

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 365/Bang/2023
Assessment Year : 2012-13

<p>M/s. IMS Health Analytics Services Pvt. Ltd. (formerly known as PharmARC Analytic Solutions Pvt. Ltd.) Omega Block, Embassy Tech Square, Marathahalli – Sarjapur Outer Ring Road, Kadubeesanahalli, Bangalore – 560 103. PAN: AADCP1532C</p>	Vs.	<p>The Deputy Commissioner of Income Tax, Ward – 3(1)(1), Bangalore.</p>
APPELLANT		RESPONDENT

Assessee by	:	Shri Darpan Kirpalani, Advocate
Revenue by	:	Shri Veera Raghavan, Addl. CIT (DR)

Date of Hearing	:	25-07-2023
Date of Pronouncement	:	18-08-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against the order passed by Ld.CIT(A) dated 09.03.2023 for A.Y. 2012-13 on following grounds of appeal.

*only 2.1 & 2.2
Presented before
Hon'ble ITAT*

Annexure 1

Sl. No	Grounds of Appeal	Tax effect (in INR)
1.	Assessment and reference to Transfer Pricing Officer are bad in law	NA
1.1	The order dated 09 March 2023 passed by the Commissioner of Income Tax (Appeals) – 12 ('Ld. CIT(A)') under Section 250 of the Income-tax Act, 1961 ('the Act'), is bad in law and on facts. The order dated 25 April 2016 passed by the Joint Commissioner of Income Tax, Circle – 5(1)(2) ('Ld. AO') under Section 143(3) read with Section 144C (13) of the Act, is bad in law and on facts.	
1.2	The Ld. AO erred in assessing the income of the Appellant as INR 43,098,033 as against the income of INR 24,940,420 offered by the Appellant in its return of income ('ROI').	
1.3	The Ld. AO has erred in law in making a reference to the Deputy Commissioner of Income Tax, Transfer Pricing Officer – 2(2)(1) ('Ld. TPO'), inter alia, since he has not recorded an opinion that any of the conditions in Section 92C(3) of the Act were satisfied in the instant case. Accordingly, the order passed by the Ld. TPO and proceedings thereon is without jurisdiction and bad in law.	
1.4	The Ld. AO and Ld. TPO have erred in not demonstrating that the motive of the Appellant was to shift profits outside of India by manipulating the prices charged in its international transactions, which is a pre-requisite condition to make any adjustment under the provision of Chapter X of the Act.	
Transfer pricing		4,052,503
2.	Erred in not referring earlier years Hon'ble ITAT order in Appellant's own case	
2.1	The Ld. CIT(A) erred in not placing reliance on the judicial precedent of the Hon'ble Income tax Appellate Tribunal ('Hon'ble ITAT') in Appellant's own case for AY 2010-11 and 2011-12 despite the facts being similar to AY 2012-13, wherein, in the aforesaid years, the Hon'ble ITAT has upheld Appellant's TP study and selection of foreign associated enterprises ('AEs') as the tested party and thereby upholding that entire TP adjustment should be deleted.	}
2.2	The Ld. CIT(A) further erred in not testing the international transaction i.e., payment made towards services received at a cost plus 5% and not appreciating the fact that even if the arm's length mark-up was nil, as per second proviso to section 92C(2) variation of +/- 5% between the Arm's Length Price and price at which international transaction has actually been undertaken can be considered to be at arm's length. The same was also upheld in the aforesaid Hon'ble ITAT's order in Appellant's own case.	
3.	Determination of arm's length price of international transactions	
3.1	The Ld. AO/ Ld. TPO grossly erred on facts and in law in rejecting the Transfer Pricing study maintained by the Appellant without considering the facts of the Appellant. The Ld. CIT(A) erred on facts and in law in upholding the action of the Ld. AO/ Ld. TPO.	
3.2	The Ld. AO/ Ld. TPO and the Ld. CIT(A) erred on facts and in law applying transactional net margin method ('TNMM') for determining the arm's length price paid by the Appellant without considering the following:	

*Not present
10/12*



4

Sl. No	Grounds of Appeal	Tax effect (in INR)
	<ul style="list-style-type: none"> The Ld. AO/ Ld. TPO and the Ld. CIT(A) erred on facts and in law in not analyzing the functions, assets and risk assumed by the transacting parties (i.e., the Appellant and the AEs) and thereby not selecting the least complex entity as the tested party for the purpose of applying TNMM; The Ld. AO/ Ld. TPO and the Ld. CIT(A) erred on facts and in law in not acknowledging the fact that the AEs are captive service providers. They also erred on facts and in law in not analyzing the financial statement of the service provider for determining the arm's length nature of the international transactions. 	
3.3	The Ld. AO/ Ld. TPO and the Ld. CIT(A) ought to have appreciated the fact that any captive service provider would incur certain costs while rendering the services and would expect an arm's length return (i.e., mark-up) on such costs.	
3.4	Without prejudice to above, the Ld. AO/ Ld. TPO and the Ld. CIT(A) ought to have at least allowed the cost incurred by the captive service providers.	
3.5	Without prejudice to the above, the Ld. AO/ Ld. TPO erred on facts and in law by conducting a fresh benchmarking analysis by selecting the Appellant as the tested party and wrongly comparing the Appellant's activities without considering the differences in functions performed, assets employed and risks assumed by the Appellant vis-à-vis comparable companies. The Ld. CIT(A) erred on facts and in law in upholding the action of the Ld. A.O/ Ld. TPO.	
3.6	Without prejudice to the above, the Ld. AO/ Ld. TPO erred in not appreciating the benchmarking conducted by the Appellant for comparable companies engaged in rendering business development, sales and support services in India.	
3.7	The AO / TPO erred in law and on facts in disregarding the application of multiple-year data while computing the margins of comparable companies.	
4.	Variation of +/-5% from the arithmetic mean	
4.1	The Ld. AO / Ld. TPO erred in law in not granting the variation as per the proviso to Section 92C(2) of the Act. The Ld. CIT(A) erred on facts and in law in upholding the action of the Ld. AO/ Ld. TPO.	
Corporate Tax		
5.	Disallowance under section 14A of the Act	77,421
5.1	The Ld. AO erred in disallowing and the Ld. CIT(A) erred in upholding the disallowance of a sum of INR 238,621 under section 14A of the Act.	
6.	Disallowance of interest towards late payment of TDS	19,709
6.1	The Ld. AO erred in disallowing and the Ld. CIT(A) erred in upholding the disallowance of a sum of INR 60,746 paid as interest on delayed payment of TDS, without appreciating that the same is compensatory in nature.	
7.	Penalty proceedings	NA
7.1	The Ld. CIT(A) erred in not adjudicating on the ground taken for penalty proceedings initiated by the Ld. AO.	



Sl. No	Grounds of Appeal	Tax effect (in INR)
8.	Relief	NA
8.1	The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.	

Each of the aforesaid grounds and sub-grounds are without prejudice to each other and are independent of each other.

2. At the outset, the Ld.AR submitted that the assessee wish to restrict its arguments only to Ground nos. 2.1 and 2.2 pertaining to the adjustment made under transfer pricing provisions. He also submitted that these issues are covered by decision of *Coordinate Bench of this Tribunal* in assessee's own case for A.Ys. 2010-11 and 2011-12 in *ITA Nos. 615 & 496/Bang/2015 by order dated 25.09.2020*.

Accordingly we are restricting this order by adjudicating Grounds 2.1 and 2.2 raised by the assessee in the present appeal.

3. Brief facts of the case are as under:

3.1 The Ld.AR submitted that assessee is a pharmaceutical data analysis and pharmaceutical market research company. It filed its return of income for the year under consideration on 11.03.2013 declaring total income of Rs.2,49,40,420/-. The case was selected for scrutiny and statutory notices were issued to the assessee, in response to which the assessee filed details and furnished relevant documents as called for.

3.2 As there was international transaction involved, reference was made to the transfer pricing officer for determining the arms length price of the transactions between the assessee and its AE. The order u/s 92CA of the Act dated 29.01.2016 was received on 29.01.2016 wherein the Ld.TPO determined the transfer pricing adjustment u/s 92CA to be Rs. 1,24,90,379/-.

3.3 On receipt of the transfer pricing order, the Ld.AO passed the draft assessment order on 29.02.2016 by making following additions:

- a) Deduction disallowed u/s. 14A – Rs.2,38,621/-
- b) Interest on TDS disallowed – Rs.60,746/-

3.4 The assessee on receipt of the draft assessment order, chose to file appeal before the Ld.CIT(A), and accordingly the final assessment order was passed u/s. 143(3) r.w.s. 144C of the act on 25.04.2016 by making addition of Rs.4,30,98,033/- in the hands of the assessee.

3.5 Aggrieved by the order of the Ld.AO, assessee filed appeal before the Ld.CIT(A).

3.6 The Ld.CIT(A) while considering the grounds of the assessee did not allow the plea of foreign AE to be the tested party for the purposes of computing the arms length margin. However the Ld.CIT(A) directed the Ld.TPO to verify whether the price paid by the assessee to its AE falls within the range of +/- 5% of the arms length price so determined.

3.7 In respect of the corporate tax issues raised by assessee, the Ld.CIT(A) upheld the disallowances made by the Ld.AO in respect of 14A, but directed the Ld.AO to verify MAT credit admissibility.

3.8 Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before this *Tribunal*.

4. As submitted by the Ld.AR, the only issue that needs consideration regarding **Ground no. 2.1**, wherein the assessee is challenging the selection of tested party by the Ld.TPO to be the assessee itself.

4.1 It is submitted that *Coordinate Bench of this Tribunal for A.Ys. 2010-11 to 2011-12 in assessee's own case upheld the foreign AE to be the tested party by observing as under:*

"6. We have considered the rival submissions. First of all, we reproduce paras 7.1 to 7.3 from the direction of DRP in Assessment Year 2010-11. These are as under:

"7.1 Foreign Tested Party ought not to be rejected: Rejection of foreign tested party is unjustified. Accordingly, The arm's length comparability analysis using the associated enterprises as tested parties as per the transfer pricing documentation ought to be accepted.

7.2 It is seen that the Assessee has chosen its subsidiaries M/s PharmARC Inc USA and M/s. PharmARC, its own AEs as tested parties for TP analysis and the same was rejected by TPO.

7.3 This Panel is not able to accept the objection regarding rejection of foreign AEs as tested parties. The functions and risks of the assessee are more complex in nature and that numerous adjustments would have to be made if a foreign entity would be taken as a tested party. Guidance is taken from decisions of Mumbai ITAT in Onward Technologies & Aurionpro Solutions cases."

7. From the above paras reproduced from the DRP directions, it is seen that this is the finding of DRP that the functions and risks of the assessee are more complex in nature and that numerous adjustments would have to be made if the foreign entity would be taken as a tested party. We fail to understand the logic behind this observation of DRP because if we are taking the foreign AEs as tested party, comparison has to be between comparables of the respective country selected by the assessee in TP study and such foreign AE selected as tested party and there is no need to compare with the data of the assessee company. More over when it is admitted by DRP that the functions and risks of the assessee are more complex in nature and numerous adjustments would have to be made, in our considered opinion, as per the Tribunal order cited by learned AR of the assessee having been rendered in the case of Ranbaxy (supra), the foreign AEs in the present case should be considered as tested party as has been considered by the assessee in the TP study....."

4.2 The Ld.DR on the contrary relied on the orders passed by the authorities below.

We have perused the submissions advanced by both sides in the light of records placed before us.

4.3 It is a settled principle in the transfer pricing provisions that the tested party should be the party in respect of which reliable data for comparison is easily and readily available. This view has been considered by *Hon'ble Delhi Tribunal* in case of *Ranbaxy Laboratories Ltd. vs. ACIT* reported in *110 ITD 428*.

Space

Respectfully following the above decision in assessee's own case for the preceding assessment years, we direct the Ld.AO/TPO to consider foreign AE as the tested party.

Accordingly ground no. 2.1 raised by assessee stands allowed.

5. The Ld.AR submitted that **ground no. 2.2** is in respect of not testing the international transaction within the range of +/- 5% variation.

5.1 We note that this issue has been already allowed by the Ld.CIT(A) in favour of assessee in para 5.5 of the impugned order. Therefore this ground need not be adjudicated. However we direct the Ld.AO to follow the directions by the Ld.CIT(A) while passing OGE.

6. Rest of the issues and grounds raised by assessee are submitted to be not pressed.

Accordingly, we are not inclined to adjudicate these grounds and are left open to be argued in an appropriate circumstances.

In the result, the appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 18th August, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 18th August, 2023.
/MS /

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| 1. Appellant | 2. Respondent |
| 3. CIT | 4. DR, ITAT, Bangalore |
| 5. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore