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

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

ITA No.1852/M/2016
Assessment Year: 2011-12

M/s. Crane Worldwide Logistics India Pvt. Ltd., A/601-604, Everest Chambers, Marol Naka, Andheri Kurla Road, Andheri (East), Mumbai – 400 059 **PAN: AADCC5477D**	Vs.	Income Tax Officer-9(2)(3), Aayakar Bhavan, Maharshi Karve Road, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Ketan Ved, A.R.
Revenue by : Shri Chetan M. Kacha, Sr.AR.

Date of Hearing : 20 . 01 . 2023
Date of Pronouncement : 23 . 01 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The Appellant, M/s. Crane Worldwide Logistics India Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 28.01.2016 passed by the AO in consonance with the orders passed by the Ld. Dispute Resolution Panel (DRP)/Transfer Pricing Officer (TPO) under section 143(3) read with section 144C(13) of the

Income Tax Act, 1961 (for short 'the Act') qua the assessment year 2011-12 on the grounds inter alia that :-

"General grounds

1. The Transfer Pricing adjustment made by the learned AO is bad in law, illegal and unsustainable on the basis of, amongst other, following grounds, taken singly or cumulatively and therefore the addition made by learned Transfer Pricing Officer (TPO)/Hon'ble Dispute Resolution ("Hon'ble DRP) shall be deleted.

2. The conditions stipulated in section 92CA(1) of the Act are mandatory and the learned AO is expected to record his satisfaction in that respect before making reference to the learned TPO.

3. The Transfer Pricing Adjustment made by the learned AO is bad in law, illegal, without jurisdiction and contrary to and / or beyond and in excess of the express statutory provisions of the Act including sections 4, 5, 9, 92, 92C, 92CA, etc.

4. The learned AO/learned TPO have failed to prove that any of the conditions laid down in section 92CA(1) of the Act have been satisfied, which made out a case for tax evasion.

5. The approval of the Commissioner of Income tax (CIT) is not in accordance with the law and hence adjustments ought to be quashed.

6. A transfer pricing adjustment cannot be made without arriving at the finding that the intention of the appellant was to evade tax and shift profits outside of India. Further, such finding of tax evasion and shifting of profits constitutes a condition precedent for making the transfer pricing adjustment.

Adjustment/Addition to Total Income on Transfer Pricing issues - Rs. 10,117,561/-

7. On the facts and in the circumstances of the case and in law, the learned TPO and the learned AO under directions issued by the Hon'ble DRP, erred in proposing an upward adjustment to total income for Rs.10,117,561 based on the provisions of Chapter X of the Act, by reducing the amount paid to associated enterprises ("AEs") on account fees for availing destination services.

8. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in arbitrarily rejecting the benchmarking analysis of the Appellant and furthermore erred in imputing/upholding benchmarking which is not in accordance with section 92C read with Rule 10B(2)

9. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in rejecting most appropriate method selected by the Appellant (i.e. TNMM) and furthermore erred in applying the CPM as most appropriate method which is not as per the principles enunciated in section 92C(1) of the Act r.w. Rule 10 C of the Rules.

10. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in restricting rate of fees paid to AEs based on rate of fees paid by AEs to Appellant and thus erred in taking controlled transaction as basis for determining Arm's Length Price.

11. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in not appreciating the difference in function, asset and risk (FAR) profile of the Appellant vis-à-vis the AEs and furthermore erred in upholding that AEs shall not be compensated more on account of performing additional functions, employing additional ants and assuming higher risk.

12. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding TP adjustment on freight expense, (instead of freight receipt) merely to derive a larger adjustment and furthermore erred in not adopting the "Rule of beneficial construction", i.e. approach that is in the favor of the taxpayer (i.e. determine the arm's-length price of the freight income)

Denial of plus/minus 5% benefit

13. The learned AO/ TPO/Hon'ble DRP erred in not granting the benefit of standard deduction of 5% range in computing the arm's length price as provided in the proviso to section 92C(2) of the Act as it stood prior to the amendment by the Finance Act (No.2), 2009 and Finance Act 2012.

