

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

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER AND
SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

IT(TP)A no.5830/Mum./2013
(Assessment Year : 2008-09)

Dy. Commissioner of Income Tax
Circle-1(1), Mumbai

..... Appellant

v/s

M/s. HSBC Asset Management (I) Pvt. Ltd.
315, Dr. D.N. Road, Fort, Mumbai 400 001
PAN - AABCH0007N

.....Respondent

IT(TP)A no.5835/Mum./2013
(Assessment Year : 2008-09)

M/s. HSBC Asset Management (I) Pvt. Ltd.
3rd Floor, Mercantile Bank Chamber
16, Veer Nariman Road, Fort
Mumbai 400 001 PAN - AABCH0007N

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-1(1), Mumbai

.....Respondent

Assessee by : Shri Porus Kaka a/w
Shri Divesh Chawla and
Shri Tejas Mhatre
Revenue by : Ms. Samruddhi Hande

Date of Hearing - 23/01/2023

Date of Order - 16/03/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The aforesaid cross-appeals have been filed challenging the impugned order dated 25/07/2013, passed under section 250 of the Income Tax Act,

1961 ('the Act') by the learned Commissioner of Income Tax (Appeals)-15, Mumbai, ['learned CIT(A)'], for the assessment year 2008-09.

IT(TP)A no.5830/Mum./2013
Revenue's Appeal – A.Y. 2008-09

2. In its appeal, the Revenue has raised following grounds:-

"1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in allowing the appeal of assessee on account of TP adjustment by the TPO relating to addition of Rs.9,97,195/- for payment of cost allocation charges towards Risk Management services to its Associate Enterprises (AE) as the expenditure is for the benefit of HSBC group as a whole, no charging of such expenditure is required by the assessee in connection with any individual member of the Group.

2. The appellant craves leave to add to, amend or withdraw the aforesaid ground of appeal."

3. At the outset, learned Sr. Counsel submitted that the total transfer pricing adjustment under challenge in the Revenue's appeal is Rs.9,97,195 and the tax thereon is below the revised monetary limit of Rs. 50 lakhs applicable to appeals before the Tribunal, as per CBDT Circular no.17 of 2019, dated 8th August 2019. Further, it was submitted that none of the exceptions provided in CBDT Circular no.3 of 2018, dated 11th July 2018 r/w circular F. no.279/Misc./142/2007-ITJ-(Pt) dated 20/08/2018, would apply to Revenue's appeal. Accordingly, the learned Sr. Counsel submitted that Revenue's appeal being covered under the aforesaid Circulars is not maintainable.

4. The learned Departmental Representative ('learned DR') could not produce any material before us to controvert the submission so made on behalf of the assessee.

5. Having considered the submissions and perused the material available on record, we are of the view that the tax effect on the amount disputed by the Revenue in the present appeal is below the revised monetary limit of Rs. 50 lakh as per CBDT Circular no.17/2019, dated 8th August 2019, r/w CBDT Circular no.3/2018, dated 11th July 2018, r/w circular F. no.279/Misc./142/2007-ITJ-(Pt) dated 20th August 2018. In view of the aforesaid, Revenue's appeal deserves to be dismissed. However, the Revenue is given the liberty to seek recall of this order if, at a later point in time, it is found that the appeal falls under any of the exceptions provided in the Circulars referred to above.
6. In the result, the appeal by the Revenue appeal is dismissed.

IT(TP)A no.5835/Mum./2013
Assessee's Appeal – A.Y. 2008-09

7. In its appeal, the assessee has raised the following grounds:-

"The grounds stated hereunder are without prejudice to one another.

1. The learned CIT-A has erred on facts and in law in upholding the Transfer Pricing additions made by the AO/TPO to the extent of Rs. 3,08,96,398 (Rs.1,13,82,173+ Rs.1,21,92,637+ Rs.28,31,154 + Rs.44,90,434) to the total income of the appellant by erroneously disallowing the cost allocation transactions in respect of central and regional support services; software development and other IT services; business support expenses and disallowing payment made for availing Investment Advisory services without providing any cogent reasons and merely based on his surmises and conjectures

2. The learned CTT-A has erred on facts and in law in upholding the upward adjustment by the AO/TPO of Rs.11,382,173 to the Appellant's total income for payment of cost allocation charges towards Central and Regional Support services based on his own conjectures and surmises while disregarding the detailed explanation of various services availed by the Appellant from its AE and documentary evidences submitted for substantiating the benefits availed by the Appellant with respect to such services availed from its AE.

3. The learned CIT-A has erred on facts and in law in upholding the upward adjustment by the AO/TPO of Rs.12,192,637 to the Appellant's total income for payment of cost allocation charges towards Software development and other IT

services based on his own conjectures and surmises while disregarding the detailed explanation of various services availed by the Appellant from its AE and documentary evidences submitted for substantiating the benefits availed by the Appellant with respect to such services availed from its AE.

4. The learned CIT-A has erred on facts and in law in upholding the upward adjustment by the AO/TPO of Rs. 2,831,154 to the Appellant's total income for payment of cost allocation charges towards Business Support services based on his own conjectures and surmises while disregarding the detailed explanation of various services availed by the Appellant from its AE and documentary evidences submitted for substantiating the benefits availed by the Appellant with respect to such services availed from its AE..

5. The learned CIT-A has erred on facts and in law in upholding the upward adjustment by the AO/TPO of Rs 4,490,434 to the Appellant's total income for payment made on account of availing of Investment Advisory services based on his own conjectures and surmises while disregarding the detailed explanation of various services availed by the Appellant from its AE and documentary evidences submitted for substantiating the benefits availed by the Appellant with respect to such services availed from its A.E.

The Appellant prays that the adjustment in relation to transfer pricing matters made by the learned AO/ TPO and upheld by the Learned CIT-A be deleted."

8. The brief facts of the case are: The assessee is a company engaged in the business of asset management for mutual funds (MF) and segregated funds (Portfolio Management Service). For the year under consideration, the assessee filed its return of income on 29/09/2008 declaring a total income of Rs.10,52,80,172. The return of income filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and served on the assessee. Pursuant to the reference made by the AO, the Transfer Pricing Officer ('TPO') vide order dated 28/10/2011 passed under section 92CA(3) of the Act proposed a transfer pricing adjustment of Rs. 3,18,93,593, to the international transactions undertaken by the assessee. In conformity, the AO passed the assessment order dated 30/01/2012 under section 143 r/w section 144C(3)(a) of the Act assessing the total income of the assessee at Rs.13,71,73,770. In appeal, the learned CIT(A)

vide impugned order partially upheld the transfer pricing adjustment made by the TPO/AO. Being aggrieved, the assessee is in appeal before us.

9. The issue arising in grounds no.2 and 4, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of payment of cost allocation charges towards Central & Regional Support Services and Business Support Services.

10. The brief facts of the case pertaining to this issue are: The assessee's principal activity is to act as an investment manager for HSBC Mutual Fund in India. The assessee manages the investment portfolio and provides various administrative services to the fund. The assessee is also engaged in providing portfolio management services to high-net-worth individuals. During the year, the assessee has entered into the following international transactions which are in the nature of intra-group services:-

<i>Sr. No.</i>	<i>Nature of International Transaction</i>	<i>Name of A.E.</i>	<i>Amount of INR</i>
1.	<i>Availing of Investment Advisory Services</i>	<i>Sinopia Asset Management (Asia Pacific) Limited</i>	<i>4,490,434</i>
2.	<i>Cost allocation towards risk management support</i>	<i>HSBC Hong Kong</i>	<i>997,195</i>
3.	<i>Cost allocation towards Central and Regional support services</i>	<i>HSBC Group Investment</i>	<i>11,382,173</i>
4.	<i>Cost allocation towards business support expenses</i>	<i>Business Limited, London</i>	<i>2,831,154</i>
5.	<i>Cost allocation towards software development and other I.T. services</i>	<i>The Hong Kong and Shanghai Banking Corporation Limited – Hong Kong Branches</i>	<i>12,192,637</i>

11. Since the cost allocation towards Central and Regional Support Services was based on the appropriate allocation key, the assessee considered the same as reasonable from the Indian transfer pricing perspective. Similarly, since cost allocation towards Business Support Services was on a cost-to-cost basis, the same was also considered reasonable from the Indian transfer pricing perspective. During the course of transfer pricing assessment proceedings, the assessee was asked to justify the payment made for the aforesaid intra-group services. In respect of cost allocation towards Central and Regional Support Services and Business Support Services, the assessee submitted that pursuant to the Intercompany Services Agreement dated 01/01/2007, HSBC London (i.e. associated enterprise) rendered certain regional support services to HSBC group companies located all over the globe including the taxpayer. For the services, each of the HSBC group entities was required to pay charges to HSBC London corresponding to an appropriate proportion of the internal operation cost +5% markup. The TPO vide order passed under section 92CA(3) of the Act did not agree with the submission of the assessee and held that the assessee has failed to prove the rendition of service. Further, the assessee has failed to prove the quantification of such services in terms of actual expenditure incurred and commensurate benefits derived therefrom. The TPO further held that when an expenditure is incurred for the benefit of the group as a whole, no charging of such expenditure is required as such expenditure is not incurred in connection with any individual member of the group and the benefit of such expenditure would be available to all the members of the group. The TPO applied Comparable Uncontrolled Price

(`CUP`) method and held that the assessee has not shown how such services would be valued by an independent entity dealing in similar circumstances. The TPO also held that the assessee has not adduced any primary evidence to show that the payment made is only to the extent of benefit received by it or to the extent that is charged between independent parties dealing at arm's length. Accordingly, the TPO determined the arm's length price of Central and Regional Support Services and Business Support Services as Rs.Nil and proposed the transfer pricing adjustment of Rs.1,42,13,327. In conformity, the AO passed the assessment order under section 143 r/w section 144C(3)(a) of the Act. In appeal, the learned CIT(A) vide impugned order, inter-alia, upheld the transfer pricing adjustment on account of payment of cost allocation charges towards Central & Regional Support Services and Business Support Services. Being aggrieved, the assessee is in appeal before us.

12. We have considered the rival submissions and perused the material available on record. HSBC Group Investment Business Ltd, London (*`HSBC London`*) has rendered certain Central and Regional Support Services and Business Support Services to HSBC group companies located all over the globe including the assessee. Under these services, HSBC London assisted HSBC group entities to review the current business model and administrative policy so as to improve business efficiency and achieve process standardisation. In this regard, an Intercompany Services Agreement dated 01/01/2007 was also entered into between parties. From the perusal of the aforesaid agreement, forming part of the paper book from pages no.84-118, we find that the allocation of each of HSBC London's internal operational costs was computed

using different allocation keys, such as headcount, time spent, etc. Under the aforesaid agreement, HSBC London provided services, such as general management, marketing, risk management, finance, human resource services, investment services, products services, cash services, and business support services. For these services, each of the HSBC group entities was required to pay charges to HSBC London corresponding to the appropriate proportion of the internal operations costs plus a mark-up in accordance with UK and OECD transfer pricing guidelines, which was determined at 5%. Further, where HSBC London is merely passing on the charges of the 3rd parties, no mark-up was charged by HSBC London to the group entities. In support of its plea of rendition of service by the associated enterprise, reference was also made to the sample invoices issued by HSBC London, forming part of the paper book from pages no.120-128. From the perusal of said invoices, we find that the same also provides the breakup of cost in respect of various types of services, viz, general management, marketing, risk, finance, human resources under the Central Management Support, and the invoices also mentions the allocation key applied for cost allocation. In order to justify the markup of 5%, reference was made to the global transfer pricing study, forming part of the paper book from pages no.129-142. We find that before the TPO also the assessee furnished the following documentary evidence vide submission dated 04/10/2011, to support the fact that services have been availed under the aforesaid agreement:-

"Documentary evidences to support the fact the fact that services have been availed by the Company under the agreement"

In relation to the above mentioned services, we are attaching herewith the following documents:

- Copy of inter-company agreement for providing central and regional support services is attached herewith as Annexure 1. In this regard, please refer 'Schedule D' of the agreement for the detailed nature of services rendered along with the appropriate allocation keys applied for determining the share of cost attributable to HSBC AMC for the services rendered;
- Summary sheet along with the copy of invoices raised by HSBC London towards the above mentioned services availed by HSBC AMC is attached herewith as Annexure 2.
- Copy of Transfer Pricing Documentation ("TP Documentation") undertaken by HSBC Global Asset Management Ltd for managing the group's investment management (AMG) businesses as Annexure 3. The purpose of undertaking the TP Documentation is to document, for transfer pricing purposes, the types of services being provided, the nature of the costs being charged and the mark-up applied. From the said TP Documentation, it is clear that various types of value added services are provided for the benefit of the Company.
- As regards, the HR Services, we are attaching herewith the following documents in support of the benefit test:
 - Snapshot of the range of services provided maintained by Group HR (London HR) as Annexure 4
 - Detailed functional instruction manual prescribed for each department by the Group to preserve Group values, to ensure the Group's Business principles are followed across the group and to maintain uniformity of practices across the group as Annexure 5.
 - Snapshot of HR Functional Instruction manual as Annexure 6
 - Approval Policies set out by the Group-wide resourcing policy as Annexure 7
 - Snapshot of Online Approval system 'Populous' developed by Group HR for hiring / transfer approvals and pay review for staff as Annexure 8
 - Snapshot of Online system developed by Group HR for Employee Self Service, online Performance Management System as Annexure 9
 - Snapshot of PeopleSoft Employee database installed globally as Annexure 10
 - Online learning management system developed by the Group with unique login for each staff as Annexure 11
 - Global Induction- HSBC Discovery Programme as Annexure 12
 - HR Academy for development of HR professionals across the Group as Annexure 13.
 - E-Mail correspondence as Annexure 14 as regards the followings:-

- *Guidelines and timelines for the Annual pay Review exercise every year from Global Asset Management Head HR to Regional CEOs (e.g. Asia- pacific) and Global Business Heads*
- *Guidelines and timelines for the Annual pay Review exercise every year from Asia- pacific Head HR to Local HR Heads (e.g. India)*
- *As regards, the Investment Services, we are attaching herewith as Annexure 15 the following documents in support of the benefit test:*
- *Global Investment Platform for discussion in Mumbai*
- *Equity Investment Philosophy and Process for discussion in Mumbai."*

13. We further find that the TPO proposed to analyse the international transaction under the CUP method, however, in the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm's length price of the international transactions was treated to be NIL. In order to justify the cost allocation based on the allocation key, it is the plea of the assessee that the same is as per the OECD guidelines. In this regard, it is relevant to note the following paragraphs of OECD guidelines:-

"7.23 In such cases, MNE groups may find they have few alternatives but to use cost allocation and apportionment methods which often necessitate some degree of estimation or approximation, as a basis for calculating an arm's length charge following the principles in Section B.2.3."

"7.25 The allocation should be based on turnover, or staff employed, or some other basis. Whether the allocation method is appropriate may depend on the nature and usage of the service. For example, the usage or provision of payroll services may be more related to the number of staff than to turnover etc."

14. We find that the coordinate bench of the Tribunal in Jabil Circuit India Private Limited vs ACIT, [2018] 100 taxmann.com 165 (Mum.), after considering the OECD guidelines upheld the usage of allocation keys for allocation of intra-group services. The relevant findings of the coordinate bench in the aforesaid decisions are as under:-

"28. We note that it is the claim of the assessee that the assessee has intra group AEs spread around the length and breadth of the globe. It has been claimed that the intra group services have been allocated on the basis of global agreement among the AEs. Proper allocation keys have been used and that the methodology adopted has the mandate of guiding of the OECD. In this regard, we note that in the OECD guidelines in the Chapter VII relating to special consideration for intra group services has observed that mainly two issues were to be considered, one was whether intra group service have in fact been provided. The other issue is whether the intra group charge for such services for tax purpose should be in accordance with the arms length principle. The OECD guidelines interalia also provide that the allocation of the group cost might be based upon the turnover or staff employed or some other basis. It mentioned that whether the allocation method is appropriate may depend upon the nature and use of the services. A reading of this OECD guidelines makes it abundantly clear that contrary to the Revenue's argument, the using of allocation keys for allocation of intra group services is not alien to international tax jurisprudence. Further, the allocation of concerned group expenses to different accounting units is a duly accepted accounting procedure."

15. Before concluding, it is relevant to note that the coordinate bench of the Tribunal in assessee's own case in ACIT vs HSBC Asset Management India Private Limited, in ITA No. 7088/Mum/2012, for the assessment year 2007-08, vide order dated 20/04/2022, while deciding similar issue in respect of transfer pricing adjustment on account of payment of cost allocation charges towards Central & Regional Support Services, observed as under:-

"5.7. We further find that the aforesaid charges were also paid by the assessee for availing services from its AE with regard to general management, marketing, risk management, finance, human resource services, investment services, product services and cash / treasury services. Further, we find that assessee had submitted the following documents before the Id. TPO it demonstrated the fact that services had indeed been obtained from the AE:-

- *Copy of inter-company agreement for providing central and regional, support services is attached herewith as Annexure K.*
- *Copy of invoices raised by HSBC London towards the above mentioned services availed by the Appellant is attached herewith as Annexure L.*
- *Actual working sheet showing the allocation of various costs towards the central management expenses and Intra-INV expenses which forms part of the invoices is attached herewith as Annexure M. This clearly evidences the charge of actual costs being allocated to the Appellant.*

- *Summary of expenses along with the recovery methodology adopted by HSBC London for allocating the costs as discussed hereinbefore is attached herewith as Annexure N.*
- *Working sheet showing the planning analysis demonstrating estimated costs being worked out for the services that were proposed to be rendered at the start of the year is attached herewith as Annexure O. This evidences bonafide intention by the Group to cross charge costs as accurately as possible.*
- *Further, appellant attached the copy of Transfer Pricing Documentation undertaken by HSBC Global Asset Management Ltd for managing the group's investment management (AMG) businesses as Annexure P. The purpose of undertaking the Transfer Pricing Documentation is to document, for transfer pricing purposes, the types of services being provided, the nature of the costs being charged and the mark-up applied. From the said Transfer Pricing Documentation, it is clear that various types of value added services are provided for the benefit of the Appellant.*
- *Further, appellant attached the working sheet showing the allocation of costs in support of the above-mentioned Transfer Pricing Documentation as Annexure Q.*

5.8. For providing the aforesaid services, the AE had charged certain costs on the assessee based on appropriate cost allocation key. In these circumstances, it could not be said that assessee had not provided any documentary services to support its claim of payment of cost allocation charges to its AE for availing various services as detailed hereinabove. In any case as stated supra, the Id. TPO had merely determined the ALP of this international transaction at Rs.Nil without benchmarking the same by using any of the prescribed methods provided in Section 92C read with Rule 10B of the Income tax Rules. Reliance again is placed on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Johnson & Johnson Ltd., referred to supra. Accordingly, we direct the Id. TPO to delete the transfer pricing adjustment made in the sum of Rs.1,18,42,942/- in respect of cost allocation towards central and regional support services. The ground No.2 raised by the Revenue is hereby dismissed."

16. Thus, in the facts and circumstances of the present case, once availing of various services from the associated enterprise is duly substantiated by the documentary evidence and the cost allocation among the group companies is also on the basis of a well-accepted allocation key method, we find no basis in upholding the transfer pricing adjustment made by the TPO/AO. Accordingly, the AO is directed to delete the transfer pricing adjustment on account of payment of cost allocation charges towards Central & Regional Support Services and Business Support Services. As a result, grounds no.2 and 4 raised in assessee's appeal are allowed.

17. The issue arising in ground no.3, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of payment of cost allocation charges towards Software Development and other IT services.

18. The brief facts of the case pertaining to this issue are: As per the transfer pricing study report, HSBC Hong Kong has rendered certain technology and support services including accessing, storing, or processing of data to HSBC group entities located all over the globe including the taxpayer. HSBC Hong Kong branch has rendered the following services to HSBC group entities located all over the globe including the taxpayer:-

- (a) *IT development: program support;*
- (b) *Data centre: mainframes, servers, storage, and printing;*
- (c) *Distributed Computing: desktop/laptop, email, remote access;*
- (d) *Telecom: data/voice network, call centre.*

19. The expenses incurred by HSBC Hong Kong for providing the services were allocated to the group entities on the cost of cost basis without any markup, which is based on the actual usage of computer resources in terms of the computer unit. Accordingly, the transaction was considered reasonable from the Indian transfer pricing perspective. The TPO vide order passed under section 92CA(3) of the Act proposed to analyse the transaction by applying the CUP method and held that the taxpayer has not proved that the services were rendered and also did not quantify such services in terms of actual expenditure incurred and commensurate benefits derived therefrom. The TPO further held that there is no basis that the quantum of such services would be to the extent of Rs.1.21 crores. It was also held that the taxpayer has not shown as to how

such services would be valued by an independent entity dealing in similar circumstances. In line with its findings rendered in respect of cost allocation towards Central and Regional Support Services and Business Support Services, the TPO determined the arm's length price of cost allocation towards Software Development and other IT services at Rs.Nil and proposed transfer pricing adjustment of Rs. 1,21,92,637. In conformity, the AO passed the assessment order under section 143 r/w section 144C(3)(a) of the Act. In appeal, the learned CIT(A) vide impugned order, inter-alia, upheld the findings of TPO/AO. Being aggrieved, the assessee is in appeal before us.

