

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. No.580/Mum/2007
(निर्धारण वर्ष / Assessment Year: 2002-03)

DDIT (International Taxation)-1(2) Room No. 117, 1 st Floor, Scindia House, Baliard Pier, Mumbai-4000038.	बनाम/ Vs.	M/s. Commerzbank A. G. 12-B, Free Press House, 215, Nariman Point, Mumbai-400021.
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Cross Objection No. 112/Mum/2013
Arising out of I.T.A. No.580/Mum/2007
(निर्धारण वर्ष / Assessment Years: 2002-03)

M/s. Commerzbank A. G. 12-B, Free Press House, 215, Nariman Point, Mumbai-400021.	बनाम/ Vs.	DDIT (International Taxation)-1(2) Room No. 117, 1 st Floor, Scindia House, Baliard Pier, Mumbai-4000038.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACC1990N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Jitendra Singh
Revenue by:	Shri Soumendu Kumar Dash (Sr. DR)

सुनवाई की तारीख / Date of Hearing: 11/01/2023
घोषणा की तारीख /Date of Pronouncement: 27/02/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the revenue and cross-objection preferred by the assessee against the order of the Commissioner of Income Tax (Appeals)-XXXI, Mumbai [hereinafter referred to as the "CIT(A)"] dated 01.09.2006 for A.Y.2002-03.

2. At the outset, it is noted that the cross-objection (CO) filed by the assessee is delayed by more than 1212 days and the assessee has expressed its inability to file an affidavit in this regard, because it has



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closed its business activity in India. The Ld. AR on behalf of the assessee has therefore filed an application seeking withdrawal of cross objections filed by him. Further, at the time of hearing, the Ld. AR submitted that out of the three (3) grounds raised in the cross objections, it does not intend to press Ground nos. 2 & 3 of cross-objection relating to the action of the Ld. CIT(A) confirming transfer pricing adjustment in relation to arm's length pricing for Liaison Services and Agency Services rendered to the head office to the extent of Rs.9,76,282/- and Rs.17,16,207/- respectively. The Ld. AR submitted that the assessee intended to press only the Ground no. 1 raised in the cross-objection which is against the action of the Ld. CIT(A) upholding the addition made in relation to interest income of Rs.1,98,63,023/-, which the Ld. AR has now alternatively raised by taking recourse to Rule 27 of the ITAT Rules.

3. The Ld. DR, on the other hand, opposed the admission of Cross Objection due to the inordinate delay of 1212 days and the fact that the explanation regarding the reasons for such delay was not supported by an affidavit. He also opposed the admission of the Ground No. 1 of the Cross Objections raised by the assessee through Rule 27 of the ITAT Rules.

4. We note that the assessee has been unable to justify the inordinate delay of 1212 days in filing of cross objection and has therefore sought to withdraw the same. Accordingly, the Cross Objection is dismissed being barred by limitation. As far as the ground raised by the assessee in relation to addition of interest income through



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Rule 27 of the ITAT Rules is concerned, it is noted that plea overlaps with Ground No. 1 of the Revenue. Bare reading of Rule 27 manifests that the assessee without having filed any cross appeal or cross objection can support the impugned order on any grounds decided against him. In the present case assessee is noted to have taken this ground before the Ld. CIT(A) and as the assessee had not further challenged the findings on this ground, then as per Rule 27 of the Rules assessee can advance his arguments even though it has not filed cross objection against the finding of the Ld. CIT(A) against it. Our view finds support from the decisions of the Hon'ble Allahabad High Court in the case of **CIT Vs Jindal Polyster Ltd (82 taxmann.com 302)**. Accordingly, the plea raised by the assessee under Rule 27 of the ITAT Rules is admitted for adjudication.