Requisite conditions under section 92 C (3)-Not satisfied

14. On the facts and in the circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in not stating reasons to show that either of the conditions in classes (a) to (d) of Section 9207) of the Act were satisfied before making an adjustment to the income of the Appellant.

Miscellaneous

15. The learned AO erred in levying interest under section 234D and 244A of the Act.

16. The learned AO erred in initiating penalty proceedings under section 274 r.w.s 271(1) (c), 271F, 271BA, 271B of the Act.

17. The Appellant submits that each grounds of appeal are without prejudice to one another.

18. The Appellant craves leave to add or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : taxpayer M/s. Crane Worldwide Logistics India Private Limited (Crane India) incorporated on 18.12.2008 as a wholly owned subsidiary of Crane Worldwide group cooperateif, UA, Crane India is a service provider for air freight, ocean freight and other institutional services. Crane India and its associate enterprises (AEs) provide freight forwarding services to ensure that the customer products are delivered from the country of origin to the country of destination.

3. During the year under consideration, as is evident from form 3CEB, the taxpayer has entered into international transactions with its AEs as under:

Sr. No.	Nature of transactions	Method Adopted by Assessee	Amount (Rs.)
1	Freight forwarding services	TNMM	397,974,707
2	Reimbursement of expenses	Not Applicable	548,927
3	Recovery of expenses	Not Applicable	2,450,530
	Total		400,974,164

4. Functional model of taxpayer is execution of freight forwarding business generated and referred by Crane overseas entities, taxpayer having not sales and marketing responsibility to generate business on its own. As per functional model between taxpayer and its AEs taxpayer received commission for destination services at the rate of 5% of freight revenue from AEs and it has paid commission for destination services at the rate of 8.88%. In other words the taxpayer has paid commission for the year under consideration for destination services to the tune of Rs.2,31,40,923/- @ 8.88% and commission for destination services received by the taxpayer was Rs.62,79,743/-.

5. The taxpayer in order to benchmark its international transactions applied transactional net margin method (TNMM) as the most appropriate method (MAM). The taxpayer earned NCP during the year under consideration at the rate of 1.06% as against average NCP earned by the comparable companies @ 0.75%. During the transfer pricing proceedings taxpayer also conducted a fresh search by identifying 7 comparables having NCP of 4.23% which was again found to be at arms length being +/- 5% range as per provisions contained under section 92C (2) of the Income Tax Act, 1961 (for short 'the Act').

6. However, the transfer pricing officer (TPO) rejected the benchmarking made by the taxpayer and preceded to apply cost plus method (CPM) as the MAM. TPO also reached the conclusion that the rate paid to the AEs for destination services should be the same as the rate paid by the AEs for availing destination services and re-computed the charges paid to the AEs @ 5% and thereby

proposed the adjustment to the arms length price to the tune of Rs.1,15,70,462/- under section 92CA qua the international transactions entered into between the taxpayer and its AEs.

7. The taxpayer carried the matter before the Ld. DRP by way of filing objections, who has given part relief to the taxpayer qua receiving fees and paying fees for destination services. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

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8. In compliance to the direction issued by Ld. DRP, the AO preceded to make upward adjustment to arms length price qua international transactions entered into by the taxpayer with its AEs during the year under consideration as under:

	Amount in INR
Freight Revenue For export shipment	26,457,235
Destination fees paid	23,140,923
Destination fees paid @ (as taken by the TPO)	10%
Destination fees paid@	8,88%
Adjustment proposed by the TPO	11,570,462
Adjustment proposed by the DRP direction	10,117,561

9. Feeling aggrieved with the impugned order passed by the Ld. DRP/TPO/AO the taxpayer has come up before the Tribunal by way of filing present appeal.

10. 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.