20. We have considered the rival submissions and perused the material available on record. HSBC Hong Kong has rendered certain technology and support services including accessing, storing, or processing of data to HSBC group entities located all over the globe including the assessee. An agreement dated 01/02/2006 to this effect has been entered into between HSBC Hong Kong and the assessee. From the perusal of the aforesaid agreement, forming part of the paper book from pages no.192-223, it is evident that for each of the services in the category of data Centre, Telecom, and distribution support, the assessee was charged on the basis of actual usage of computer resources in terms of the computer unit, such as normalised CPU seconds, per processor per month, per GB per month, etc. The assessee has availed following types of services from its associated enterprise:-

- *Technology and Support Service;*
- *Development Services;*
- *IT System Services;*
- *System services maintenance, consultancy services, and planning of the IT services for server hosting and site hosting.*

21. The assessee also filed copy of the sample invoices raised by HSBC Hong Kong for services provided under the aforesaid agreement, which forms part of the paper book from pages 224-232. From the perusal of the aforesaid invoices, we find that the various services provided by HSBC Hong Kong have been duly mentioned in the annexure along with the invoices. We find that before the TPO the assessee furnished the following documentary evidence vide submission dated 04/10/2011, to support the fact that services have been availed under the aforesaid agreement:-

"C. Documentary evidences to support the fact the fact that services have been availed by the Company under the agreement.

- *Copy of the inter-company agreement for providing above mentioned services is attached herewith as Annexure 16;*
- *Copy of the invoice or debit notes raised by HSBC Hongkong along with the working sheet showing the allocation of costs towards the various IT costs such as data centre cost, distributed support cost and IT Development cost are attached herewith as Annexure 17;*
- *Description of various services IT support services relating to IT Development, external consultancy, external software, windows/linux server CPU, internet search, distributed external disk storage and web trends availed from HSBC HK has been attached herewith as Annexure 18; and*
- *Details such as break-up of RTB costs for the year under consideration have been attached herewith as Annexure 19."*

22. In respect of this international transaction also, we find that the TPO proposed to analyse the international transaction under the CUP method, however, in the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm's length price of the international transactions was treated to be NIL. We find that the coordinate bench of the Tribunal in assessee's own case in HSBC Asset Management India Private Limited (supra), for the assessment year 2007-08, after considering the similar services rendered under the same agreement

dated 01/02/2006 decided the similar issue of transfer pricing adjustment on account of payment of cost allocation charges towards Software Development and other IT services, by observing as under:-

"5.2. From the perusal of the above facts, which remain undisputed and uncontroverted by the Revenue before us, we find that the entire transfer pricing adjustment in respect of cost allocation has been made by the Id. TPO completely on an adhoc basis without carrying out the benchmarking analysis by following any of the prescribed methods provided in the statute. We find that during the year end consideration the assessee had incurred software development and other IT service related expenses of Rs.1,82,58,074/-. It was submitted that HSBC (HK) has rendered certain technology and support services including accessing, storing or processing of data to HSBC group entities located all over the globe, An agreement dated 01/02/2006 to this effect has been entered into between the parties. The expenses incurred by HSBC (HK) for providing these services were allocated without any mark-up to the HSBC group entities based on actual usage of computer resources in terms of computer unit. It was also submitted that technology and support services were provided by the AE to the assessee from time to time pursuant to submission of work, which may include development services and IT system services. The various other support services rendered by AE to the assessee are as under:-

- IT Hardware Support- It ascertains the requirements for routers for efficient load handling;*
- Helpdesk for email and other communication queries and new requests handling;`*
- Configuration of engineering software's and tools required in business;*
- Helpdesk for common software's used;*
- Data-base administration support;*
- Upgradation of platforms and servers;*
- Roll-outs for technology enabled solutions;*
- Negotiating for enterprise licenses resulting in price-benefits passed on to the Appellant (prices were fixed on global basis);*
- 24x7 support and onsite warranty for all enterprise solutions as a part of global negotiation;*

5.3. It was specifically submitted that with respect to the above services, the cost allocation that has been made to the assessee was purely based on cost to cost basis based on actual usage. Further, we find that assessee had submitted the following documents to the Id. TPO to demonstrate the fact that services had indeed been obtained from the AE as under:-

- Copy of the inter-company agreement for providing above mentioned services is attached herewith as Annexure G. Copy of the invoice or debit notes raised by HSBC HK along with the working sheet showing the allocation of costs towards the various IT costs such as data centre cost, distributed support cost and IT Development cost are attached herewith as Annexure H.*
- On sample basis, with regard to IT costs, we are providing herewith the details such as project name, total cost, basis of allocation and the name of beneficiaries as Annexure I. Standard allocation methodology for each type of IT support and IT*

services along with the details of relevant cost pool and unit of cost computation is attached herewith as Annexure J.

5.4. Hence, it could be safely concluded that assessee had indeed 5.4. availed the aforesaid services and derived benefits thereon by incurring the cost paid to AE on the basis of cost allocation based on cost allocation case depending on actual usage without any thereon. Hence, the assessee duly discharged its onus of justifying the claim of expenses paid to its AE towards cost allocation of software development and other IT services. In any case, the Id. TPO ought not to have disallowed 50% of the said expenditure on an adhoc basis. The Id. TPO is duty bound to determine the ALP of an international transaction only by following any of the five prescribed methods provided in Rule 108 of the Income Tax Rules and not otherwise. This issue is no longer res integra in view of the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Johnson & Johnson Ltd,. reported in 80 taxmann.com 337 (Bombay High Court) dated 07/03/2017 wherein it was held as under:-

4. Regarding question (D):-

- (a) The respondent assessee paid to its Associated Enterprises (AE), technical know how royalty of 2%. The Transfer Pricing Officer (TPO) by order dated 24th March, 2005 restricted the technical know how royalty paid by the respondent assessee to its AE at 1% instead of 2%, as claimed. In terms of the determination dated 24th March, 2005 of the TPO on the above issue amongst others, an assessment order dated 28th March, 2005 for the subject Assessment Year was passed by Assessing Officer under Section 143(3) of the Act.
- (b) Being aggrieved with the order dated 28th March, 2005 of the Assessing Officer, the respondent assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 22nd March, 2007, the appeal of the respondent assessee on the issue of royalty payable on technical know how, allowed the appeal. It inter alia held that restricting the royalty paid on account of technical know how to 1% was arbitrary and ad-hoc. Inasmuch as, there were no reasons justifying the restriction of the technical know how royalty paid by the respondent assessee to its AE at 1%. Moreover, it also records the fact that the TPO did not determine the ALP of the technical know how royalty by adopting any of the methods prescribed under Section 92C of the Act.
- (c) Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. By the impugned order dated 20th August, 2013 the Tribunal dismissed the Revenue's appeal inter alia upholding the order of the CIT(A).
- (d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know how royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal.

(e) *In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.*

5.5. Respectfully following the same, we direct the Id. TPO to delete the transfer pricing adjustment made in the sum of Rs.91,29,037/- towards cost of allocation on an adhoc basis."

23. Thus, in view of the above, once availing of various services from the associated enterprise is duly substantiated by the documentary evidence and the cost allocation among the group companies is also on a cost-to-cost basis, we find no reason to uphold the transfer pricing adjustment made by the TPO/AO. Accordingly, the AO is directed to delete the transfer pricing adjustment on account of payment of cost allocation charges towards Software Development and other IT services. As a result, ground no.3 raised in assessee's appeal are allowed.

24. The issue arising in ground No. 5, raised in assessee's appeal, is pertaining to transfer pricing adjustment on account of payment made for availing Investment Advisory Services.

25. The brief facts of the case pertaining to this issue are: During the year, the assessee had availed portfolio management services from Sinopia Asset Management (Asia-Pacific) Ltd ('SAML') in relation to HSBC 85% Capital Protection Oriented Portfolio, HSBC Equity Linked Portfolio, and HSBC Capital Guard Portfolio. For availing of Investment Advisory Services, the assessee had paid fees to SAML based on a percentage of the assets under management for its portfolio management business. The TPO vide order passed under section 92CA(3) of the Act held that the assessee has failed to prove the rendition of service. Further, it was held that the assessee has also failed to

submit regarding the expertise of SAML in providing Investment Advisory Services. The TPO also held that the quantification of expenditure and commensurate benefits derived by the assessee was also not proved. Accordingly, the TPO determined the arm's length price of the aforesaid international transaction at Rs.Nil and proposed the transfer pricing adjustment of Rs. 44,90,434. In conformity, the AO passed the assessment order under section 143 r/w section 144C(3)(a) of the Act. In appeal, the learned CIT(A) vide impugned order, inter-alia, upheld the transfer pricing adjustment on account of payment made for availing Investment Advisory Services. Being aggrieved, the assessee is in appeal before us.

26. We have considered the rival submissions and perused the material available on record. During the year, SAML provided the following investment advisory services to the assessee in relation to HSBC 85% Capital Protection Oriented Portfolio, HSBC Equity Linked Portfolio, and HSBC Capital Guard Portfolio for its portfolio management business:-

- *Advisory services relating to investment decisions on various scripts in Indian market;*
- *Technical analysis and macroeconomic analysis and review of Indian markets;*
- *Trend analysis and trend forecasting;*
- *Portfolio analysis and diversification based on the overall investment strategy for the fund;*
- *Price movement in various analysis for scripts forming part of portfolio;*
- *Suggested purchased/sales volume and price analysis;*
- *Profit and loss analysis on daily basis for the portfolio of scripts relevant to the fund;*

- *Annual fund maintenance cost and cost control variance analysis;*
- *Monitoring of performance index of the scrip in line with investment strategy*

27. In order to justify the rendition of service, the assessee furnished the following documents, as mentioned in the submission dated 04/10/2011 filed before the TPO:-

- *"Details of investment advice provided by SAML in relation to HSBC 85% Capital Protection Oriented Portfolio for execution of trades in Indian securities as Annexure 22;*
- *Document showing sharing of market review of funds operated during the year under consideration on sample basis for February 2008 as Annexure 23,*
- *Details on sample basis showing the summary of expenses incurred in relation to a portfolio for a month as Annexure 24;*
- *Details showing the portfolio review on sample basis for a month as Annexure 25; and*
- *Details showing provision of services in relation to providing data on monitoring of funds inter-alia include position report, investment guideline report, performance series, performance which report, index performance, return and transaction Report as Annexure 26."*

28. The assessee has also placed on record the sample invoices raised by SAML, Hong Kong on the assessee for the investment advisory services, which forms part of the paper book from pages no.272-273. The assessee has also filed investment advice received from SAML on 05/05/2007 regarding which HSBC 85% Capital Protection Oriented Portfolio stock. From the perusal of said advice forming part of the paper book on page No. 274, we find that the same also mentions the time of trading on the market. As per the assessee, the services are in the nature of value-added service which is beneficial to the assessee's overall business activities, and accordingly have been appropriately

paid based on its share of services availed. It is also the plea of the assessee that for India it was a new business operation and therefore assessee availed services from the associated enterprise, who has vast knowledge on the subject. The assessee also provided the details of transactions in Capital Guard Portfolio, on page 277 of the paper book, wherein it had earned a gain of 10.59%. Further, in the Performance Asset Account, the assessee has shown a gain of Rs. Rs.15,38,84,283.

29. Thus, from the perusal of the above documents, it is evident that the assessee has not only proved the receipt of services from the associated enterprise but also provided the details of the benefit received by it from the Investment Advisory Services received from the associated enterprise. Therefore, in view of the above, we find no basis for upholding the transfer pricing adjustment made by the TPO/AO. Accordingly, the AO is directed to delete the transfer pricing adjustment on account of payment made for availing of Investment Advisory Services. As a result, ground no.5 raised in assessee's appeal is allowed.

30. Ground No. 1 is general in nature and in view of our aforesaid findings, the same need no separate adjudication.

31. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 16/03/2023

Sd/-
M. BALAGANESH
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 16/03/2023

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

Assistant Registrar
ITAT, Mumbai