आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री वी दुर्गा राव, न्यायिक सदस्य एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 584/Chny/2015 & 529/Chny/2017**
निर्धारण वर्ष / Assessment Year: 2010-11 & 2012-13

ConferenceCall Services India Private Ltd RMZ Titanium, No. 135, 1st Floor, Old Airport Road, Bangalore – 560 017. **[PAN: AACCC-6574-A]**	v.	Assistant Commissioner of Income Tax, Corporate Circle -1(2), Chennai – 34.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. Soumen Adak, CA & Shri. Ashish Poddar, CA

प्रत्यर्थी की ओर से/Respondent by : Shri. A. Sasikumar, CIT

सुनवाई की तारीख/Date of Hearing : 20.06.2023
घोषणा की तारीख/Date of Pronouncement : 15.09.2023

आदेश /O R D E R

PER MANJUNATHA. G, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are directed against final assessment orders passed by the Assessing Officer u/s. 143(3) r.w.s. 144C(13) r.w.s. 92CA of the Income-tax Act, 1961 (hereinafter referred to as "the Act") dated 15.01.2014 & 27.12.2016, in pursuant to DRP directions dated 24.12.2014 & 17.10.2016 issued u/s. 144C(5) of the Act for

assessment years 2010-11 & 2012-13. Since, facts are identical and issues are common, for the sake of convenience these two appeals were heard together and are being disposed off, by this consolidated order.

2. The assessee has more or less filed common grounds of appeals for both assessment years. Therefore, for the sake of brevity grounds of appeal filed for assessment year 2012-13 are reproduced as under:

> *"A. Transfer Pricing Adjustment in respect of payment of Intra-group & Management services (Rs. 4,48,24,686 /-):*
>
> *1. That on the facts & circumstances of the case, the learned Transfer Pricing Officer ("Ld. TPO") & learned Assessing Officer ("Ld. AO") on direction issued by the learned Dispute Resolution Panel ("Ld. DRP") were not justified in making downward adjustment/ disallowance on account of payment of Intra-group & Management services to its AEs amounting to Rs. 4,48,24,686/-.*
>
> *2. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in not appreciating that the Transactional Net Margin Method ('TNMM') is the Most Appropriate Method ('MAM') to determine the Arm's Length Price (' ALP') of the International Transactions entered into by the appellant with its AEs and determining the ALP at NIL without giving any cogent reasons as per the provisions of Section 92C(3) of the Income-tax Act, 1961 ('the Act').*
>
> *3. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in analyzing the transaction separately by inappropriate application of Comparable Uncontrolled Price ('CUP') method without furnishing details of price charged in any comparable uncontrolled transaction.*

4. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in not considering the fact that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP & not to determine whether there is a service or not from which the appellant benefits and thereby challenging the commercial wisdom of the appellant in making such payments.

5. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in concluding that the services rendered under the combined agreement by the AEs were in the nature of shareholder's activity as the same were rendered without analyzing the need of such services by the appellant.

6. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in determining the ALP at NIL & erred in not appreciating the evidences including the service agreements filed by the appellant to demonstrate that the appellant has derived benefits from the Intra group & Management Services.

7. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in not considering the fact that the cost allocation methodology adopted by the AEs for allocation of costs with respect to rendering of services was in line with internationally accepted methodologies.

8. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in relying on judicial pronouncements without considering the applicability of the principle laid down to the facts of the appellant's case and erred in placing reliance on the OECD Guidelines in a selective and piecemeal basis.

9. That on the facts & circumstances of the case, the Ld. AO/ Ld. TPO on the directions issued by the Ld. DRP erred in not affording sufficient opportunity to the appellant for providing additional factual details for justifying the impugned transaction.

B. <u>Disallowance in respect of payment of Intra-group & Management services u/s 40(a)(i) of the Act (Rs. 5,69,98,348 /-):</u>

10. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in disallowing payment of Intra-group services and Management Service on account of non-deduction of tax at source u/s 195 of the Act without appreciating the fact that the said services has not "made available" any knowledge, experience, skill and hence not taxable as 'Fees for Technical Services' under the relevant Double Tax Avoidance Agreement ("DTAA").

11. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in not considering the fact that the appellant has made payment of Management Fees to group companies situated in different countries. The detail of the same are as under-

Sl. No	*Name of the group company*	*Country involved*	*Amount of management fees paid (INR)*	*Amount of Royalty paid (INR)*	*Total*
1.	*Intercall Inc.USA*	*USA*	*31,26,050*	*1,21,73,662*	*1,52,99,712*
2.	*Intercall Singapore*	*Singapore*	*1,65,24,867*	*-*	*1,65,24,867*
3.	*Intercall Australia Pty Ltd*	*Australia*	*2,51,73,769*	*-*	*2,51,73,769*
	Total		*4,48,24,686*	*1,21,73,662*	*5,69,98,348*

12. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in not considering the fact that under the DTAA between India and USA, the word "managerial services" is not included under "Fees for Included Services" .

13. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in considering the definition of "Fees for Technical Services" as per the India-USA DTAA and confirming the disallowance by applying the same to the total Management Fees under section 40(a)(i) of the Act without considering the fact that there is a separate Article on "Fees for Technical Services under each of the DTAA being between India and USA, India and Australia, and India and Singapore.

14. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in not applying the Memorandum of Understanding ("MOU") between India and USA as Notification vide Notification No. 8786 (F.No.

501/2/74FTD) in determining whether the services are "made available" to the appellant.

15. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in considering the total amount of Management Fees paid as INR 5,69,98,348 instead of INR 4,48,24,686, the amount of INR 1,21,73,662 being royalty paid on which the tax has been appropriately withheld by the Appellant.

16. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in proposing to levy interest under section 234A of the Act of 2,86,124/-.

17. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in proposing to levy interest under section 234B of the Act of Rs. 1,07,06,266/-.

18. That on the facts & circumstances of the case, the Ld. AO on direction issued by the Ld. DRP erred in proposing to levy interest under section 234C of the Act of Rs. 4,56,561/-.

C. General

That the Appellant craves to add, amend, modify, rescind, supplement or alter any of the Grounds stated here-in-above, either before or at the time of hearing of this appeal."

3. The brief facts of the case are that, the appellant company, ConferenceCall Service India Pvt. Ltd., is a wholly-owned subsidiary of InterCall Inc.USA. The appellant company is engaged in providing software development services and marketing support services to its Associate Enterprises (AE). During the financial year relevant to assessment years 2010-

11 and 2012-13, the appellant had entered into various international transactions including payment of Intra-Group and Management services etc. The appellant had conducted TP study with respect to international transactions with its AE and adopted TNMM as most appropriate method and claimed that its transactions with AE are at Arms Length Price (ALP). The appellant has filed its return of income for the assessment year 2010-11 on 14.10.2010, admitting total income of Rs. 5,03,49,438/-. The appellant had also filed its return of income for the assessment year 2012-13 on 30.11.2012, admitting total income of Rs. 14,82,85,308/-. The cases were selected for scrutiny and during the course of assessment proceedings, a reference was made to the Transfer Pricing Officer (TPO) to determine ALP of international transactions of the assessee with its AE. The TPO, vide order u/s. 92CA dated 15.01.2014 for assessment year 2010-11 has suggested downward adjustment of Rs. 4,48,24,686/- towards Intra-group and management services paid by the appellant to its AE. The TPO has suggested downward adjustment of Rs. 8,51,18,192/- towards Intra-Group services and Management services to AE for assessment year 2012-13. The TPO had also suggested adjustment towards payment made to AE for

software development services of Rs. 60,42,506/- for assessment year 2012-13.

4. Pursuant to TP adjustment as suggested by the TPO, the Assessing Officer has passed draft assessment order u/s. 143(3) r.w.s. 144C(1) for assessment year 2010-11 on 30.03.2014 and determined total income of Rs. 10,79,29,740/-, by making addition towards disallowance of management fees as suggested by the TPO and also u/s. 40(a)(i) of the Act, for non-deduction of TDS on said payment. The Assessing Officer had also passed draft assessment order for assessment year 2012-13 on 17.03.2016 and determined total income of Rs. 24,00,39,958/-, by making additions towards TP adjustment as suggested by the TPO towards Management and Intra-group services and also u/s. 40(a)(i) of the Act. Against draft assessment order, the assessee has filed objections before the DRP. The DRP, Chennai, vide their directions dated 24.12.2014 issued for the assessment year 2010-11, upheld TP adjustment as suggested by the TPO. The DRP, had also upheld additions made u/s. 40(a)(i) of the Act, for non-deduction of TDS on sum paid to AE, on the ground that the payment made to AE is in the nature of 'fee for

technical services' as provided in Explanation (2) to section 9(1)(vii) of the Act. A similar direction has been given for assessment year 2012-13, where the DRP has upheld TP adjustment as suggested by the TPO and also disallowance of payment made to AE u/s. 40(a)(i) of the Act. The DRP, had also directed the TPO to exclude certain comparables selected by the TPO while making adjustment towards software development services. Thereafter, the Assessing Officer has passed final assessment order u/s. 143(3) r.w.s. 144C(13) of the Act for both assessment years and determined total income of Rs. 10,79,29,740/- and Rs. 24,00,39,958/-, for assessment year 2010-11 and 2012-13, respectively. Aggrieved by the final assessment order, the assessee is in appeal before us.