5. In view of the above, we now take up the appeal of the Revenue. Ground No. 1 of the revenue and the Ground No. 1 raised by the assessee in Rule 27 of the Rules which are inter-connected, and is therefore taken up together for adjudication. Briefly stated, the facts of the case are that, the assessee-bank is a branch of a foreign banking institution whose Head Office is in Germany. During the year, the assessee had paid interest of Rs.1,98,63,023/- to the Head Office ('HO') in Germany which was claimed as deduction while computing the taxable income in India. In the assessment, the AO disallowed the payment of interest to HO on the premise that the assessee was required to withhold tax at the rate of 10% on such payment and since the assessee was an assessee-in-default u/s 195 of the Act, the expense



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so claimed was disallowed by invoking Section 40(a)(i) of the Act. Further, the AO separately held that such interest of Rs.1,98,63,603/- received by the HO was taxable in India and therefore added the same separately to the total income of the assessee Branch. On appeal, the Ld. CIT(A) deleted the disallowance of interest expenditure of Rs.1,98,63,023/- made by the AO u/s 195 of the Act but upheld the AO's action of taxing the interest income of HO separately in the hands of the assessee. Aggrieved by the action of the Ld. CIT(A) deleting the interest expenditure, the Revenue is in appeal before us. On the other hand, the assessee in Rule 27 has challenged the Ld. CIT(A)'s action of confirming the addition made by the AO in relation to the interest income earned by the HO in the hands of the assessee Branch.

6. We have heard both the parties. At the onset, the Ld. AR brought to our notice that both these issues have since decided and answered in favour of the assessee by the Hon'ble Calcutta High Court in the case of **ABN AMRO Bank Vs CIT (198 taxmn 376)**. It is noted that identical question was framed by the Hon'ble Calcutta High Court which was as follows:

“1. Whether interest payment made by the Indian branch of the appellant to its head office abroad was to be allowed as a deduction in computing the profits of the appellant's branch in India?”



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2. Whether in making such payment to the head office, the appellant's said branch was required to deduct tax at source under section 195 of the said Act?"

7. Answering the same in favour of the assessee, the Hon'ble High Court had held as under:

"18. An unnecessary complication has been created by the interpretation made of section 40(a) (i) of the Income-tax Act read with section 195 of the Act by both the appellant and the respondents. First of all, a proper meaning has to be ascribed to the expression "chargeable" under the provisions of this Act. Section 195(1) says that, if any interest is paid by a person to a foreign company, which interest is chargeable under the provisions of this Act tax should be deducted at source. The word "chargeable" is not to be taken as qualifying only the phrase "any other sum" only but it qualifies the word "interest" also. This interpretation is supported by the phrase in parenthesis, namely, not being income chargeable under the head "Salaries". Therefore, the meaning of this section is that such interest must be chargeable under the provisions of this Act. To simplify the matter, this interest must be accounted for or credited in the account of some person who is chargeable under the Act. In other words, this remittance of interest must result in an income which is chargeable under the Act. In those circumstances tax may be deducted at source. But where this interest is not so chargeable, no tax is deducted. In this case, by virtue of the above convention, the head office of the appellant is not liable to pay any tax under the Act. Therefore, in our opinion, there was and still is no obligation on the part of the



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appellant's said branch to deduct tax while making interest remittance to its head office or any other foreign branch.

19. Therefore, in the circumstances there is no scope for any argument that for the purpose of computation of expenditure the branch and the head office are to be taken as separate entities but for the purpose of payment of tax to be deducted at source on interest payment, it is to be taken as one bank and no deduction is to be made as sought to be made by the learned counsel for the appellant. Such contentions are totally unfounded in our opinion. The permanent establishment and the head office have to be taken as separate entities for all purposes. But in the making of payment of interest no tax has to be deducted under section 195(1), for the reasons above.

20. Therefore, if no tax is deductible under section 195(1), section 40(a) (i) of the Act will not come in the way of the appellant claiming such deduction as from its income. Therefore, in the circumstances the appellant would be entitled to deduct such interest paid, as permitted by the convention or agreement, in the computation of its income.” (emphasis supplied)

8. The Ld. AR particularly brought to our notice that the Hon'ble High Court had categorically held that, (a) the Indian Branch is under no obligation to deduct tax at source u/s 195 of the Act on the interest paid to Head Office, (b) the interest income of HO is not taxable in India by virtue of Article 7 of the DTAA and (c) although the interest income of HO is not taxable in India but the Indian Branch would be entitled to claim deduction for such interest paid in its computation of income.



