

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER &
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 6681/Mum/2017
(A.Y.2013-14)**

| | | |
|---|-----|---|
| Boehringer Ingelheim India Private Limited 1102, 11 th Floor, Hall Mark Business Plaza, Gurunanak Hospital, Bandra (East), Mumbai- 400 051 | Vs. | Income Tax Officer, Range 14(1)(2) Room No. 431, Aaykar Bhavan, M.K. Road, Mumbai – 400 020 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACCB2979C | | |
| Appellant | .. | Respondent |

| | |
|-----------------|----------------------------------|
| Appellant by : | M.P. Lohia & Hemen Chandariya |
| Respondent by : | Tejinder Pal Singh Anand |

| | |
|-----------------------|------------|
| Date of Hearing | 02.12.2022 |
| Date of Pronouncement | 10.02.2023 |

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the assessee is directed against the order passed by the DRP-1, Mumbai dated 22.11.2016 for A.Y. 2013-14. The assessee has raised the following grounds before us:

“Grounds

1. erred in assessing the total income of the Appellant at Rs.34,54,42,575/- as against Rs.12,61,94,683 as computed by the Appellant.

Transfer pricing

Transfer Pricing Adjustment of Rs.6,66,56,695 on account of provision of marketing support services

2. *erred in law and on facts in not accepting the economic analysis conducted by the Appellant undertaken in accordance with the provisions of the Act read with the Rules for the purpose of determination of the Arm's Length Price of the impugned transaction involving provision of marketing support services and making an adjustment of Rs.6,66,56,695.*
3. *erred in rejecting the aggregation approach adopted by the Appellant in its transfer pricing documentation by not appreciating the fact that the international transactions pertaining to Import of FDFs from Associated Enterprises (AEs) for resale and provision of marketing support services to AEs are closely linked to the overall trading business of the Appellant and erred in analyzing these transactions separately for the determination of the arm's length price.*
4. *erred in law in making an adjustment to the total income of the Appellant by way of an adjustment in the arm's length price of the international transaction pertaining to provision of marketing support services as the circumstances necessitating the determination of price by the learned TPO as mentioned in sub-section (3) of Section 92C of the Act did not exist in the instant case.*
5. *erred in endorsing that the appellant was 'promoting' Boehringer Ingelheim brand and creating marketing intangibles instead of appreciating that the appellant was only carrying out its business by using the well-established brand name of Boehringer Ingelheim and that it is the primary benefactor of all expenses and any benefits derived by the AEs are purely incidental in nature.*
6. *erred in suggesting that a mark-up of 5 percent has been charged by the Appellant to its AE in pursuance of the inter-service agreement undertaken between the Appellant and its AE, without appreciating that the service income received is not in accordance with the said remuneration methodology.*
7. *erred in not adopting a scientific search process but cherry picking comparable companies to identify companies comparable to the Appellant for benchmarking of the international transaction of provision of marketing support services and considering inappropriate comparable companies which are functionally not comparable to the services provided by the Appellant*
8. *Without prejudice to ground no. 7 above, erred in rejecting HCCA Business Services Private Limited for being a loss making entity, without giving cognizance to the fact that the same is not a persistent loss making entity.*
9. *erred in rejecting the Appellant's claim to use multiple year data of comparable companies selected by the Learned TPO for computing the arm's length price of the impugned transaction involving provision of marketing support services and has instead adopted use of single year updated data to compute the arm's length price of the said transaction.*

10. erred in law in not applying the proviso to section 92C and not allowing the Appellant the benefit of variation of +/-3% in determining the ALP for the international transaction of provision of marketing support services to its AE.

Transfer Pricing Adjustment of Rs.1,01,66,399 on account of provision of clinical trial support services

11. erred in making an adjustment to the total income of the Appellant by way of an adjustment in the arm's length price of the international transaction pertaining to provision of clinical trial support services as the circumstances necessitating the determination of price by the learned TPO as mentioned in sub-section (3) of Section 92C of the Act did not exist in the instant case.

12. erred in not accepting the economic analysis conducted by the Appellant undertaken in accordance with the provisions of the Act read with the Rules in relation to the impugned transaction of provision of clinical trial support services.

13. erred in rejecting the Appellant's claim to use multiple year data for computing the arm's length price of the impugned transaction involving provision of clinical trial support services, and has instead adopted use of single year updated data to compute the price of the said transaction.

14. erred in not accepting the fact that the agreement with AE is to charge mark-up of 18.37% on internal costs and to charge no mark-up on external third party costs, thereby adding up a notional mark-up on such external cost for which no service has been provided by Appellant to AE.

Without prejudice to ground no. 11 to ground no. 14

15. erred in referring to an incorrect agreement of IS services dated 8 November 2012 and thereby adopting a mark-up of 5% on total cost (internal and external cost) for provision of clinical support services on a time proportionate basis e. 5% for April to December 2012 and 18.37% for January to March 2013

16. Without prejudice to ground 15, erred in not considering the actual costs incurred for the period April to December 2012 and January to March 2013 while determining adjustment amount, by allocating the total cost on a 9 month 3 month basis.

17. erred in not undertaking an objective comparative analysis and inter alia rejected following comparable companies selected by the Appellant

- Cyber Media (India) Limited
- EDCIL (India) limited
- India Tourism Development Corporation Limited
- Max Neeman International Limited
- ICRA Management Consulting Services Limited

18. erred by not considering the impact of working capital adjustment while computing the operating margin of comparable companies for the purpose of determination of the arm's length price of the said transaction

19. erred in not applying the Proviso to section 92C and not allowing the Appellant the benefit of variation of +/-3% in determining the ALP.

20. erred in making adjustment on alternate basis by holding that in case the Appellate authorities uphold that the Appellant is engaged in provision of support services only. the comparable companies engaged in support services identified by the Appellant in the transfer pricing documentation are not appropriate and accordingly, the comparable companies identified by the learned TPO for provision of marketing support services should be applied for the purpose of computing the arm's length price of the impugned international transaction

Corporate Tax

Disallowance in sales promotion expenses

21. erred in disallowing sales promotion expenses amounting to Rs.13,34,63,283 without appreciating that such expenses were incurred wholly and exclusively for business purposes.

22. erred in not considering the fact that the accounts had been duly audited and therefore, the said expenses are genuine and bonafide.

23. without prejudice to ground nos 21 and 22, erred in not restricting the disallowance to 10% of sales and promotion expenses at Rs 2,77,19,192 as per the draft assessment order, when on the directions of DRP, appellant has submitted invoices of more than 50% of the value in support of its claim.

Disallowance of the employees' contribution to Provident Fund

24. erred in disallowing Rs 89,61,515 for payment of employees' contribution to Provident Fund (PF) considering it as delayed payment without appreciating that the same was deposited before the due date of filing the return of income

25. erred in not considering the proviso to section 43B of the Act, which states that contribution paid to PF/ Employees State Insurance Corporation fund on or before the due date of filing of tax return, shall be allowed as deduction in the relevant previous year.

Initiation of Penalty under section 271(1)(c)

26. erred in initiating penalty proceedings under section 271(1)(c) of the Act.

The Applicant craves leave to add, alter, modify or delete such other objections before or during the course of hearing before the Hon'ble Income Tax Appellate Tribunal, so as to enable the Hon'ble Tribunal to decide on the objections raised by the Applicant, as per law.”

2. The fact in brief is that return of income declaring total income at Rs.12,61,94,683/- under the normal provision of the Act and book profit of Rs.10,46,33,624/- under the provisions of Sec. 115JB of the Act was filed on 30.11.2013. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 02.09.2014. The assessee company is engaged in the business of importing life saving drugs and animal health products manufactured by Boehringer Ingelheim Group of Companies and selling these in India. The assessee company has also rendered services to BI Group companies towards marketing research, clinical research and development of product which the parent company i.e. Boehringer Ingelheim Ansländsbeteiligungs BmbH intended to introduce in India.

3. A reference u/s 92CA(1) of the Act was made to the Addl. CIT, TPO-1(2) Mumbai for computation of Arms Length Price in relation to the international transactions. Vide order u/s 92CA(3) of the Act dated 28.10.2016 the TPO had taken the Arms Length Price of the said transactions at the transaction values and adjustment of Rs.8,75,56,734/- has been made on account of provision of marketing support services and provision of clinical trial co-ordination and support services in respect of the international transaction. Against the draft order of the AO the assessee has filed objection from the DRP. The DRP vide order u/s 144C(5) of the Act dated 07.08.2017 held that the international transaction of the assessee were correctly benchmarked by the TPO. The TPO vide order u/s 92CA(3) dated 28.10.2016 has taken the arm's length price of the said transaction at the transaction value and adjustment of Rs.8,75,56,734/- has been made on account of provision of marketing support services and provisions of clinical trial coordination and support services in relation to the international transaction. Further facts are discussed while adjudicating the ground of appeal filed by the assessee:

Ground No. 6: (Transfer Pricing adjustment of Rs.6,66,56,695/- on account of provision of marketing support services:

6 erred in suggesting that a mark-up of 5 percent has been charged by the Appellant to its AE in pursuance of the inter-service agreement undertaken between the Appellant and its AE, without appreciating that the service income received is not in accordance with the said remuneration methodology.

4. The assessing officer has made reference u/s 92CA(1) of the Act to the Additional Commissioner of Income Tax, Transfer Pricing Officer, Mumbai for computation of arm's length price in relation to the international transaction.

5. As per form no.3CEB the assessee has entered into the following international transaction:

| Sr. No. | Nature of transaction | AY 2013-14 amount | Method Used |
|---------|--|------------------------------|--|
| 1. | Import of finished dosage forms from AEs | 3,817,40,702 | Resale Price Method ('RPM') |
| 2. | Purchase of samples from AEs | 34,09,256 | |
| 3. | Provision of marketing support services to AEs | 56,58,00,565 | |
| 4. | Provision of clinical trial support services | 13,64,55,892 | Transactional Net Margin Method ('TNMM') |
| 5. | Provision of sourcing support services to AEs | 1,25,79,465 | TNMM |
| 6. | Payment of software charges | 1,58,71,182 | TNMM |
| 7. | Recovery of expenses | 18,09,52,065 26,15,83,444 | NA – Cost reimbursements |
| 8. | Reimbursement of expenses | 1,35,03,553 | NA – Cost reimbursement |

The TPO stated that assessee has not maintained separate segmental account for trading and marketing and support services. Instead the assessee has benchmarked the transactions of trading and marketing activity together. The TPO has also observed that no expenses corresponding to the marketing and support activities have been

considered for the purpose of working out the gross margin. He also stated that assessee has not maintained segmental accounts for the marketing and support and trading activities but there was an important provision in Article II of initial agreement that assessee will charge AE on cost plus 5% basis. The TPO after taking into consideration the DRP's directions for separate benchmarking of this transaction in A.Y.2011-12 in respect of marketing activity the TPO has taken the following comparable:

| Sr. No. | Comparable Company | Margins for A.Y. 2013-14 |
|---------|-------------------------------------|--------------------------|
| 1. | India Cements Capital Limited | 1.31% |
| 2. | HSCC (India) Limited | 10.86% |
| 3. | Spectrum Business Solutions Limited | 1.71% |
| 4. | BVG India Limited | 20.54% |
| 5. | Axis Integrated System Limited | 31.44% |
| 6. | Inmacs Management Services Limited | 36.39% |
| | Average | 17.04% |

Accordingly, the adjustment in respect of the marketing support services has been made by the TPO at Rs.6,48,87,446/- as below:

| Particulars | Amount |
|------------------------------------|--------------|
| Value of international transaction | 56,58,00,565 |
| Cost (assuming 5% mark up) | 53,88,57,681 |
| ALP mark up | 17.04% |
| Arm's Length Price | 63,06,88,011 |
| Adjustment | 6,48,87,446 |

In respect of international transaction of provision of trial support services the TPO has used the following comparable:

| Sr. No. | Name of company | NCP% |
|---------|---|--------|
| 1. | Biocon Ltd. | 13.95% |
| 2. | Concept Public Relations India Ltd. | 3.71% |
| 3. | Impresario Event Management India Limited | 1.99% |
| 4. | Piramal Pharmaceutical Devp. Services Pvt. Ltd. | 20.13% |

| | | |
|----|----------------------------|--------|
| 5. | Syngene International Ltd. | 22.31% |
| 6. | Vimta Labs Ltd. | 9.00% |
| 7. | Vivo Bio Tech Limited | 5.80% |
| | Average | 10.98% |

And accordingly made upward adjustment of Rs.2,26,69,288/- as below:

| Particulars | Amount |
|------------------------------------|--------------|
| Value of international transaction | 39,80,39,336 |
| Cost (assuming 5% mark up) | 37,90,85,082 |
| ALP mark up | 10.98% |
| Arm's length price | 42,07,08,624 |
| Adjustment | 2,26,69,288 |

Thereafter as per the draft assessment order u/s 143(3) r.w.s 144C(1) of the Act the assessing officer has made addition of Rs.8,75,36,734/- as finalized by the TPO.

6. The assessee has filed objections before the DRP against the said draft order. The DRP passed their directions under section 144C(5) of the Act dated 07.08.2017 by revising the Transfer Pricing Adjustment and directed the TPO to exclude certain segments of certain companies from the list of comparables. As per the directions of the DRP the TPO modified the amount of adjustments as under:

| | | |
|------|--|--------------------|
| (i) | Provision of marketing support services: | 6,66,56,695 |
| (ii) | Provision of clinical trial support services | <u>1,01,66,399</u> |
| | Revised Adjustment to the ALP | <u>7,68,23,094</u> |

Accordingly, in the final assessment order the AO has made addition of Rs.7,68,23,094/-.

7. During the course of appellate proceedings before us the Id. Counsel referred the order of TPO particularly para 6.7 of his order where he has held that there is an important provision in article II of initial agreement that assessee will charge the AE on cost plus 5% basis in respect of marketing and support and trading activities. In this regard

the ld. Counsel referred the direction issued by the DRP dated 07.08.2017 stating that DRP has not given any comments on the TPO's finding of charging AE on cost plus 5% basis as per the said initial agreement. The ld. Counsel submitted that before the DRP as per para 4.4 of their order assessee has categorically contended that it has not received 5% mark up in respect of marketing support services provided by it. The ld. Counsel further referred page no. 312 to 323 of the paper book pertaining to service agreement between the assessee and its AE and submitted that as per the new agreement the charging of 5% mark up in respect of marketing and support service is not correct. The ld. Counsel also referred to the submission given to the TPO pertaining to separate segmental accounts for trading and marketing functions.

8. On the other hand, the ld. D.R after referring page no. 321 & 325 of the paper book pertaining to statement of work submitted that for reimbursement to BI India the amount specified in the respective statement of work was plus 5%. In his rejoinder the ld. Counsel submitted that agreement of the assessee referred by the ld. D.R. is pertained to different entity i.e B II and not the associate enterprise.

9. Heard both the side and perused the material on record. During the year under consideration the assessee has provided marketing support services to its associate enterprise (AE) for a sum of Rs.56,58,00,565/-. The assessee had combined the international transactions of purchase from AE and receipts on account of provision of marketing support services to AEs and had benchmarked the transactions on Resale price method under the trading segment. However, the TPO disregarded aggregation approach and proceeded to benchmark the transaction of provision of marketing support services, separately using Transactional Net Margin Method (TNMM). The TPO was of the view that mark up of 5% has been received by the assessee as

per the inter-company agreement dated 01.01.2004 from its AE. However, after perusal of the material on record, we find that TPO has not considered the revised statement of work which was appended to the amended agreement dated 01.01.2009 between the assessee and Boehringer Ingelheim International GmbH (BIII). It is undisputed fact that as per revised statement of work, the scope of services as well the manner of compensation was revised thereby setting aside the remuneration methodology of mark up of 5% as prescribed earlier in the agreement dated 01.01.2004. After taking same comparable companies the TPO computed the adjustment by comparing comparable margin of 17.04% of operating cost vis-a-vis assumed 5% mark-up as per inter-company agreement and proposed an adjustment of INR. 6,48,87,446/- on the transaction of marketing support services. After giving effect to the DRP directions an adjustment of Rs.6,66,56,695/- with respect to provision of marketing support services was made.

10. During the course of proceedings before the TPO and DRP assessee has made submission pointing out that the cost was apportioned between the trading and marketing support services segment on the basis of turnover.

The assessee has also submitted the additional evidence vide letter dated 28.07.2021. The additional evidence were admitted to decide the issue on merit. As per page no. 539 of additional evidence filed on 28th July 2021 of account certificate showing that operating margin of the assessee from the marketing support services was 18.64% as per the certified segmental accounts. The Id. Counsel has also placed reliance on the following judicial pronouncements:

- *Valmet Automation India (P) Ltd [(2017) 87 taxmann.com 25 (Mumbai - Trib.)] (refer page 1736 to 1740 of legal paper book)*
- *Sandoz (P) Ltd (2013) 34 taxmann.com 28 (Mumbai - Trib.)] (refer page 1741 to 1751 of legal paper book)*

- *SNC Lavalin Engineering India (P) Ltd [(2018) 93 taxmann com 61 (Mumbai -Trib.)] (refer page 1752 to 1755 of legal paper book)*
- *Tecnimount ICB (P) Ltd (2011) 11 taxmann.com 49 (Mumbai - Trib)) (refer page 1756 to 1768 of legal paper book)*

In the light of the above facts and material we restore this matter to the TPO for examination of segmental account filed by the assessee as an additional evidence that operating margin of 18.64% from marketing support services segment is at arm's length as compared to operating margin of comparable companies. Accordingly, this ground of appeal of the assessee is allowed for statistical purposes.

11. Ground No. 7 to 10 become academic and not pressed, therefore the same stand dismissed.

12. Ground No. 11 to 13 and 15 to 20 will be academic in nature and not pressed the same stand dismissed.

Ground No.14: Error in charging mark up of external cost:

13. Regarding external cost incurred by the assessee the ld. Counsel submitted that it was pass through cost hence, no mark-up was payable thereon by the AE. In this regard the assessee has filed certificate in the form of additional evidence dated 06.04.2022 confirming that the AE has paid mark-up on 18.46% on internal cost and no mark-up is to be charged on external cost. On perusal of the order of the TPO it is noticed that he has not discussed the specific issue in relation to external cost in his order, however, he has considered mark-up of external cost. In this regard we have gone through the specific submission made by the assessee vide letter dated 17.10.2016 as per page no. 400 to 513 of the factual paper book. In respect of charging no mark-up of external cost the assessee has placed reliance on the following decision:

- *Cheil Communications India Private Limited [1.T.A No 712/Del/2010] (Refer page 1795 to 1839 of legal paper book)*

- Vedanta Ltd [TS-503-ITAT-2020(DEL)-TP] (relevant extract only) (Refer page 1840 to 1856 of legal paper book)
- FedEx Express Transportation & Supply Chain Services India (P) Ltd. (ITA No 435/Mum/2014) (Refer page 1857 to 1873 of legal paper book)

In the light of the above facts and circumstances we restore the additional evidences dated 06.04.2022 as discussed supra for examination to the TPO with respect to mark-up charge of external cost. Therefore, this ground of appeal of the assessee is allowed for statistical purposes.

Ground No. 21 to 23: Disallowance of sale promotion expenses:

14. During the course of assessment the A.O has noticed that assessee has debited sale promotion expenses to the amount of Rs.27,71,91,923/- under the head sales. The assessee was asked to produce the supporting bills and vouchers towards the expenses. However, some of the expenses remained unverified. Therefore, 10% of such expenses to the amount of Rs.2,77,192/- was disallowed and added to the total income of the assessee.

15. The ld. Counsel submitted that after DRP directions issued on 7th August 2017, the assessment was finalized on 29th September 2017 therefore the assessee was having only had one month for submission of relevant invoices/vouchers etc. running into 30 box files. Therefore, during the course of appellate proceedings before us the ld. Counsel filed additional evidences in support of its claim of sale promotion expenses.

16. After hearing both the sides we restore this issue to the file of the assessing officer for deciding afresh to the extent of additional evidence filed by the assessee, therefore, the ground of appeal of the assessee is allowed for statistical purposes.

Ground No. 24 & 25:

17. This ground of appeal is pertained to disallowance of Rs.89,61,515/- for delayed payment in respect of employee's contribution to provident fund beyond the period prescribed in the specific act. The Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd. Vs. CIT-1 & others Civil Appeal No.2833 of 2016, dated 12.10.2022 has clarified that employees contribution if paid after due date of payment, deduction of the same is not allowable. Therefore, we do not find any merit in this ground of appeal of the assessee and the same stand dismissed.

18. Ground No. 26 is pertained to initiation of penalty u/s 271(1)(c) which is premature at this stage therefore the same stand dismissed.

19. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 10.02.2023

Sd/-

Sd/-

(Rahul Chuadhary)
Judicial Member

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 10.02.2023

Rohit: 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 DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलिय अधिकरण/ ITAT, Bench,
Mumbai.