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

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.2507/M/2022
Assessment Year: 2018-19

M/s. Ness Digital Engineering (India) Pvt. Ltd., [Formerly known as Ness Technologies (India) Pvt. Ltd.] Unit No.201, 2nd Office Floor, Building No.5 & 6, Mindspace SEZ, Thane Belapur Road, Airoli, Navi Mumbai – 400 708 **PAN: AAACA9649L**	Vs.	The Addl./Jt./Dy. Asst. Commissioner of Income Tax/Income Tax Officer, National e-Assessment Centre, Delhi Dy. Commissioner of Income Tax, Maharashtra
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Devendra Jain, A.R.
Revenue by : Shri Tushar Mohitre, D.R.

Date of Hearing : 07 . 02 . 2023
Date of Pronouncement : 23 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Appellant, M/s. Ness Digital Engineering (India) Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 24.09.2021 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. DRP/TPO under section 143(3) read with

section 144C (13) of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2018-19 on the grounds inter alia that:-

"On the facts and circumstances of the case and in law, the Learned AO/Honble DRP has

General Ground

1. erred in passing the final assessment order dated 31 July 2022 as this order has been passed in contravention of Faceless assessment procedures laid down under section 144B of the Act read with various orders/ notifications/ circulars issued by Central Board of Direct Taxes in this regard and hence, the order is bad in law and therefore void-ab-initio.

Transfer Pricing Grounds

2. erred in making a transfer pricing adjustment of Rs.66,26,894 to the total incomes of the Appellant on the premise that the international transaction of recovery of reimbursement of expenses paid by Associated Enterprise (AE) to Appellant were not at arm's length;

Reference made to the Transfer Pricing Officer

3. erred in referring the Appellant's case to the Learned Transfer Pricing Officer (TRO) under Section 92CA(1) of the act without satisfying the conditions specified therein Adjustment made to international transaction of comment of ass given by AE to Appellant

4. erred in making a transfer pricing adjustment of Rs.66,26,894 in relation to the international transaction of reimbursement of expenses received by the Appellant from the AE disregarding the fact that these expenses were primarily the liability of the AE and were incurred initially by the Appellant only for administrative convenience;

5. erred in not appreciating that in the aforesaid reimbursement of expenses, there was no service/ income element and expenses were reimbursed on cost to cost basis and the same being not the expense of Appellant were not routed through profit and loss account;

6. erred in arbitrarily imputing a profit element of 10% in the international transaction of recovery of expenses without appreciating that the AEs themselves recover such expenses from third parties at cost and accordingly, there is no profit element at any step of the transaction;

7. erred in not adopting one of the methods prescribed under Section 92C of the Act read with Rule 10B of the Income Tax Rules to

determine the arm's length price of the international transaction of recovery of expenses;

8. erred in arbitrarily levying a mark-up of 10% on the expenses recovered by the Appellant without providing any rationale/ basis for arriving at the said mark-up:

Addition proposed basis intimation issued under Section 143(1) of the Act

9. erred in making addition of Rs.30,32,720 to the returned income basis order under Section 143(1), without providing any opportunity of being heard, wherein the AO failed to appreciate that no addition can be made directly in the final assessment order in excess of addition made in the draft assessment order and any such variation in final assessment order is in violation of Section 144C and has to be deleted.

10. erred in disallowing a sum of Rs. 6,86,536 [(difference between the disallowance reported in section 37 in the income tax return (in respect of CSR contribution of Rs.3,22,200) and tax audit report (in respect of loss on sale of fixed assets of Rs 10,08,736)] disregarding the fact that both these sum have been disallowed by the Appellant in its return of income, thereby resulting in double disallowance.

11. erred in disallowing Rs. 23,43,269 under section 40(a)(i)/ 40(a) (ia) despite the fact that the said sum stands suo-moto disallowed by the Appellant in its return of income, thereby resulting in double disallowance.