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9. To further buttress his contention that, although the interest income of HO was not chargeable to tax in India by virtue of Article 7 of DTAA, the assessee Branch was entitled to claim deduction for the interest paid in computing its total income, the Ld. AR invited our attention to the Protocol signed between India and Germany on 19th June, 1995 of the Agreement, wherein, with reference to Article 7 (business profit), it was provided that no deduction shall be provided in respect of amount paid or charged by any PE (branch) to the Head Office by way of interest on money lent to PE (branch), except in case of banking institution. The relevant extracts of the Protocol reads as under: -

“(e) No deduction shall be allowed in respect of amounts paid or charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other officers, by way of

- (i) royalties, fees or other similar payments in return for the use of patents or other rights;
- (ii) commission for specific services performed or for management; and
- (iii) interest on moneys lent to the permanent established *except in case of a banking institution.*” *(emphasis supplied)*

10. We note that the above judgment is squarely applicable in the facts of the case. As held by the Hon’ble High Court (supra), the assessee Branch was under no obligation to deduct tax at source u/s 195 of the Act while remitting interest to its Head Office and therefore the Ld. CIT(A) had rightly deleted the disallowance made by the AO



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u/s 40(a)(i) of the Act. Also, in terms of Article 7 of the DTAA between India and Germany (which is akin to the Article 7 between India & Netherlands), the interest income earned by the HO from the assessee Branch was not liable to tax in India.

11. In view of the above, we Ground No. 1 of the Revenue is dismissed. Also, the ground raised by the assessee in Rule 27 of the Rules is allowed and the AO is directed to delete the addition of interest income of Rs.1,98,63,023/-.

12. Ground No. 2 of the Revenue is against the action of the Ld. CIT(A) in deleting the addition of Rs.3,29,347/- in relation to the transfer pricing adjustment made to the interest expense paid to the HO. The facts noted by the TPO was that, the assessee has borrowed US \$ 10 million from the HO on 10.04.2001 at interest rate of 4.51% for a period of 353 days. Accordingly, the total interest due was US \$ 442,230.56. The assessee had determined the arm's length interest rate based on the data obtained from Reuters at 4.43%. According to assessee the difference of 0.18% in the arm's length price was within the permitted range of +/-5% as per proviso to Section 92C (2) of the Act and therefore contended that the transaction was at arm's length. The TPO however did not agree with the same. According to TPO, the rate of 4.43% did not represent the arithmetic mean of the interest rates prevailing during the said period and therefore he held that the assessee was not entitled to benefit of proviso to Section 92C(2) of the Act. The TPO accordingly worked out the arm's length price at USD 4,09,416 as against the actual interest payment of USD 4,15,922 and



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accordingly made transfer pricing adjustment of Rs.3,29,347/- [(415922 – 409416) * Rs.47.69/USD]. Aggrieved by the action of the TPO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the addition by observing as follows:

“4.3 I have considered the arguments of the AR and I have also examined the facts. Reuter rate quoted by the appellant are LIBOR rate. In the international money market deals for borrowing and lending for short term and long term are made between related and unrelated banks. It goes without saying that the transactions entered during the day between the unrelated parties are at arm’s length prices with which the transaction between related parties can be compared. The Reuter rates are computed based on the averages of the rate of interest at which the deals are made during the day. It is therefore inherent in Reuter/LIBOR rate that they primarily represent the arithmetical mean of the rates of the interest offered and accepted in transaction between unrelated parties during the day. Section 92C(2) provides that where more than one price is computed by the appropriate method, taxpayer would be entitled to variation of 5% over the arithmetical mean of such prices determined by the most appropriate method. Reuter/LIBOR rate represent the mean rates of the day as they are computed based on the transaction during the day. I am therefore of the view that the appellant is entitled to variation of 5%, since the proviso to section 92C(2) is applicable to it. In view of this, it is held that the TPO has wrongly refused to allow the benefit of proviso. After applying the proviso no



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more addition is required to be made. Accordingly, addition of Rs. 3,29,000/- is deleted.”

13. Aggrieved, the Revenue is now before us.

14. We have heard both the parties and perused the records. The Ld. DR was unable to controvert the above findings of the Ld. CIT(A) holding that the Reuter/LIBOR rates represented the arithmetical mean of the rates of the interest offered and accepted in transaction between unrelated parties during the day, and therefore the assessee was entitled to benefit of +/-5% in terms of proviso to Section 92C(2) of the Act. We therefore do not see any reason to interfere with the above order of the Ld. CIT(A). Accordingly, Ground No. 2 of the Revenue stands dismissed.

15. Ground No. 3 of the Revenue is against the action of the Ld. CIT(A) deleting the transfer pricing adjustment to the extent of Rs.55,98,853/- out of the total adjustment of Rs.65,75,135/- made by the TPO in relation to the arm's length price of the international transaction of Liaison Services rendered to the Head Office and the Overseas Branches. Briefly stated the facts of the case are that, the assessee had rendered liaison services to HO & Overseas Branches for which it had charged the cost incurred for rendering such services along with a mark-up of 8%, which worked out to Rs.1,50,61,618/-. According to TPO, the mark-up of 8% charged by the assessee was on the lower side, and upon undertaking a comparative study, he identified three comparable whose profit rates computed by him were as follows:



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Sr. No	Company	F.Y.	Profit Rate
a.	Centrum Finance Ltd.	2001-02	44.38%
b.	Integrated Enterprises India Ltd.	2001-02	32.09%
c.	Pioneer Investcorp Ltd	Calendar year 2001	88.97%

16. Based on the above, the TPO worked out the arm's length remuneration for rendering the liaison services at Rs.2,16,36,753/- and accordingly made transfer pricing adjustment of Rs.65,75,135/- [Rs.2,16,36,673 - Rs.1,50,61,618]. Aggrieved by the order of the TPO, the assessee preferred an appeal before the Ld. CIT(A). In the appellate proceedings, the assessee objected to its FAR profiling undertaken by the TPO, and also contended that the functional & business profile of the three (3) comparables identified by the TPO were completely distinguishable. The assessee also pointed out that the computation of profit rates of these three (3) comparables suffered from apparent errors and infirmities. The assessee placed on record the financial statements of these three (3) comparables in support thereof.

17. Taking note of the above, the Ld. CIT(A) called for a remand report from the TPO, who sent his report of 31.07.2006. Considering the submissions of the assessee, findings & report of the TPO, the Ld. CIT(A) only rejected Pioneer Investcorp Ltd as a comparable. The Ld. CIT(A), however, noted that manner computation of profit rates by the TPO was not proper and worked it out at, (a) Centrum Finance Ltd. –



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8.5% and (b) Integrated Enterprises India Ltd. – 19.5%. The Ld. CIT(A) thus held that the appropriate mark-up rate was 15% as opposed to 8% adopted by the assessee. Accordingly, the transfer pricing adjustment worked out to Rs.9,76,282/- which was confirmed by the Ld. CIT(A) and the remaining addition of Rs.55,98,853 [65,75,135 – 9,76,282] was deleted. Aggrieved by this order of the Ld. CIT(A), the Revenue is now in appeal before us.

18. We have heard both the parties and perused the material placed on record. Before us, the Ld. DR appearing on behalf of the Revenue first assailed the action of the Ld. CIT(A) in rejecting Pioneer Investcorp Ltd as a good comparable. In this regard, it is noted from the facts placed before us that, the assessee was providing correspondent banking services to his Head Office and Overseas Branches. These activities consist of marketing Nostro Accounts, Letter of Credit, Cheques for Collection and providing Guarantees. It is noted that the appellant did not bear any risk of loss or deficiency for rendering these services as it was being uniformly compensated for the costs incurred plus mark-up of 8%. The Ld. CIT(A) however had noted that, Pioneer Investcorp Ltd. was a category-I Merchant Banker with the SEBI which was also engaged in non-fund-based activities like Merchant Banking, Debt Syndication, etc. and therefore rejected Pioneer Investcorp Ltd. as the business profile and activities of this company was not comparable to the assessee. These findings of the Ld. CIT(A) remain uncontroverted before us and therefore we do not see any reason to interfere with the same.



