case and in law, the revenue has erred in violating the mandatory provisions of section 92C of the Act read with Rule 10AB of the Income Tax Rules, 1962, thereby the Transfer Pricing adjustment deserves to be quashed.

5. The Revenue erred in not appreciating that the pricing of such services including the mark-up paid thereof has been accepted by the Revenue in all of the past years (AYs 2010-11 to 2016-17) in the Appellant's own case and there being no change in the facts and circumstances of the case in AY 2018-19 vis-a-vis the aforesaid years.

6. On a without prejudice basis, on the facts and circumstances of the case, the Revenue has incorrectly computed the transfer pricing adjustment as INR 12,603,272 amounting to INR 11,252,922.

Pertaining to Corporate Tax Matters

7. On the facts and circumstances of the case, the Ld. AO has grossly erred in granting short deduction of taxes deducted at source of INR 1,13,368.

8. On the facts and circumstances of the case, the Ld. AO has grossly erred in levying consequential interest under Section 234B and Section 234C in the final assessment order dated 9 March 2022.

General

9 On facts and in law, the Ld. AO erred in initiating penalty proceedings u/s 270A of the Act for furnishing inaccurate particulars of income."

5. At the outset, the ld. AR submitted that out of all the grounds filed, the assessee would be contesting the grounds pertaining to ALP adjustment of made by the AO on account of profit mark-up.

6. Brief facts relating to this issue are that the assessee obtained IT support services from the AE of Rs.10,50,27,270/- which has been examined by the TPO and the factum of obtaining of services has not been disputed by the revenue. The TPO held that the services were necessary for the operational performance of the assessee and held that no concrete explanation has been given by the assessee as to why a mark-up is warranted on a third party cost. The TPO held that the assessee merely performs coordination services and adds no value to the functions that the third party performs. Hence, the same doesn't require any mark-up from Indian entity. The AO held that third party cost in anyway has been allocated to the Indian entity which includes a mark-up, therefore a double mark-up is not justified.

7. Before the ld. DRP, the assessee submitted that the TPO erroneously disallowed the 5% markup charged by BMW AG by observing that no markup was warranted on third party cost, since no value addition done by BMW AG and that third party cost was inclusive of markup, allocated by the assessee. The TPO accordingly selected 'other method' as MAM instead of TNMM and used service provider as tested party. It was submitted before the ld. DRP that the TPO has already accepted

need and receipt of such services, but the TPO disregarded the benchmarking analysis documented in TP report without providing any cogent reason. It was argued that relevant documentary evidences were duly submitted during the TPO proceedings, demonstrating extensive IT support provided by BMW AG with various screenshots. It was pleaded that before the ld. DRP that considering the nature of services and benefits, TNMM would provide most reliable measure of an arm's length result. It is submitted that other method used by the TPO does not provide any methodology and that it was appropriate to apply only where none of the other five methods are applicable, it was further submitted that no independent third party would agree to provide such services without keeping an arm's length profit element over and above cost of services.

8. Reliance was placed on the ITAT judgment in case of Humboldt Wedag India Pvt. Ltd (ITA No. 475/Del/2021 and ITA No.8119/Del/2018, for AY 2016-17 and AY 2014-15. It was further submitted that similar charging mechanism is followed for other entities within the Group, which is in line with Group's TP policy for such services. Before the ld. DRP, it was submitted that the whole premise on which the TPO has disallowed 12% [overhead cost (7%) and profit markup (5%)] is based on assumption that the underlying cost are third party costs, which is incorrect as demonstrated as follows:

Nature of Cost	In-house/ Third party	Cost (without markup)	% to Total Cost	Remark
Employee Cost (IT Staff)	In-house	EUR 1.17 million (INR 9.18 cr.)	98%	Recharged to BMW India FS with markup
IT Infrastructure cost	In-house			

License Cost	Third Party	EUR 28,306 (INR 0.22 cr.)	2%	Recharged to BMW India FS at cost.

9. It is further submitted that 5% mark-up policy finds support in multiple international guidance as the nature of services received are a mix of high end and low end services. It was argued that EU Joint Transfer Pricing Forum suggests a markup of 5% for low value adding services which includes IT services as well. It was further argued that the illustrative list of LVIGS in Para 7.49 of BEPS Action Plan 8-10: 2015 Final report ('Action Plan') includes certain IT support services and Para 7.61, thereof suggests that a markup of 5% would be appropriate on such services.

10. The ld. DRP held that the TPO has correctly noted in this regard that the assessee merely performs coordination service, adding no value to the functions that the third party performs. Thus, no mark-up from the Indian entity was required. The ld. DRP held that the TPO was also correct in his reasoning that the third-party cost, which is invariably allocated to the Indian entity, already includes a mark-up, and thus, a double-mark up could not be justified under these circumstances, more so, when around 88 percent of the total IT cost is third party cost. The Panel, therefore upheld the order of the TPO.

11. During the hearing before us, the ld. AR reiterated the arguments taken up before the ld. DRP and submitted that 5% mark-up on IT Software services and 7% mark-up on administrative expenses is in consonance with the international trade practices.

12. Rebutting the arguments, the ld. DR submitted that the agreement was signed on 14.01.2015 whereas as per the terms at page 286 of paper book mentions that the agreement shall have retroactive effect for the services rendered since 1st April 2010 and shall remain in force until terminated by either party. The ld. DR argued this clause read with clause 1.2 which reads BMW AG shall invoice within 21 days of each completed month of services provided to the assessee a fee equivalent to cost to BMW AG along with an arm's length markup. The ld. DR argued that this retrospective agreement is a make belief arrangement as the invoices could not be submitted within 20 days of his completed month from 2010 when the agreement itself as signed in the year 2015.

13. Heard the arguments of both the parties and perused the material available on record.

14. We find from the paper book that BMW Group uses principles followed in transactions between unrelated entities, for setting prices for intra group transactions and attempts to ensure an appropriate arm's length return to all group entities for functions, assets and risks involved in performance of business activities relating to international transactions, having regard to local TP Regulations, as may be applicable. Specific terms of transactions between group entities can vary depending on the business and economic realities in different countries. For the recovery of costs by BMW Group, a full cost approach is followed which means all directly and indirectly attributable costs, which are needed to provide the service are considered which are, budget costs, cost of financing or leasing, costs for company internal like cost of premises, electricity

costs etc., and external subcontracting and Administration/cross-departmental costs.

15. For providing the IT support services to BMW FS, the costs incurred by BMW Group were recharged to the Company along with a margin /mark-up of 5%. It is to be noted that BMW Group recovered from BMW FS, the costs incurred by it in relation to IT support services, which inter alia, also included the purchase cost of certain IT products/licenses from third parties. In this regard, it is pertinent to note that the cost of external licenses purchased by the Group is allocated without a mark-up. On perusal of the invoices, we find that there are certain terminologies used at the time of rising of invoices like IT services or communication costs. While these terminologies define the category of 'service' availed from BMW AG, there is a further sub-set of these services, which in turn has a further 'service type'. Accordingly, based on the nature of service availed by the Assessee, appropriate amount based on an appropriate allocation basis is apportioned to the Assessee.

16. Further, the entire log of usage by BMW FS for respective IT support services is maintained in SAP, which gets auto populated against respective material code of the IT support service, at the time of rising of an invoice by BMW AG. The same is demonstrated by way of screenshots of SAP in paper book, in which detailed break-up of service type Wide Area Network (WAN) received from third party vendor i.e. Singtel, and corresponding amounts cross charged by BMW AG to BMW FS in India, has been provided.

17. On perusal of the screenshots, we observed that third party agreements with Singtel entered into by BMW AG documents, the fixed price which shall be charged to BMW AG for provision of WAN services at the location of BMW FS in India. The amount charged by Singtel is then passed on to BMW FS in India by BMW AG along with additional costs which BMW AG must have incurred in connection with such services with a mark-up of 5%.

18. It is critical for the Company to avail IT support services from the specialized teams in BMW AG. It is also important to note that the performance/co-ordination of functions/services being rendered through a centralized office/Group companies, helps the participating Group companies in achieving global standardization of processes, realization of economies of scale, realizing operating and financial efficiencies, the services received from the BMW Group are provided by experienced personnel who focus on their respective domains, other direct benefits derived by the Company from such IT Support services include leveraging on the specialized support services of BMW Group who have the required expertise and knowledge.

19. Hence, in view of the observations above, it cannot be said that the software/IT support services cannot be charged at par. A markup of 5% policy for the IT services rendered is an acceptable markup by international guidelines and as per EU Joint Transfer Pricing Forum. It cannot be expected that the parent organization supply support services without charging anything for such services rendered. Hence, we hold that the markup of 5% is sufficient to recoup the expenditure involved by the AE in exploration, inspection, testing and finalization of

the suitable software. Accordingly, we direct that no other expenses other than 5% markup be allowed on the support services rendered by the AE.

20. Deduction u/s 80G be allowed.

21. Due TDS credit be given.

22. In the result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 03/02/2023.

Sd/- Sd/-

(C. N. Prasad) **(Dr. B. R. R. Kumar)**
Judicial Member **Accountant Member**

Dated: 03/02/2023

Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR