

आयकर अपीलिय अधिकरण
मुंबई पीठ "जे" मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य, एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" BENCH
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आ.आ.सं. ७३८०/मुंबई/२०१८ (नि.व. २०१४-१५)
ITA No.7380/MUM/2018 (A.Y.2014-15)

Sabre Travel Network (India) Pvt. Ltd.
Urmi Estate, 14th Floor,
96, Ganpatrao Kadam Marg,
Lower Parel (West)
Mumbai-400 013

PAN No. AAACA4836H

..... अपीलार्थी / Appellant

बनाम Vs.

Deputy Commissioner of Income Tax CC-8 (1) (2),
Room No.625, 6TH Floor,
Aayakar Bhavan,
Mumbai-400 020

..... प्रतिवादी / Respondent

अपीलार्थी द्वारा / Appellant by : S/Shri. Nitesh Joshi & Ruben Menezes
प्रतिवादी द्वारा / Respondent by : Shri Vinod Tanwani, CIT-DR
Ms. Vranda U. Matkari, Sr. AR

सुनवाई की तिथि / Date of hearing : 03/03/2023
घोषणा की तिथि / Date of pronouncement : 23/05/2023

आदेश / ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 31.10.2018 passed u/s 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), for the Assessment Year 2014-15.



2. The facts of the case as emanating from records are: The assessee is a wholly owned subsidiary of Sabre Asia Pacific Pte Ltd. (SAP). SAP provides a Computerised Reservation System (CRS) that facilitates the travel agents to provide Travel information, hotel and cab booking facilities and facilitates to make air bookings. The assessee promotes the CRS offered by SAP in India. SAP remains the owner of CRS. In order to promote the CRS offered by SAP, the assessee undertakes marketing and promotion activities. It provides support to the subscribers of CRS like training to users, computer hardware support, third party communication lines, help desks support, etc. The assessee company gets compensation for its services in accordance with the provisions of the sub distribution agreement and addendum agreement entered into by it with SAP. During the period relevant to the assessment year under appeal, the assessee *inter-alia* entered into international transactions with its Associated Enterprise (AE) with respect to provision for marketing services. The assessee applied Transactional Net Margin Method (TNMM) as most appropriate method to benchmark the transactions. The assessee selected six comparables to benchmark the transaction. The Transfer Pricing Officer (TPO) vide order dated 11.12.2017 rejected all the comparables selected by the assessee and introduced fresh set of five comparables as under:

Sr. No.	Name of the Company	OP/OC (%)
1	Marketing Consultants and Agencies Limited	8.75%
2	Killick Agencies and Marketing Limited	23.02%
3	Axis Integrated System Ltd.	17.32%
4	B V G India Limited	19.80%
5	Apitco Limited	8.84%
	Average	15.51%

With the introduction of fresh comparables and taking average margin of the comparables against margin of the assessee-11.22% (OP/OC), the TPO made adjustment of Rs.323,911,745/-. The TPO further made adjustment of Rs.2 crores in respect of marketing service fee, rejecting assessee's entity level TNMM approach. The assessee filed objections before the Dispute Resolution Panel (DRP) assailing the adjustments made by the TPO. The DRP upheld the comparables selected by the TPO, the DRP further accepted one of the comparables i.e. Quadrant Communication Limited as suggested by the assessee. The DRP further rejected the assessee's objections qua marketing service fee and foreign exchange loss. Hence, the present appeal by the assessee.

3. The assessee in appeal has raised five grounds including sub grounds assailing Transfer Pricing Adjustment (TPA) and the additions made by the AO on account of foreign exchange loss. The assessee vide application dated 10.05.2022 raised additional ground of appeal seeking direction to AO to comply with the directions of the DRP.

4. Shri Nitesh Joshi appearing on behalf of the assessee confined his submissions to ground no. 2.7 assailing selection of comparables by the TPO and ground no. 2.11 challenging TPA of Rs.2 crores in respect of under recovery of marketing service fee. The Ld. Counsel submitted that out of the set of five comparables selected by the TPO, four companies i.e. Apitco Limited, B V G India Limited, Axis Integrated Systems Limited and Killick Agencies and Marketing Limited were rejected by the Tribunal in assessment year 2013-14 in assessee's own case on account of difference in functionality. There has been no change in the business model of the said companies in the period relevant to the impugned assessment year. Hence, the said companies are liable to be rejected as



comparables. The Ld. Counsel further submitted that the DRP has accepted Quadrant Communication Limited to be valid comparable. The AO while passing impugned order has not included Quadrant Communication Limited in the list of comparables. The Assessee has raised additional ground of appeal seeking direction to the AO to include Quadrant Communication Limited in the set of comparables.

4.1. In respect of TPA on account of marketing service fee, the Ld. Counsel submits that in immediate preceding year that is AY 2013-14, the TPO had made adjustment for identical reasons. The Tribunal in appeal by the assessee in ITA No.7306/Mum/2017 for AY 2013-14 vide order dated 14.07.2021 deleted the adjustment.

4.2. In respect of disallowance of foreign exchange loss of Rs.25,53,09,140/-, the Ld. Counsel submits that the assessee is consistently following same accounting principles and tax treatment for foreign exchange loss/gain over the years and the same has been accepted by the tax authorities in the past. The addition on account of foreign exchange loss was made in assessee's own case for AY 2009-10 and 2012-13. For identical reasons foreign exchange loss has been disallowed in AY 2014-15. The Tribunal in appeal of the assessee for AY 2013-14 (supra) deleted the disallowance.

4.3 No submissions were made by the Ld. Counsel for the assessee with respect to ground no. 2.1 to 2.6 and 2.8 to 2.10.

5. Per contra, Shri Vinod Tanwani representing the Department vehemently defended the impugned order. The Ld. Departmental Representative (DR) submitted that the assessee's objections with respect to selection of comparables were considered by the DRP and the same were rejected by passing a reasoned directions. In respect of other additions/adjustments, the Ld. DR strongly supported the assessment order and prayed for dismissing appeal of the assessee.

However, the Ld. DR fairly stated that the issues raised by the Counsel in present appeal are similar to the one adjudicated by the Tribunal in assessee's own case in AY 2013-14.

6. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decision on which the Ld. Counsel for the assessee has placed reliance.

The ground no. 1 and 5 of appeal by the assessee are general, hence, require no separate adjudication.

7. In ground no. 2, the assessee has raised 11 sub grounds that is from 2.1 to 2.11. The assessee has made submissions only in respect of ground no. 2.7 and 2.11, the same read as under:

"2.7 The learned DCIT/DRP erred in selecting the comparable companies, which are functionally dissimilar.

2.11 The learned DCIT/DRP erred in confirming the separate transfer pricing adjustment of Rs.2 crores without relying on the entity level TNMM (whole entity aggregation approach) followed by the Appellant for benchmarking its international transactions."

8. The assessee has assailed selection of comparables by TPO to benchmark assessee's international transaction of provision of marketing service to AE. The assessee is aggrieved by selection of following companies as comparables:

1. Apitco Limited;
2. B V G India Limited;
3. Axis Integrated Systems Limited;
4. Killick Agencies and Marketing Limited

We find that the Co-ordinate Bench in ITA No.7306/Mum/2017 (supra) in assessee's own case for AY 2013-14 had considered all the aforesaid companies. The Bench following the order of Tribunal in ITA No.1054/Mum/2017 for AY 2012-13 in assessee's own case decided on 04.05.2018 rejected Axis Integrated System



Ltd., B V G India Limited, Apitco Limited as good comparable on account of functional disparity, hence, directed to exclude the same from the list of comparables. Insofar as exclusion of Killick Agencies and Marketing Limited, the Co-ordinate Bench after examining annual report for the year ended 31.03.2013 came to the conclusion that the said company deserve to be excluded from the list of comparables on account of functional dis-similarities and also in the absence of segmental details for marketing support services.

9. The Revenue has not been able to distinguish the findings of the Tribunal in the case of assessee for AY 2013-14. The statement made by the Ld. Counsel for the assessee that there has been no change in the functions/business model of aforesaid comparables in the impugned assessment year remains unrebutted. Thus, following the decision of Co-ordinate Bench in assessee's own case and for parity of reasons, we direct the AO to exclude Apitco Limited, B V G India Limited, Axis Integrated Systems Limited and Killick Agencies and Marketing Limited from the list of comparables. Hence, ground no.2.7 of the appeal is allowed, *pro-tanto*.

10. The assessee has raised additional grounds of appeal seeking direction to the AO for including Quadrant Communication Limited in the list of comparables as per the directions of DRP. We find that the DRP while deciding the issue of inclusion/exclusion of comparables has accepted assessee's comparable i.e. Quadrant Communication Limited to be valid comparable for assessment year 2014-15 as well. However, while passing the impugned assessment order, the AO has failed to give effect to the said direction of DRP. After inclusion of Quadrant Communication Limited, the list of comparables to benchmark the transactions of marketing service would have two comparables i.e. Quadrant Communication Limited and Marketing Consultant and Agencies Limited. The TPO is directed to give effect to the order of DRP and recompute ALP for provision of marketing service



with the revised set of comparables. The additional ground of appeal is thus, allowed.

11. In ground no. 2.11 of appeal, the assessee has assailed adjustment of Rs.2 crores. The TPO has made adjustment of Rs.2 crores on the premise that the assessee has recovered less marketing service fee from its AE. Thus, the AO made adjustment of Rs.2 crores to make good the short fall. We find that identical addition was made in AY 2013-14. The Co-ordinate Bench in turn following the order of Tribunal in assessee's own case in ITA NO.1054/Mum/2017 (supra) deleted the addition. The relevant extract from the order of Tribunal in ITA No. 1054/Mum/2017 is reproduced herein below:

"8. We have considered rival submissions and perused materials on record. It is evident, the Transfer Pricing Officer while determining the arm's length price of the international transaction has considered both the marketing fee paid by the AE to the assessee as well as incentives paid by the assessee to the travel agent for determining the arm's length price of the international transaction and accordingly has arrived at transfer pricing adjustment of Rs.14,12,65,777. Of course, it is a fact that the Transfer Pricing Officer in the order passed under section 92CA(3) of the Act did observe that the assessee has failed to provide a reasonable explanation with respect to deduction of 2 crore with regard to marketing service fee received from AE against the trade incentives paid to travel agent. It is also true that the Tribunal in order passed in assessee's own case for assessment year 2009-10 in ITA no.1402/Mum./2014, dated 5th January 2018, has approved similar observation of the Transfer Pricing Officer with regard to short receipt of Rs.2 Crore from the A.E. However, a perusal of the order passed by the Transfer Pricing Officer would make it clear that he has aggregated all the international transactions with the AE for determining the arm's length price and has neither determined the arm's length price of marketing service fee separately nor has suggested any separate addition on account of the difference of Rs.2 crore between the incentive paid to travel agent and the marketing support fee received from the AE. Rather, it is the Assessing Officer who while framing the draft assessment order has made a separate addition of Rs.2 crore on the ground that the assessee should have received the amount of Rs.2 crore from the AE as against the total incentives paid to travel agents. Nothing has been brought on record by the Departmental Authorities to demonstrate that the assessee has actually received the amount of 2 crore from the AE The Department has also not disputed or doubted the payment of incentives of Rs.56,13,02,874 to the travel agents. That being the case, the addition made purely on presumption and

surmises cannot be sustained. Moreover, it is evident from the order of the DRP that relying upon their own decision in assessee's case for assessment year 2010-11, they have upheld the disallowance. Notably, while deciding the appeal of the assessee on identical addition of Rs.2 crore on account of difference payment of incentives to travel agents and marketing service fee received from the AE, the Tribunal in assessment year 2009-10 in ITA no. 1402/Mum./2014, dated 5th January 2018, has deleted the addition with the following observations:-

"As far as disallowing the expenditure of Rs.2 crores, while computing the taxable income of the assessee, is concerned, we would like to hold that the DRP was not justified in disallowing the same. There is no doubt about incurring of expenditure by the assessee, as stated earlier. The assessee had introduced an incentive scheme and had incurred the expenses of Rs.34.61 crores. Whether the money received from AE was at arm's length or not is a separate issue. But, incurring of expenditure was never in doubt. So, in our opinion, the alternate argument raised by the assessee has to be allowed"

No contrary material has been placed before us. Following the decision of Co-ordinate Bench in AY 2012-13 and 2013-14, the AO is directed to delete the addition. The ground no. 2.11 of appeal is thus allowed.

12. In ground no. 3 of appeal, the assessee has assailed disallowance of foreign exchange loss. The assessee suffered foreign exchange loss on account of:

1. Revaluation of outstanding line charges and airfare transaction charges;
2. Outstanding ECB loans;
3. Advance commission received;
4. Revaluation of certain expenses viz: travel, freight, conference expenses, courier charges, marketing and consulting fee, etc.

We find that this is a perennial issue. The assessee has been claiming foreign exchange loss in the past and the AO has consistently disallowed the same. The Tribunal in appeal by the assessee has allowed foreign exchange loss in the past. In AY 2013-14, the Co-ordinate Bench followed the order of Tribunal in assessee's own case in ITA No.1504/Mum/2017 (supra) and allowed deduction towards



foreign exchange loss. In the impugned assessment year, the facts are similar. The AO has not raised any doubt over quantum of charges or loss claimed. Hence, following the earlier order of Tribunal in assessee's own case, ground no. 3 of appeal is allowed, for parity of reason.

13. In ground no. 4 of appeal, the assessee has assailed initiation of penalty proceedings u/s 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, hence, ground no. 4 of appeal is dismissed.

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

Order pronounced in the open court on Tuesday the 23rd day of May 2023.

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai,

दिनांक/Dated: 23/05/2023

Mahesh R. Sonavane

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपी अग्रेषित Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/The Respondent.
3. आयकर आयुक्त/ CIT
4. विभागीय प्रतिनिधी, आय. अपी. अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाईल/Guard file.



BY ORDER,

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(Dy. /Asst. Registrar)/
Sr. Private Secretary
ITAT, Mumbai