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19. Now we come to the objection of the Revenue regarding the re-computation of profit rates of Centrum Finance Ltd. and Integrated Enterprises India Ltd. worked out by the Ld. CIT(A). Qua both these comparables, it is noted that the narrow issue in dispute is that, according to Revenue, the interest and other financial income and correspondingly the interest and financial charges was to be excluded as it was '*non-operating income/expense*', and therefore not includible while computing the operating profit. We however find ourselves in agreement with the Ld. CIT(A) that both M/s Centrum Finance Ltd. & M/s Integrated Enterprises India Ltd being engaged in the business of providing financial services viz., financing, brokerage, debt syndication, provision of guarantee etc., both the expenditure on interest and finance charges and also the earning of interest formed integral part of its operating business and therefore the operating profit cannot be computed by excluding the same. We therefore do not find any infirmity in the action of the Ld. CIT(A) including both the interest income as well as interest expense & finance charges for computing the operating profit of these companies. The relevant findings of the Ld. CIT(A) in this regard, are noted to be as follows:

“4.18 Centrum Capital Ltd.:

The AR has taken the total receipt as per balance sheet and has not taken into account preliminary expenses of Rs.2,700/- and loss on sale of assets of Rs.98,151/- debited in accounts. The AR has accordingly computed the total expenditure at Rs.7,29,14,038/- and the profit before tax of Rs.61,96,401/-. The increase in profit is on account of exclusion of preliminary



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expenses of Rs.2,700/- and loss of sale of assets of Rs.98,151/-. The AR has accordingly computed the ratio of PBT to total expenses at 8.5%. On the other hand, the TPO has computed the ratio at 44.38%. Examination of the TPO's working reveals that the TPO has excluded interest and other income of Rs.47,93,758/- and Rs.1,47,227/- from the profit and simultaneously has also excluded the interest and financial charges of Rs.21,643,326/- and preliminary expenses of Rs.2,700/-. This has resulted in profit of Rs.2,28,00,591/-. The TPO has taken the total operating cost of Rs.7,30,14,899/- and has deducted from it the interest and financial charges and preliminary expenses mentioned as above and has computed net cost at Rs.5,13,68,863/-. Ratio of profit to total operating cost has been computed at 44.38%.

The AR has submitted that the Centrum Finance Ltd. is a company engaged in providing primary debt market & project finance and debt syndication, etc. It is not correct to exclude the interest income and also to exclude the interest and finance charges. All the expenses are interlinked with the earning of income and it is only the net profit and the total operating cost inclusive of interest and finance charge which has to be taken into account.

I have examined the AR's objections. Centrum Finance Ltd. is engaged in the business of financing and therefore expenditure on interest and finance and the earning of interest are part of the main business activities of the appellant. Profit from the business cannot be computed by excluding these essential and closely interlinked expenditures in income. I therefore do not agree with the working adopted by the TPO to compute the



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operating profit and the total operating cost and consequently the ratio of operating cost to total operating cost. After consideration of the facts, I hold that the ratio of operating profit to total expenses is only 8.5% and not 44.38% as computed by the TPO.

4.19 Integrated Enterprises (India).Ltd.

The AR has computed the operating profit at Rs.3,32,53,000/- and the operating expenses at Rs.21,10,84,000/- The AR has taken the entire income from other sources as shown in the Profit & Loss Account except the profit on sale of assets of Rs.1,38,000/-. Regarding the expenses, AR excluded the loss of sale of fixed assets of Rs.4,21,000/- The ratio of operating profit to total expenses computed by AR is 15.75%. On the other hand, the TPO has excluded the profit from share trading of Rs.16,70,000/-, profit of sale of fixed assets of Rs.1,38,000/- and other income of Rs.9,02,000/-. The TPO has also excluded interest and bank charges of Rs.1,62,84,000/-, loss on sale of fixed assets of Rs.4,21,000/- and loss on sale of investments of Rs.80,00,000/-. The TPO has thus computed profit at Rs.5,45,65,000/- and operating expenses at Rs.17,00,28,000/-. The AR has submitted that the company is engaged in the business of providing depository participant activities, personal financial services and share transfer and registry income, etc. Expenditure on interest & bank charges is linked with the business of the company and cannot be separated from it. Similarly income from other sources consisting of interest and misc. income is also interlinked with the business. The AR has further submitted that similarly profit on share trading and loss



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on sale of Investment should also be taken into account for computing the expenses and operation profit.

