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

BEFORE SHRI B R BASKARAN, AM AND MS. KAVITHA RAJAGOPAL, JM

ITA No. 722/Mum/2022
(Assessment Year: 2017-18)

NTT India Pvt. Ltd. 1701-1704, B-Wing, One BKC Level, 17 G Block, Plot No. C-65, Bandra Kurla Complex, Bandra (E), Mumbai-400 051	Vs.	Addl/JT/Dy./ACIT/Tax/ITO National Faceless Assessment Centre Delhi
PAN/GIR No. AAACD 2145 G		
(**Appellant**)	:	(**Respondent**)

Assessee by	:	Shri Vijay Mehta
Revenue by	:	Shri Sunil A Umap & Shri Samuel Pitta

Date of Hearing	:	06.06.2023
Date of Pronouncement	:	04.09.2023

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the Assessing Officer ('A.O.' for short), passed u/s.143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('the Act') dated 23.02.2022, pursuant to the direction of the learned Dispute Resolution Panel ('ld. DRP' for short) dated 25.01.2022 pertaining to the Assessment Year ('A.Y.' for short) 2017-18.

2. The assessee has challenged this appeal on the following grounds:

*1. **Ground No. 1: Transfer Pricing adjustment of INR 119,52,99,430/- on account of payment of management fees:***

1.1 On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel (DRP) / Learned Transfer Pricing Oficer (Ld. TPO') / Learned Assessing Officer (Ld.AO') have erred, in making transfer pricing adjustment of INR 119,52,99,430/- to the value of international transactions in respect of payment of management fees to its Associate Enterprise (AE') i.e. NTT Asia Pacific Holdings Pte. Ltd. ('NTT Asia' - formerly known as Dimension Data Asia Pacific Pte Ltd).

1.2 The Hon'ble DRP / Ld. TPO / Ld. AO have erred in law by considering management fees paid as a separate class of transaction and segregating it for the benchmarking purpose.

1.3 The Hon'ble DRP / Ld. TPO / Ld. AO have exceeded their powers in questioning the commercial wisdom of the Appellant's decision to take benefit of the expertise of NTT Asia and accordingly determining the arm's length price of management services as Nil.

1.4 The Hon'ble DRP/Ld. TPO/ Ld. AO have erred in law by rejecting the Transactional Net Margin Method (TNMM) analysis adopted by the Appellant to benchmark its international transactions and applying the Comparable Uncontrolled Price ('CUP') Method in contravention of the provisions of Rule 10A of the Income Tax Rules, 1962.

1.5 The Hon'ble DRP / Ld. TPO / Ld. AO has erred in facts and law in not considering or not appreciating the detailed analysis and evidence presented by the Appellant as regards the benefits received by the Appellant towards the management services availed from its AE and rejecting such detailed analysis of the Appellant without providing proper justification.

1.6 The Hon'ble DRP / Ld. TPO / Ld. AO have erred in stating that NTT India receives a fixed quarterly charge of USD 4,182,048 for management services availed and have also erred in stating that such quarterly invoices raised by AE on the Appellant are without any cost base and allocation keys.

1.7 The Hon'ble DRP / Ld. TPO / Ld. AO have erred in rejecting the detailed documentary evidences with respect to 10 categories of services (Inputs on company policy related matters, Services related to human resource function, Assistance with corporate communications and brand management, Services related to business development and business operations, Legal support for corporate and compliance matters, Services related to finance and accounting. Services related to development of solutions, Services related to project management and consulting services, Information technology related assistance, Support with sales activities) produced by the Appellant, by stating generically that the activities were routine in nature, part of shareholder activities or evidences do not lead to availment of services. The Hon'ble DRP / Ld. TPO /Ld. Assessing Officer ('A.O.' for short) have further erred in concluding that no costs were incurred by AE for rendering the services and that no services were rendered by the AE.

1.8 The Hon'ble DRP / Ld. TPO / Ld. AO have erred in stating the fact that the Appellant has not been able to demonstrate any benefit received by it from services for which payment is made, when in fact the benefit demonstrated by the Appellant was multiple times more than the payment made to NTT Asia.

1.9 On the facts and in the circumstances of the case and in law, the Hon'ble DRP has erred in confirming the conclusion of the TPO that the gain in the form of discounts on the purchase price is not because of the efforts of NTT Asia but is on account of membership of the Appellant in the multinational group. Further, the Hon'ble DRP / Ld. TPO erred in concluding that the benefit of Rs 266.05 crores computed by the Appellant has no basis.

1.10 The Hon'ble DRP/ Ld. TPO / Ld. AO have erred in ignoring the benefits received and quantified by the Appellant and in ignoring the fact that the overall benefit derived by the Appellant is much higher than the cost charged by the AE for the management services and hence, it would be just and equitable to conclude that the Appellant has been able to justify the benefit test. The Appellant contends that as the payment of management fees is for the bundle of services, the benefit also has to be looked at in totality rather than for specific services. The Hon'ble DRP Ld. TPO/ Ld. AO have erred in ignoring the fact that the Appellant has the right to

avail any of the services mentioned in the umbrella agreement for various services entered with its AE.

1.11 The Hon'ble DRP / Ld. TPO T Ld. AO have erred in granting a partial relief of only 0.50% as a saving in the guarantee fee to the Appellant as against 3% to 4% claimed by the Appellant in respect of the guarantee provided by the AE which is bundled in the management services rendered by the AE.

1.12 The Hon'ble DRP / Ld. TPO / Ld. AO have erred in stating that the Appellant has not submitted the evidence of expenses incurred by the AE and the basis on which the charges were allocated. They have erred in ignoring the evidence submitted by the Appellant in respect of the third-party costs incurred by the AE and allocable to the Appellant to the tune of INR 8,58,91,740 on the turnover basis, in connection to the management services. The Hon'ble DRP / Ld. TPO /Ld. Assessing Officer ('A.O.' for short) have also erred in interlinking the management services with the technical support and maintenance services availed from the AE without appreciating the fact that the same is a separate class of transaction.

1.13 The Ld. TPO has further erred in not considering the details of third-party costs incurred by the AE pertaining to IT expenses (i.e., software, licences, etc) and allocable to the Appellant to the tune of INR 6,89,85,920/- submitted by the Appellant based on the directions of the Hon'ble DRP. The Ld. TPO has erred in stating that the Appellant has not provided any basis for allocation of said IT expenses when in fact the working of cost allocation clearly mentions employee headcount as the basis of allocation.

1.14. The Hon'ble DRP/ Ld. TPO / Ld. AO have erred in law by not considering the Mumbai Income-tax Appellate Tribunal's decision in the Appellant's own case for AY 2011-12 which specifically held that while deciding the Arm's Length Price (ALP')) of the umbrella of services what has to be considered is the right of Appellant that it is entitled to avail the services and non-availing of services cannot be the basis for rejecting the claim and it had accordingly decided the matter in favour of the Appellant.

2. Ground No.2: Erroneous computation of Total Income by the Ld. AO:

The AO has erred in considering a Total income of INR 179,67,43,310/- in the Demand Computation sheet as against the correct Total income of INR 177,30,90,012/- which was mentioned in the final assessment order, resulting in an excess income of INR 2,36,53,298/-. Consequently the erroneous computation of total income results in a higher tax demand.

The Appellant, therefore, prays the Hon'ble Members to direct the Ld. AO to consider the correct total income and consequently the tax and interest payable thereon.

3. Ground 3: Short grant of Tax Deducted at Source (TDS') credit amounting to INR 1,44,58,550/-

On the facts and circumstances of the case and in law, the Ld. AO has erred in granting TDS credit of Rs 52,46,91,071/- against Rs 53,91,49,621/- as claimed in the revised return of income filed by the Appellant.

The Appellant, therefore, prays the Hon'ble Members to direct the learned AO to grant balance credit for TDS of Rs. 1,44,58,550/-.

4. Ground 4: Penalty Proceedings:

The Ld. AO has erred in law in initiating penalty proceedings under section 274 rw.s. 270A of the Act.

3. The brief facts are that the assessee NTT India Pvt. Ltd. (NTT India) formerly known as Dimension Data India Pvt. Ltd. is part of NTT Group (Nippon Telegraph and Telephone group - formerly known as Dimension Data Group) and is a subsidiary of NTT Asia. The assessee is engaged in trading of network products and in providing services such as training, maintenance, installation, consultancy, facility management, outsourcing, system integration in the area of information communication system and computer networking and computer hardware and software and also engaged in IT enabled services at small scale. The assessee is also a dealer for Cisco and other networking products. The assessee had filed its return of income dated 30.03.2018 declaring total income at Rs.57,77,90,530/-. The assessee's case was selected for scrutiny and notice u/s. 143(2) was issued on 27.08.2018. The assessee had entered into the following international transactions with its AE:

Sr. No.	***Nature of international transactions***	***AY 2017-18 Amount (Rs.)***	***Method adopted for bench marking***
1	*Sale of Goods*	*21,27,70,568*	*TNMM*
2	*Global Account Management Services Rendered*	*2,86,200*	*TNMM*
3	*Global Account Management Services Availed*	*5,53,88,656*	*TNMM*
4	*Management fees paid*	*121,94,85,623*	*TNMM*
5	*Training fees paid*	*2,83,48,867*	*TNMM*
6	*Technical Support Services Rendered (ITES)*	*16,73,33,880*	*TNMM*
7	*Maintenance & Technical Services Availed*	*5,04,96,660*	*TNMM*
8	*Maintenance & Technical Services Rendered*	*107,77,81,864*	*TNMM*
9	*Rendition of advisory services*	*7,81,73,803*	*TNMM*
10	*Other Income*	*3,53,51,419*	*TNMM*
11	*Cloud services availed*	*98,83,027*	*TNMM*
12	*Recovery of expenses*	*75,32,611*	*Other method*
13	*Reimbursement of expenses*	*4,14,16,995*	*Other method*
14	*Advance Billing*	*28,00,28,626*	*Other method*