5. The first issue that came up for our consideration from appeal filed by the assessee for both assessment years, is transfer pricing adjustment with reference to payment to Intra-group services and management services to Associate Enterprises. The Ld. Counsel for the assessee, submitted that the appellant has, inter alia, availed Intra-group services and Management services in the nature of General Management

Services, Marketing and Sales, Finance, Human Resource and Information Services etc from its Associate Enterprises, vide Service Agreement entered between all the IntraCall Companies operating in Asia Pacific region and Service Agreement entered with IntraCall Inc, USA. The aforesaid transactions were duly benchmarked by using the Transactional Net Margin Method (TNMM) being most appropriate method. The TPO has made downward adjustment towards total amount paid for Intra-Group services and Management Services, on the ground that CUP method should be adopted as most appropriate method, instead of TNMM. Further, the services rendered by AE are in the nature of shareholder activity and no benefit has been derived by the appellant by availing such services. The TPO, while deciding the issue has relied upon certain judicial precedents and held that except few e-mail correspondence, the assessee could not file any evidence to justify rendering of service. But, fact remains that the assessee has filed various evidences to substantiate the services provided by the AE. The Ld. Counsel for the assessee, has further submitted that when the appellant has adopted TNMM method to benchmark all its international transactions, it was not open to TPO to subject

only one element under CUP method. In this regard, he relied upon certain judicial precedents including the decision of Hon'ble Delhi High Court in the case of Magneti Marelli Powertrain India (P) Ltd vs DCIT [2016] 75 Taxmann.com 213 (Del).

6. The ld. DR, Shri. A. Sasikumar, CIT, on the other hand supporting the order of the DRP submitted that there is no dispute with regard to the fact that the assessee claims to have availed certain services from its AE. If you go by the agreement between the parties, the said agreement is general in nature, where various services has been specified, but the assessee could not file necessary evidences to prove its claim that the AE has in fact provided services to the appellant company. Further, except e-mail no other evidences has been filed to justify the case of the appellant. Therefore, the TPO and DRP has rightly made downward adjustment towards Intra-Group and Management services paid to AE. In this regard he relied upon the decision of ITAT, Chennai Benches in the case of M/s. Lite on Mobile India Pvt Ltd vs DCIT in ITA No. 3194 & 478/Chny/2017 dated 03.11.2021.

7. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The assessee has paid Intra-Group services and Management services to its AE and such payment is on the basis of agreement between the IntraCall Companies operating in Asia Pacific region and service agreement with Intra-Call Inc, USA. The appellant claims that the AE provides services to all group companies in the field of General Management Services, Marketing and Sales, Finance, Human Resource, Information Services etc. The appellant had filed copies of agreement between the parties and on going through the nature of services specified in the agreement, we find that those services are need based services specified by any entity, but there is no specific services are agreed between the parties. Further, the appellant except filing certain e-mail correspondence between its AE, no other evidence has been filed to substantiate payment for Intra-Group services. No doubt, the Assessing Officer cannot question the necessity of services and also cost benefit analysis of services. In Many cases, payment for various services may not yield any desired results. Therefore, in our considered view, adjustments cannot be made on the basis of necessity of services and cost

benefit analysis. But fact remains that, evidence should be filed to substantiate rendering of services by the AE. But, on perusal of certain e-mail correspondence between employees of appellant and its AE, we could not ascertain exact nature of services rendered by the AE. Therefore, we are of the considered view that the assessee could not able to file required evidences to justify payment made to Intra-Group services. We further noted that, the assessee claims to have filed additional evidences which are available in paper book page no. 184 to 285. We have gone through the additional evidences filed by the assessee and once again we find that those are certain e-mail correspondence between the appellant and its AE and also copies of agreement invoices etc. Since, the appellant has filed some additional evidences and claimed that services rendered by the AE are substantiated, we are of the considered view that, the issue needs to be re-examined by the ld. TPO, in light of the decision of ITAT, Chennai Benches in the case of M/s. Lite on Mobile India Pvt Ltd vs DCIT (Supra). Thus, we set aside the issue of TP adjustment with reference to payment for Intra-Group services and Management Services to the file of the Assessing Officer and direct the Assessing Officer to refer the matter to the TPO to

re-examine the issue of Transfer Pricing adjustment with reference to payment made to AE for Intra-Group services and Management services for both the assessment years.

8. The next issue that came up for our consideration from assessee appeal for both assessment years is disallowance of Intra-Group services and management services fees paid to associate enterprises u/s. 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act. The Assessing Officer, without prejudice to the adjustments suggested by the TPO on management fees paid to ASSESSMENT ORDER, has invoked provisions of section 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act, on payment made to AE towards Intra-Group and Management services. According to the Assessing Officer, such payment is in the nature of 'fee for technical services' as defined u/s. 9(1)(vii) of the Act, and Article 12 of the respective DTAA between India and other countries. It was the argument of the assessee that, payment made for Intra-group and Management services are not in the nature of FTS as defined u/s. 9(1)(vii) of the Act and Article 12 of DTAA between India and respective countries, because

there is no 'make available' technical knowledge, experience and know-how etc.

9. We have heard both the parties and considered relevant material available on record and we find that the Assessing Officer has invoked provisions of section 40(a)(i) of the Act, for very same payment made to AE for Intra-Group services on which TPO has already made 100% adjustment and disallowed entire payment. Since, the issue of TP adjustment has been set aside to the file of the AO/TPO for further verification of the issue, in light of additional evidence filed by the appellant, the issue of disallowance on very same payment u/s. 40(a)(i) of the Act, for non-deduction of TDS u/s. 195 of the Act, also needs to be set aside to the file of the Assessing Officer. Thus, we set aside the issue of disallowance of Intra-Group services and Management services paid to AE for non-deduction of tax at source to the file of the Assessing Officer and direct the Assessing Officer to reconsider the issue in light of various averments made by the appellant. Thus, the issue of disallowance of Intra-Group services and Management services u/s. 40(a)(i) of the Act, has been set aside to the file of the Assessing Officer for both the assessment years.

10. In so far the disallowance of Royalty payment of Rs. 1,21,73,662/- for assessment year 2010-11, it was the argument of the Ld. Counsel for the assessee that, the appellant has withheld the tax and also paid to the credit of the Government account in respect of Royalty payment to AE, but the Assessing Officer has erroneously treated royalty payment as management fees and disallowed u/s. 40(a)(i) of the Act. The fact needs to be verified. The appellant contended that on Royalty payment, TDS has been deducted u/s. 195 of the Act and remitted to the Government account, whereas the Assessing Officer has disallowed said payment u/s. 40(a)(i) of the Act, for non-deduction of TDS. Since, facts are contradictory, we direct the Assessing Officer to verify the claim of the assessee and in case the claim of the appellant is correct that TDS has already been deducted to royalty payment, then same cannot be subjected to disallowance u/s. 40(a)(i) of the Act. Thus, we direct the Assessing Officer to verify the issue and decide in accordance with law.

11. The next issue that came up for our consideration for assessment year 2012-13 is Transfer Pricing adjustment in relation to payment for software development service at Rs.

60,43,506/-. During the financial year relevant to assessment year 2012-13, the appellant has paid a sum of Rs. 5,83,51,092/- towards provision for software development services to its AE IntraCall Inc, USA. The assessee has admitted 12% PLI (OP/OC) in this segment. From the TP document submitted by the appellant, the appellant has selected 7 comparables with Arithmetic Mean of 4.80%. The TPO rejected comparables selected by the appellant and has conducted fresh TP study resulting 14 comparables with an arithmetic mean of 20.62%. The assessee has objected for selection of certain comparables, on the ground of incorrect application of filters and functional dissimilarities. The TPO, rejected objections filed by the assessee and selected final comparables of 14 companies with an arithmetic mean of 20.62% and then compared with PLI of the assessee which was at 12% and suggested TP adjustment of Rs. 63,36,438/-.

12. The Ld. Counsel for the assessee, submitted that the ld. TPO has erroneously rejected certain comparable companies selected by the appellant, even though the final list of selected companies is similar to the appellant company. Similarly, certain comparables had been considered by the appellant and

also accepted by the TPO, but the ld. DRP has rejected comparables without assigning proper reasons. Therefore, he submitted that the issue may be set aside to the file of the TPO to reconsider TP analysis conducted by the assessee in light of comparables selected by the TPO and retained by the DRP.

13. The Ld. DR, Shri. A. Sasikumar, CIT, on the other hand fairly agreed that this issue may be set aside to the file of the TPO to reconsider the TP analysis on the issue of payment for software development services to its AE.

14. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. There is no dispute with regard to the method adopted by the appellant for benchmarking international transactions with its Associate Enterprise for software development services. In fact, the appellant has benchmarked its transactions with TNMM as most appropriate method and the same has been accepted by the TPO. There is no dispute with regard to the PLI computed by the appellant, because the TPO has accepted PLI of the appellant company. The only dispute

is with regard to the selection of comparables. The appellant has initially selected 7 comparables with arithmetic mean of 4.80%. The TPO has considered 14 comparables with arithmetic mean of 20.62%, which includes certain comparables selected by the appellant. Although, the appellant has raised objections for inclusion and exclusion of certain comparables, the ld. DRP has rejected certain comparables, even though the functionality test of those companies are similar to the appellant company. Further, the DRP has upheld certain comparables selected by the TPO even though said companies fails certain filters including turnover filter. Similarly, the DRP has rejected certain companies considered by the TPO, even though there is similarity between functions performed by the appellant company and companies considered by the TPO. We find that the sole dispute with regard to the TP adjustment in respect of software development service is selection of comparables. It is an admitted position of law that in applying TNMM certain filters invariably needs to be applied like turnover filter, segmental information, functionality comparable, exclusion of certain companies having extra-ordinary event etc. In the present case, the TPO has selected certain companies even

though the assessee has raised objection, but the objections raised by the assessee has not been dealt with proper reasons. Similarly, the DRP has rejected certain comparables selected by the appellant and accepted by the TPO, without any findings as to how said comparables are not acceptable. Further, the DRP has also upheld certain comparables even though said comparables fails turnover filter test. For example, Infosys Ltd, Persistent Systems Ltd, Acropetal Technologies Ltd, Larsen & Turbo Infotech Ltd, having high turnover when compared to turnover of the appellant. Therefore, we are of the considered view that both the TPO or DRP has not considered the objection raised by the appellant with regard to the selection of comparables, in light of functionality test and procedure to be followed by applying TNMM method. Therefore, we are of the considered view that the issue needs to go back to the file of the AO/TPO to reconsider TP adjustment in respect of payment for software development services. Thus, we set aside the orders of the lower authorities and restore the issue back to the file of the AO/TPO for fresh consideration of TP adjustment with reference to payment made for software development services in light of various averments made by the appellant.

15. The next issue that came up for our consideration for assessment year 2012-13 is denial of credit for self-assessment tax and TDS amounting to Rs. 3,47,71,132/-. The Ld. Counsel for the assessee, referring to details for payment of self-assessment tax and TDS credit submitted that, the Assessing Officer has failed to give credit for self-assessment tax and TDS amounting to Rs. 3,47,71,132/-. We find that, although the appellant has paid self-assessment tax and also filed necessary evidences for credit for TDS, the Assessing Officer has not allowed credit for self-assessment tax and TDS. Thus, we direct the Assessing Officer to verify the claim of the assessee in light of relevant evidence and also necessary information with the department and allow the credit in accordance with law.

16. The next issue that came up for our consideration for assessment year 2010-11 and 2012-13 is levy of interest u/s. 234A, 234B & 234C of the Act. Levy of interest u/s. 234A, 234B & 234C of the Act, is mandatory and consequential in nature, on total income computed by the Assessing Office, after considering date of filing of return for relevant assessment year, payment of advance tax, TDS etc. Since, we

have set aside the issue of adjustment made towards international transactions of the assessee with its AE and also non-grant of credit for self-assessment tax and TDS, interest u/s. 234A, 234B & 234C of the Act, needs to be recomputed by the Assessing Officer after finally assessing the total income of the appellant for both the assessment years. Therefore, we direct the Assessing Officer to re-compute interest if any, payable u/s. 234A, 234B & 234C of the Act, in accordance with law, after considering relevant advance tax payment and TDS available for both assessment years.

17. In the result, appeals filed by the assessee for assessment years 2010-11 & 2012-13 are allowed for statistical purposes.

Order pronounced in the court on 15th September, 2023 at Chennai.

Sd/-	**Sd/-**
(वी दुर्गा राव)	**(मंजुनाथ. जी)**
(V. DURGA RAO)	**(MANJUNATHA. G)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 15th September, 2023
JPV
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR 5. गार्ड फाईल/GF