I have considered the arguments of the AR and I have examined the case records. Integrated Enterprises (India) Ltd. has earned income from brokerage, services and partly interest. Expenditure on interest and bank charges is part of the business activity and it cannot be separated. Similarly income from other sources is also interlinked with the business of providing services and therefore cannot be separated. However, profit on share trading and the loss on sale of investment are independent activities and are therefore unconnected with the business activities of providing services. The TPO has accordingly justified in reducing the profit on share trading and adding the loss on sale of investment. With this, the revised operating profit is computed as under:

Net profit as computed by AR	:	Rs. 3,32,53,000/-
Add: Loss on sale of investment	:	Rs.80,00,000/-
Total	:	Rs. 4,12,53,000/-
Less : Profit on share trading	:	Rs. 16,70,000/-
Operating Profit	:	Rs. 3,95,83,000/-

The TPO has computed the operating cost at Rs.17,00,28,000/-. On the other hand, the AR has computed the operating expenditure at Rs.21,10,84,000/-. The comparison of the two reveals that the TPO has taken the entire expenditure debited to the P&L Account except the interest and bank charges of Rs.1,62,84,000/-. He has thus computed the total operating cost at Rs.17,00,28,000/-. On the other hand, the AR has taken entire cost debited in the P&L account of Rs.21,15,05,000/- and



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reduced it by the loss on sale of fixed assets of Rs.4,21,000/- to compute the operating expenditure at Rs.21,10,84,000/-. As mentioned above, interest and bank charges have been incurred by the appellant to earn the income and these expenses are closely interlinked with the main business activities. expenses. Accordingly, the TPO is not justified in excluding these. However as held above, loss on sale of investment is not allowable expenditure. It, therefore, cannot be considered as part of total operating cost. With this discussion, the total operating costs computed as under:

Total expenditure as computed in the P&L account	: Rs 21,15,05,000/-
Less: (a) Loss on sale of fixes assets	: Rs. 4,21,000/-
(b) Loss on sale of investment	: Rs. 80,00,000/-
Total Operating Cost	: Rs. 20,30,84,000/-

The ratio of operating profit to operating expenditure = 19.50%

20. In view of the discussion, we do not find any infirmity in the impugned action of Ld CIT(A), therefore Ground No. 3 of the Revenue stands dismissed.

21. We now take up Ground no. 4 of the Revenue which is against the action of the Ld. CIT(A) in allowing the relief of Rs.28,04,513/- out of transfer pricing adjustment of Rs.45,20,709/- made by the TPO on account of arm's length price for the Agency Services for precious metal transactions rendered to its AEs.



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22. Briefly stated, the facts relating to this issue are that, the assessee branch is involved in coordination and liaison between Commerzbank, Luxembourg and customer banks in India for purchase & sale of precious metals. The assessee Branch communicated enquiries/purchase/sale orders to the Luxembourg branch, which in turn, sends quote to the assessee branch. The assessee branch liaises with the customer-bank and communicates their agreement or disagreement to the deal/price to Luxembourg branch. Thereafter, the Luxembourg branch independently purchases/sales gold metals with the customer branch. The role of the assessee Branch is restricted to providing agency services to the Luxembourg Branch for which it charges a compensation of 8% markup on the cost incurred.

23. It is noted that although the TPO did not dispute the mark-up of 8% charged by the assessee but objected to the manner of quantification of the cost incurred for rendering the services. According to the assessee, it had incurred direct & indirect costs of Rs.56,77,000/- whereas according to the TPO the total cost attributable to this activity was Rs.97,62,858/-. Accordingly, after taking mark-up of 8%, the arm's length value was worked out at Rs.1,05,43,886/- as against the actual consideration of Rs.60,23,166/-, which led to adjustment of Rs.45,20,770/-. Aggrieved by the order of the TPO, the assessee carried the matter in appeal who partly allowed the claim of the assessee.



