

आयकर अपीलिय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA-TP No. 282/Hyd/2022
(निर्धारण वर्ष / Assessment Year: 2011-12)

Commvault Systems (India) Private Limited,
Hyderabad
[PAN : AACCC3708L] Vs. The Deputy Commissioner of
Income Tax,
Circle-1(1),
Hyderabad

अपीलार्थी / Appellant

प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri D. Prabhakar Reddy, AR
राजस्व द्वारा/Revenue by: Shri Rajendra Kumar, CIT-DR

सुनवाई की तारीख/Date of hearing: 10/04/2023
घोषणा की तारीख/Pronouncement on: 18/04/2023

आदेश / ORDER

PER K. NARASIMHA CHARY, JM:

Aggrieved by the final assessment orders passed consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), in the case of M/s. Commvault Systems (India) Private Limited ("the assessee") for the assessment year 2011-12 under section 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961 (for short "the Act") assessee filed this appeal.

2. Brief facts of the case are that the assessee is engaged in the business of software development services and unified data storage solutions. They have filed their return of income for the assessment year

2011-12 on 29/11/2011 declaring a loss of Rs. 1,26,86,720/- under normal provisions of the Income Tax Act, 1961 (for short "the Act") and Rs. 2,11,50,476/- under the provisions of section 115 JB of the Act. According to form PCB, the assessee had international transactions with its associated Enterprises during the year and therefore a reference was made to the Transfer Pricing Officer (Ld. TPO). Learned TPO by order dated 27/01/2015 suggested adjustment of Rs. 1,54,47,842/- towards arm's-length price of the international transactions.

3. Pursuant to the order of the learned TPO, draft assessment order was passed on 17/02/2015 and aggrieved by such an order assessee filed objections before the learned DRP, Bangalore. By order dated 06/11/2015, the learned DRP did not accept the objections filed by the assessee. Accordingly, a final assessment order was passed on 21/12/2015 by assessing the income of assessee 27,61,122/- after making the addition of Rs. 1,54,47,842/- towards TP adjustment. Assessee filed an appeal before the Tribunal and a Co-ordinate Bench of this Tribunal set aside the issue to the file of the learned Assessing Officer/learned TPO directing them to conduct a fresh TP analysis by treating the impugned transaction of the assessee as distribution and to determine the most appropriate method.

4. Subsequently, pursuant to the orders of the Tribunal, the learned TPO issued notice to the assessee and by order dated 30/10/2019, considered Transactional Net Margin Method (TNMM) as the most appropriate method and proceeded to determine the Arm's Length Price (ALP) of the distribution transaction. Assessee filed objections before the learned DRP, and again the learned DRP confirmed the findings of the learned TPO that TNMM is the most appropriate method. Consequently, final assessment order was passed on 18/05/2022 determining the income of the assessee as Rs. 24,15,146/- after adding the TP adjustment of Rs. 1,51,01,866/-.

5. Hence the assessee is before us in this appeal, contending that when once the ITAT concluded in the first round of litigation that the business of the assessee is merely that of a pure distributor, then it is, but natural to conclude that the Resale Price Method (RPM) is the most appropriate method but the authorities below failed to appreciate the fact that the assessee got the goods it sold in the Indian market were provided to the assessee by the parent company at free of cost and the assessee was earning the maximum gross margin after incurring certain expenditure. Assessee further contended that in such situation, TNMM cannot be the most appropriate method.

6. Per contra, it is the contention of the learned DR that since the assessee is given the goods by the parent company at free of cost, it cannot be said that the assessee purchased the products from the AE for resale in the Indian market. Learned DR further submitted that RPM is applicable in case where the product is purchased from AE and resold to a third party by reducing the resale price by an appropriate gross margin thereon. Such margin would be the amount which the reseller would like to cover the cost of sales and other charges and such adjusted margin should be compared to a comparable un-controlled resale transaction. Sum and substance of the argument on behalf of the Revenue is that when there is no purchase, there cannot be any resale and for that simple reason, RPM is not an appropriate method. According to the learned DR, under the agreement, the assessee is receiving the goods for free of cost, incurring certain expenditure and distributing the goods for a particular price and all this constitutes a service under the agreement and there is no profit element or the margin involved here. Learned DR, therefore, submits that unless there is a purchase price and margin, the ALP of the margin cannot be determined by taking into consideration the costs stated by the assessee.

7. In reply, learned AR submitted that against the directions of the learned DRP for the assessment year 2013-14 analysing the similar transactions under the very same agreement held that RPM is the most

appropriate method to benchmark the transaction and determine the ALP thereof. He submitted that if the view taken by a coordinate Bench of this Tribunal in assessee's own case for the assessment year 2013-14 is followed, the matter needs to be restored to the file of the learned Assessing Officer/learned TPO to adopt the RPM as MAM and to look at the facts from that angle.

8. Learned DR, however, read out the relevant observation of the Co-ordinate Bench of this Tribunal and submitted that the Co-ordinate Bench of this Tribunal observed that as per 10B(1)(b) of the Act, RPM could be applied where the property or service purchased from AE are resold to an unrelated enterprise. He, therefore, submits that the Co-ordinate Bench of this Tribunal recorded its findings on the premise that there was purchase of products from the AE and then such products were resold to an unrelated enterprise, which is not the case on hand.

9. We have gone through the record in the light of the submissions made on either side. A copy of the order dated 26/11/2020 in ITA No. 2280/Hyd/2017, for the assessment year 2013-14 in assessee's own case, is furnished before us and the same part of the record. The subject matter under ground No. 10 thereon, the assessee challenged the findings of the learned DRP stating that the learned DRP committed error in not appreciating the fact that the transfer pricing regulations cannot be applied to the distribution activity or service provided when no payment was made to the AE towards software licenses and also in rejecting the RPM as the most appropriate method and selecting TNMM in its place for determination of ALP for distribution activity.

10. On a perusal of the order dated 26/11/2020 in ITA No. 2280/Hyd/2017, for the assessment year 2013-14 in assessee's own case (supra), we find that the Co-ordinate Bench of this Tribunal dealt with this issue in detail and vide paragraph No. 6.5 observed and held that ,-

“6.5.We find as per 10B(1)(b) of the Income Tax Rules, re-sale price method could be applied where the property or service purchased from Associated Enterprises are resold to an unrelated enterprise. The facts of the assessee’s case squarely fit into this parameter as assessee herein has purchased the software free of cost from its AE and had sold it to unrelated parties in India. Hence, we hold re-sale price method should be the most appropriate method in the instant case. Moreover, the re-sale price method is traditional transaction method which would always be preferable to transactional profit method like profit split method and TNMM.

6.6. Yet another excruciating fact which is relevant to be addressed in the instant case is that the arm’s length price adjustment should be restricted only to the value of international transaction. Admittedly, the international transaction involved in the distribution segment is purchase of software by the assessee from the AE. Since the assessee is not making any payment to its AE for the software supplied to it, the value of international transaction had to be concluded as zero and consequently the transfer pricing adjustment thereon also would be only zero. The arm’s length price adjustment should be restricted only to the value of international transactions and cannot be done at entity level is no longer res integra in view of the decision of the Hon’ble Bombay High Court in the case of CIT vs. Phoenix Mecano (India) Pvt. Ltd., reported in 414 ITR 704 and in the case of CIT vs. Thyssen Krupp Industries Pvt. Ltd., reported in 381 ITR 413 (Bom) and CIT vs. Tara Jewels Export P. Ltd., reported in 381 ITR 404 (Bom).

6.7. In any case we find that the issue in dispute is squarely covered by the Co-ordinate Bench of this Tribunal in assessee’ own case for the A.Y.2011-12 in ITA No.343/Hyd/2016 dated 11/04/2018 wherein this Tribunal after examining the nature and terms of the distribution agreement had held that assessee’s functional profile is akin to a distributor and not a service provider. The relevant observations are made in para 10 of the said order which are not reproduced herein for the sake of brevity”.

11. It is, therefore, clear that the Co-ordinate Bench of this Tribunal considered the functional profile of the assessee in the light of the terms of distribution agreement and held that the assessee is a distributor and not a service provider and also that RPM is the MAM. Since there is nothing contrary on record, we find it difficult to take a different view for this year under consideration. We, therefore, accordingly set aside the impugned findings of the authorities below on this aspect and restore the

issue to the file of the learned Assessing Officer/learned TPO to consider the RPM as the MAM and take a view on the necessity of any adjustment towards ALP for distribution function, after hearing the assessee. Grounds are ordered accordingly.

12. In the result, appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on this the 18th day of April, 2023.

Sd/-
(RAMA KANTA PANDA)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Hyderabad,
Dated: 18/04/2023

TNMM

Copy forwarded to:

1. M/s. Commvault Systems (India) Private Limited, 10th Floor, (Level-12), Atria, The V Park, Plot No. 17, Hitech City Road, Software Units Layout, Madhapur, Hyderabad.
2. The Deputy Commissioner of Income Tax, Circle-1(1), Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
7. GUARD FILE

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ITAT, HYDERABAD