11. Undisputedly TNMM as the MAM applied by the taxpayer to benchmark it's international transactions entered into with its AEs qua paying and receiving fee for destination services has been rejected by the Ld. TPO. It is also not in dispute that the taxpayer is receiving fee/commission for destination services @ 5% of freight revenue from its AEs and has paid fee/commission for destination services to its AEs @ 8.88%. It is also not in dispute that during the transfer pricing proceeding Ld. TPO has not provided any opportunity to the taxpayer to carry out fresh search to benchmark it's international transactions by applying CPM as the MAM rather preceded to benchmark the international transactions on the basis of its own search. It is also not in dispute that the Ld. TPO has applied CPM as the MAM and has also proceeded to hold that both the paying and receiving fee for destination services should be at par.

12. In the backdrop of the aforesaid undisputed facts when we examine the order passed by the Ld. DRP it has upheld the method applied by the Ld. TPO by rejecting the TNMM as the MAM applied by the taxpayer but has overlooked the fact that the taxpayer has not been given any opportunity to carry out its own search by applying CPM as the MAM.

13. When we examine para 2.13 of Ld. DRP no doubt it is mentioned that the "nature and extent of services being rendered by the taxpayer and its AEs to each other are similar but nothing has been brought on record to show that the fees being paid to the AEs

includes any fees to be paid for introducing client to the Indian entities as part of the agreement. Further no evidence has also been brought on record to show that the clients of Indian entities were introduced by AEs and then certainly payment of a higher fees to the AEs." It is further noticed by the the Ld. DRP that "we have already noted that nothing has been brought on record to show that the fee to be paid by the taxpayer would be more because of most of its business was to be generated by the AEs. No working has also been furnished to show as to the rate of cost plus 10% has been worked out". Despite recording aforesaid findings the Ld. DRP proceeded to reject the objections raised by the taxpayer.

14. Even otherwise when we examine para 6 (conclusion) of the Ld. TPO the entire benchmarking has been made on the basis of surmises without undertaking any comparative exercise. Rather entire findings have been based upon the layman's concept that "*Even if the Company was predominantly into the nomination business of merely executing the freight forwarding business generated by Crane overseas entities and referred to the Company, it doesn't justly paying AES at a higher rate for the same services involved as it doesn't absolves the assessee for the functions that it has to perform with respect to freight forwarding services*."

15. We are of the considered view that even if CPM as the MAM is to be applied benchmarking in accordance with the provisions contained under the Act needs to be carried out by the taxpayer as well as by the Ld. TPO. No doubt there appears to be a reciprocal arrangement between the taxpayer and its AEs for providing destination services to each other but the same has to be examined

and benchmarked by conducting a search by the taxpayer as well as by the Ld. TPO. It needs to be brought on record as to what addition is being made by AEs @ 5%.

16. Even the Ld. DRP in para 2.11 "has also observed that the transaction relating to rendering of services to the AEs by the taxpayer at cost plus 5% and the transaction of AEs rendering services to the taxpayer at the cost plus 10% are separate transaction to be benchmarked separately and by aggregation of all the transactions of different nature correct arms length price of the transaction cannot be arrived at.". All these facts need to be examined by the Ld. TPO.

17. In view of what has been discussed about, we are of the considered view that this case for benchmarking the international transactions entered into by the taxpayer with its AEs has not been enquired into by the Ld. TPO in its entirety. No benchmarking of the taxpayer as per CPM being the MAM has been called for by the Ld. TPO to explain as to how the services being rendered and services being taken by the taxpayer from its AEs are different in order to justify the difference of fee for services paid/received. By applying the CPM as the MAM by the Ld. TPO rule 10B(1C) has not been applied. In other words it is also a case of not providing opportunity to the taxpayer to explain as to why the CPM as MAM is not applied for benchmarking the international transactions.

18. In these circumstances the Bench has no option except to remand the case back to the Ld. TPO to call for fresh search from the taxpayer and examine the same as per provisions contained under the Act by conducting his own search for benchmarking

international transactions entered into by the taxpayer with its AEs during the year under consideration. Needless to say that Ld. TPO shall provide adequate opportunity of being heard to the taxpayer.

19. In the result, the appeal filed by the taxpayer is allowed for statistical purposes.

Order pronounced in the open court on 23.01.2023.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 23.01.2023.

* 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.