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24. The details of cost identified and attributed by the assessee and the TPO are noted to be as follows:

Sl No.	Expense Head	Amount allocated by assessee	Amount allocated by TPO
a.	Personnel Cost	15,64,000	34,82,000
b.	Depreciation	4,19,000	4,19,000
c.	Travel & HO Expenses	26,22,000	26,22,000
d.	Communication Expenses	3,08,000	3,08,000
e.	Administrative Expenses	7,60,000	21,33,000
f.	Support Staff Cost	-	7,98,773
	TOTAL	56,77,000	97,62,858

25. It is noted that the allocation of depreciation, communication expenses and travel & HO expenses to the agency business of precious metal were not in dispute. With regard to the items (a), (e) & (f), the Ld. CIT(A) after examining the facts and nature of expenses, re-worked these three (3) items as follows:-

Sl No.	Expense Head	Amount allocated by TPO	Amount allocated by Ld. CIT(A)
a.	Personnel Cost	34,82,000	23,30,673
e.	Administrative Expenses	21,33,000	10,81,447
f.	Support Staff Cost	7,98,773	4,04,966

26. The Ld. CIT(A) accordingly re-worked the cost attributable to the agency business as follows:

Sl No.	Expense Head	Amount allocated by CIT(A)
a.	Personnel Cost	23,30,673
b.	Depreciation	4,19,000
c.	Travel & HO Expenses	26,22,000
d.	Communication Expenses	3,08,000
e.	Administrative Expenses	10,81,447
f.	Support Staff Cost	4,04,966
	TOTAL	71,66,086



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27. After taking into mark-up of 8%, the arm's length value was re-worked by Ld. CIT(A) at Rs.77,39,372/- as opposed to Rs.1,05,43,886/- computed by TPO. Accordingly, the Ld. CIT(A) granted partial relief to the assessee to the extent of Rs.28,04,513/-. Aggrieved by the above re-allocation of expenses undertaken by the Ld. CIT(A), the Revenue is now in appeal before us.

28. Heard both the parties. Having regard to the facts stated above, the limited issue in dispute before us, is the re-working & re-allocation of personnel cost, administrative cost and support cost by the Ld. CIT(A). In respect of allocation of personnel cost, it is noted that the assessee had explained that two employees, Shri Amit Juneja & Shri Tarun Tandon were employed for this agency bullion division. However, as this business had significantly reduced, these two employees were also utilized for treasury operations. The assessee had accordingly allocated 50% of their salaries towards personnel cost for this agency business. The TPO, on the other hand, had allocated the entire 100% of their salaries. Additionally, the TPO noted, that the assessee had paid severance pay to one employee Mr. R Vijay Anand who left the job in April 2001, which had been not included in the personnel cost by the assessee. The TPO added the payment to Vijay Anand as well to the total personnel cost. Before the Ld. CIT(A), the assessee had substantiated with evidences like deal tickets etc., that the two employees, Shri Amit Juneja & Shri Tarun Tandon were indeed engaged in treasury division also. The Ld. CIT(A) taking note of this fact accepted the contention of the assessee that their entire 100%



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salary could not be allocated to the agency business but, to meet the ends of justice, he found it appropriate to hold 75% of their salaries to be allocable. We do not see any infirmity in this approach/action of the Ld. CIT(A).

29. As far as the severance pay of Mr. Vijay Anand is concerned, the Ld. CIT(A) had rightly held that, as the AO had already separately disallowed the severance pay while assessing income of the assessee, no cost on this account could be allocated to the agency business. The Ld. DR was also unable to controvert the same. We therefore uphold the Ld. CIT(A)'s calculation of personnel cost attributable to agency business at Rs.23,30,673/-.

30. On the issue of the allocation of administrative expenses & staff support expenses, we note that the relevant findings of the Ld. CIT(A) were as follows:

“5.6 Allocation of Administrative Cost.

The Appellant has allocated administrative cost of Rs.4,30,30,690/-. The TPO has allocated cost of Rs.4,13,64,690/-. The difference is coming out of the operating expenses allocation to ZFI division. The appellant has allocated Rs.52,53,000/- whereas the TPO has allocated Rs.69,19,000/-. The AR has submitted that he has no objection to the computation of administrative cost at Rs.4,30,30,690/-. Total number of employees at year end was 59. The appellant had taken the employee figure at 59 at his own allocation. The TPO has also taken the employee figure at 59 during the course of hearing before TPO. Total number of employees was taken at 64



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to provide certain working which was not accepted by the TPO. Thus, there is no dispute about the total number of employees i.e. 59. In view of this, the administrative cost per employee comes to Rs.7,01,100/- (Rs.4,13,64,690/- ÷ 59). Total number of employees employed in bullion division is 1.5425. Accordingly total administrative cost is Rs.10,81,447/- (7,01,100/- X 1.5425).

5.7 Support Cost.

The AR has further mentioned that the support staff cost, namely, EDP, HRD, legal compliances and service department of Rs.1,54,89,780/- has also been partly allocated by the TPO. The AR has submitted that while computing the amount of compensation receivable from the Luxembourg Branch, it is only direct cost and the cost which is indirectly related to the agent business are to be taken into account. The AR has submitted that the expenditure on EDP, HRD, legal compliance and service department of Rs.1,54,89,780/- is the expenditure of the Indian branch, but it is not connected with the bullion business. The bullion business was being taking care of by ZFI division. Expenses of this division were being a separately counted. Expenditure on EDP, HRD, legal compliance and service department are not the cost of the agency business for precious metal. That business was very small and was being taken care of by two employees alongwith their other duties. The AR has accordingly submitted that the allocation of support cost of Rs.7,98,773/- is not justified.



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5.8 The appellant had mentioned before the TPO that the support cost being the expenditure incurred on EDP, HRD, legal & compliances and service department are not to be allocated to the bullion business. The TPO had however computed these amounts and allocated a certain portion towards the bullion business as under:

Support Cost:

Total Support Cost	:	Rs.
1,54,89,780/-		
Total Number of employees	:	59
Cost of 3.0425 employees	:	Rs. 7,98,773/-

5.9 The AR has submitted before me that the AO has wrongly allocated the support cost towards the bullion business. He has mentioned that this is against the industry norm. The AR has however failed to produce any documents to show as to how the allocation of support cost is against the industry norm. On the other hand, the accounting principle requires that all direct and indirect cost should be taken into account while computing the cost of operation of any business division. The indirect costs are not to be excluded. The cost incurred on EDP (Data Processing Support), HRD (Human Resource Development), legal & compliance and other service department are incurred for the smooth operation of the entire business. All these costs are allocable to different business units even though it may not be possible to identify the direct cost under these heads, for a specific business division. I therefore agree with the TPO that the support service cost on EDP, HRD, legal & compliance and



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other services department also need to be allocated towards the cost and running of bullion division. Objection of the AR is therefore not acceptable. However against the total employees of 3.0425 taken by the TPO, total employee units of 1.5425 is taken. With this, the support cost allocable to bullion division works out to Rs. 4,04,966/- (1,54,89,790 X 1.5425 ÷ 59).

31. It is noted that the allocation of administrative & support expenses by the Ld. CIT(A) underwent change due to alteration of the multiple viz., the time ratio of the employees, which is noted to be as under :-

Employee	Time Allocation as per TPO	Time Allocation as per CIT(A)
Amit Juneja	100%	75%
Tarun Tandon	100%	75%
R Vijay Anand	100%	-
Hemant Ratanjankar	4.25%	4.25%
Multiple	3.0425	1.5425

32. As we have already upheld the manner of allocation of personnel cost viz., allocation of 75% of salaries of Amit Juneja & Tarun Tandon, we see no reason to interfere with their time allocation by the Ld. CIT(A) for the purposes of attribution of administrative & support costs. Also, having regard to the fact that Mr. Vijay Anand had left the job in the first month of the FY 2001-02 i.e., April 2001 and his severance pay was also disallowed by the AO, we hold that the Ld. CIT(A) had rightly considered his time allocation at NIL. Consequently, the re-working of the allocation of administrative costs



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and support expenses to Rs.10,81,447/- and Rs.4,04,966/- by the Ld. CIT(A) does not warrant any interference.

33. In view of the above, accordingly, we do not find any infirmity in the order of Ld. CIT(A) determining the arm's length price of the operations of agency business at Rs.77,39,372/-. Therefore, the Ld. CIT(A)'s action of granting relief to the extent of Rs.28,04,513/- in relation to the transfer pricing adjustment made by the TPO in relation to the agency services rendered by the assessee to its AE is upheld. Ground No. 4 is accordingly dismissed.

34. In the result, the appeal of the revenue as well as cross-objection of the assessee are dismissed.

Order pronounced in the open court on this 27/02/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 27/02/2023.
Vijay Pal Singh, (Sr. PS)



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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, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**