12. erred in disallowing Rs.2,915 on account of delay in deposit of employee's contribution to Provident Fund ('PF')/ ESIC beyond the due date, disregarding the fact that the said amount had been deposited before the due date of filing the return of income.

Erroneous computation of interest under Section 234C of the Act

13. erred in erroneously computing interest under Section 234C at Rs.1,99,842 as against Rs. 1,65,731;

Penalty Proceedings

14. erred in initiating penalty proceedings under Section 274 read with section 270A of the Act. Each of the above ground of appeal is without prejudice to and independent of one another.

The Appellant craves leave to add, alter, amend or delete the above ground of appeal at or before the time of hearing of the appeal, so as to

enable the Hon'ble Income tax Appellate Tribunal to decide this appeal according to law."

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are: the assessee company is a wholly owned subsidiary of M/s. Ness Technology Inc, USA (Ness US). Ness group is one of the largest IT services & solutions provider in Israel and it is a leading global information technology services firm. The assessee is an off shore-centric technology solutions group with four units in Bangalore, Mumbai and Hyderabad. The assessee has been providing software development services to its group entities.

3. During the year under consideration the assessee reported in its form 3CEB the international transactions entered into with its Associated Enterprises (AEs) as under:

Sl No.	**Nature of Transactions**	**Amount**	**Method used to determine the ALP**
1.	Provision of Software Development Services	239,43,24,903	TNMM
2.	Availing of IT Support Services	4,61,54,986	TNMM
3.	Recovery of expenses	6,62,68,936	CUP
4.	Reimbursement of Expenses	19,26,985	CUP

4. The Ld. Transfer Pricing Officer (TPO) after examining TP study submitted by the assessee qua provision of software development services carried out his own search and rejecting the working capital adjustment sought for by the assessee computed the Arms Length Price (ALP) of assessee's transaction of provision of software services of Rs.239,43,24,903/- proposed the difference between ALP and transaction value at Rs.10,75,00,302/-. During the year under consideration the assessee has also recovered certain expenses to the tune of Rs.6,62,68,936/- from its AEs. It is the case

of the assessee company that these recoveries are primarily in the form of cost of travel, accommodation, visa, per diem and other day to day expenses which was incurred by the assessee initially for administrative convenience and there is no service element involved. However, the Ld. TPO declining the contentions raised by the assessee added a markup of 10% to the expenses received by the assessee to compensate the AE for its services as well as the cost of provision of service and for suffering financial cost by the assessee and thereby made addition of Rs.66,26,894/- (10% of Rs.6,62,68,936/-) on account of service charge and proposed adjustment thereof to the ALP of transaction of Rs.7,28,95,829/-. The Ld. TPO proposed the total adjustment of Rs.11,41,27,196/- [Rs.107500302 and Rs.66,26,894/- qua provision of software development services and recovery of expenses (service charges) respectively]

5. On the basis of TP order passed by the Ld. TPO, draft order under section 144C of the Act has been passed.

6. The assessee carried the matter before the Ld. DRP by way of filing objections challenging adjustment made by the AO on the basis of order passed by the Ld. TPO who has dismissed the objections filed by the assessee. Feeling aggrieved with the impugned order, the assessee has come up before the Tribunal by way of filing present appeal.

7. 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.

Grounds No.1, 2 &3

8. During the course of argument the Ld. A.R. for the assessee has not pressed grounds No.1, 2 & 3 raised in this appeal, hence the same are dismissed.

Grounds No.4, 6, 7 & 8

9. By raising grounds No.4 to 8 the assessee has challenged the TP adjustment of Rs.66,26,894/- qua the international transaction of reimbursement of expenses received by the assessee from its AE. It is the case of the assessee that in case of reimbursement of aforesaid expenses there was no service/income element and expenses are reimbursed on cost to cost basis and the same are not expenses of the assessee having not routed through profit & loss account. The assessee has also challenged the profit element of 10% in the international transactions of recovery of expenses and the Ld. TPO has not adopted one of the methods prescribed under section 92C read with rule 10B of the Income Tax Rules to determine the ALP.

10. However, at the same time it is contended by the Ld. A.R. for the assessee that this issue is already covered in its favour in assessee's own case, which fact has not been controverted by the Ld. D.R. by bringing on record any distinguishable facts nor there is any change in the business model of the assessee qua the year under consideration vis-à-vis A.Y. 2011-12.

11. We have perused the order passed by the co-ordinate Bench of the Tribunal in assessee's own case in ITA No.696/M/2016 for A.Y. 2011-12 order dated 11.11.2016 wherein identically worded grounds No.22 & 23 were raised, which have been decided in favour of the assessee by returning following findings:

> *"13.3 We have considered the rival submissions. At the outset, in our considered opinion, it would be appropriate to cull out appropriate facts which are relevant to decide the controversy. Notably, assessee is rendering services to its associated enterprises abroad for which it is to be compensated on a cost plus mark-up basis and such transactions have been separately bench-marked. In the course of rendering such services, assessee also incurred certain costs relating to travel, accommodation, visa, per diem and other day-to-day expenses, which were expended by its personnel. Further, assessee also incurred certain out of pocket expenses on the specific request of its associated enterprises. The responsibility for the aforesaid type of expenses was of the associated enterprises but the payment towards these costs were initially made by the assessee and thereafter, recoveries were made from the associated enterprises. Before the DRP, assessee also pointed out that such expenses, which are recovered by it from its associated enterprises, are in-turn recovered by the associated enterprises from the ultimate clients on a cost to cost basis. In this context, assessee furnished sample copies of debit notes raised by it on its associated enterprises alongwith copies of the corresponding debit notes raised by the associated enterprises on the ultimate clients. The aforesaid was canvassed by the assessee to substantiate that there was one to one co-relation and that the entire exercise did not involve any element of profit or mark-up in the hands of the associated enterprises. The aforesaid material is placed at pages 518 to 612 of the Paper Book and which was also before the lower authorities. At the time of hearing, the Ld. Representative for the assessee had also referred to page 613 to 645 of the Paper Book, wherein are placed copies of assessee's arrangement with the associated enterprises and also the sample agreements between the associated enterprises and the ultimate clients, which prescribe that all impugned travel and related expenses are separately chargeable on a cost to cost basis. All this material clearly brings out a pertinent feature that in the entire transaction involving payment of expenditure by the assessee, its recovery from the associated enterprises, which-in turn recovers it from the end clients, there is no involvement of any profit-element in the hands of the associated enterprises. Therefore, it would be wrong on the part of the income tax authorities to take a position and infer notionally about recovery of mark-up or profit element in the hands of assessee. It has also been brought out that it is a standard practice in the I.T. Industry to recover out of pocket expenses incurred during the course of providing services for the clients on a cost to cost basis. Under these*

circumstances, in our view, the Transfer Pricing Officer erred in proceeding to infer a non-existent understanding between assessee and its associated enterprises so as to impute income qua the instant transaction in terms of section 92(1) of the Act. Another pertinent fact which has not been rebutted by the Revenue before us is to the effect that in similar situation, from assessment year 2004-05 to 2010-11, no transfer pricing adjustment has been made by the Assessing Officer in relation to the International Transactions on recovery of expenses.

13.4 Another aspect which emerges from the order of the TPO is as follows. After considering the factual matrix, the TPO has proceeded to determine the arm's length price for the service charges at 10% of the expenses recovered. Ostensibly, the income arising from an international transaction is liable to be computed, having regard to the arm's length price as mandated in section 92(1) of the Act. Section 92C prescribes the manner of determination of the arm's length price and sub-section (1) thereof specifically lays down various methods by which the determination of arm's length price has to be made. It is quite clear that there is no adhocism permissible in the manner of computation of arm's length price of an international transaction, whereas the action of the Transfer Pricing Officer in considering the arm's length price @10% of the expenses recovered is not only adhoc but it also does not conform to any of the methods prescribed in section 92C(1) of the Act. On this count itself, the action of the TPO is suspect, even if, it is to be understood that the impugned transaction was an international transaction requiring computation of income having regard to its arm's length price.

13.5 Considered in the aforesaid light, in our considered opinion, the action of the Transfer Pricing Officer/Assessing Officer in making an addition of Rs.3,19,51,284/- deserves to be set-aside. We hold so. Thus, in so far as Ground of Appeal No.22& 23 are concerned, the same are allowed."

12. Following the order passed by the co-ordinate Bench of the Tribunal in assessee's own case for A.Y. 2011-12 and in view of the fact that no such transfer pricing adjustment has been made by the Revenue qua the international transaction on recovery of expenses from A.Y. 2004-05 to A.Y. 2010-11, we are of the considered view that when ALP of the international transactions rendering services by the assessee to its AEs, for which it is to be compensated on cost + mark up basis have already been benchmarked separately, the day to day pocket expenses incurred

by the assessee during rendering of such services are to be reimbursed on cost to cost basis. Incurring of such expenses has not been disputed by the Revenue Department. When there is no element of profit or mark up in the hands of the AE in incurring the day to day pocket expenses the same is not to be bench marked.

13. Moreover, in view of section 92(1) of the Act income arising from an international transaction is liable to be computed for the purpose of ALP as prescribed under section 92C of the Act. However, the Ld. TPO has considered the ALP at 10% of expenses recovered on adhoc basis without conforming to the methods prescribed under section 92C(1) of the Act. So in view of the matter and following the order passed by the co-ordinate Bench of the Tribunal adjustment made by the TPO/AO to the tune of Rs.66,26,894/- qua international transaction of reimbursement of expenses received by the assessee from its AE is not sustainable in the eyes of law, hence ordered to be deleted. So grounds No.4 to 8 are determined in favour of the assessee.

Grounds No.9 to 11:

14. The AO made an addition of Rs.30,32,720/- under section 143(1) without issuing any notice to the assessee and this addition has also not found mention in the draft assessment order which is in violation of section 144C of the Act. The AO disallowed an amount of Rs.6,86,536/- being the difference between the disallowance reported in section 37 in the income returned (in respect of CSR contribution of Rs.3,22,200/-) and tax audit report (in respect of loss on sale of fixed assets of Rs.10,08,736/-) without considering the fact that both these sums have already been

disallowed by the assessee in its return of income which amount to double disallowance. The AO also disallowed an amount of Rs.23,43,269/- under section 40(a)(ia) without considering the fact that the assessee has suo-moto disallowed this sum in its return of income.

15. During the course of argument the Ld. A.R. for the assessee contended that he has already moved an application for rectification before the AO dated 15.02.2022 available on the paper book on page 306 to 308 which has not been decided. We are of the considered view that since there is apparent error in making aforesaid addition by the AO, the same be rectified under section 154 of the Act. So we hereby direct the AO to decide the rectification application (supra) lying pending with him (AO) for disposal within a period of three months from the date of receipt of order. So ground No.9, 10 & 11 are decided in favour of the assessee for statistical purposes.

Ground No.12

16. The AO made a disallowance of Rs.2915/- on account of delay in deposit of employees contribution of provident fund (PF)/ Employees' State Insurance Corporation (ESIC) beyond the due date prescribed under the Act. The Ld. A.R. for the assessee candidly conceded that this issue is no longer res-integra now having been decided by the Hon'ble Supreme Court in case of Checkmate Services Pvt. Ltd. vs. CIT order dated 12.10.2022. So in view of the decision rendered by the Hon'ble Supreme Court, we are of the considered view that employees' contribution on account of PF & ESIC deposited by the employer after due date prescribed

under the Act is not an allowable deduction. So since the assessee has failed to comply with the condition precedent for depositing the employees' contribution on account of PF & ESIC before the due date prescribed under the Act the same has been rightly disallowed by the AO. So ground No.12 is determined against the assessee.

17. Resultantly the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 23.02.2023.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 23.02.2023.

* 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.