4. The A.O. had made reference to the Transfer Pricing Officer ('TPO' for short) u/s. 92CA of the Act for determination of arm's length price ('ALP' for short) to the TPO-1(2)(2), Mumbai, which was subsequently transferred to Asst. CIT (Transfer Pricing)-

3(1)(1), Mumbai consequent to the change in name of the assessee from Dimension Data India Pvt. Ltd. to NTT Data India Pvt. Ltd. The TPO vide order dated 29.01.2021 passed u/s. 92CA(3) of the Act proposed an adjustment of Rs.121,24,85,623/- to the international transaction with regard to the allocation of management fees. The A.O. passed the draft assessment order dated 30.03.2021 u/s. 144C(1) of the Act after duly considering the proposed adjustment made by the TPO. The assessee had preferred an objection before the ld. DRP who vide order dated 25.01.2022 disposed off the objections raised by the assessee and thereby passed an order u/s. 144C(5) of the Act with specific direction to the TPO to revise the order based on the directions proposed. The ld. TPO then passed the revised order dated 18.02.2022 duly giving effect to the directions of the ld. DRP. The A.O. passed the final assessment order dated 23.02.2022 u/s. 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act making an adjustment of Rs.119,52,99,430/- as per the revised order of the TPO pursuant to the direction of the DRP and determined the total income at Rs.177,30,90,010/-.

5. The assessee is in appeal before us, challenging the impugned order on various grounds:

6. Ground No.1 : This ground of appeal challenges the transfer pricing adjustment of Rs.119,52,99,430/- towards payment of management fees. It is observed that the assessee has paid a sum of Rs.121,94,85,623/- on account of management fees to its AE for providing various operational support services to all its group companies which includes strategic execution and business management services, vendor management services, sales and marketing, corporate communications and brand management, finance, human

resource services, IT services. The assessee had bench marked the said transaction in entity level TNMM for the reason that the margins earned by the assessee at an entity level was in accordance with the provision of section 92C(2) of the Act and stated that the same was determined at ALP. The TPO was not in agreement with the ALP determined by the assessee for the reason that the assessee's management fees agreement consist of 10 services which were not provided with itemwise break up and no justification was given for the requirement of the said services. The ld. TPO further stated that the assessee has failed to show the cost allocated to each of the said services along with the third party costs incurred by the AE for similar services. The ld. TPO necessitated FAR analysis and the benefit tests to determine the ALP for the said transaction. The assessee had submitted various details before the ld. TPO categorizing the various services included in the management services and also the benefits the assessee gets by availing these services. The ld. TPO rejected the contention of the assessee for the reason that it had failed to furnish the evidence for receipt of services for justifying the cost allocation and also that the assessee has also not maintained the books as to the time taken by the employees of the AE to provide the intra group services to the assessee and also the details of actual cost incurred by the AE for rendering the said services. The TPO bench marked the said transaction using CUP method as the most appropriate method thereby rejecting TNMM as the most appropriate method for determining the ALP. The ld. TPO further held that the assessee has relied upon the allocation keys which is not the prescribed method as per the provision of section 92C(1) of the Act and thereby applied CUP method for determining the ALP. The ld. TPO held that the ALP of the services rendered by the AE to the assessee is determined at nil by

applying CUP method and thereby proposed the impugned adjustment of Rs.121,94,85,623/-. The ld. DRP while disposing the objection filed by the assessee stated that this issue on management fees was there in assessee's case for A.Ys. 2013-14 and 2014-15 where the DRP's finding was on the issue of determination of ALP and not the purpose of rendering the said services. The ld. DRP further held that the TNMM method will not be applicable to bench mark the entire group services where identifying the cost of services for each service would be difficult. The DRP further held that the assessee has to prove that the said services were actually rendered and received and the actual expenditure incurred for each services should have been quantified and whether the same is at ALP has to be determined by the assessee. The ld. DRP further proposed the TPO to exclude to Rs.2,42,00,000/- towards the international transaction of providing group corporate guarantee @ 0.50% based on the decision of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Everest Kento Cylinders Ltd.* (in ITA No. 1165 of 2013 vide order dated 08.05.2015) and the same to be excluded from the adjustment of Rs.121,94,85,623/- on account of international transaction allocation of management fees.

7. The learned Authorised Representative ('ld. AR' for short) for the assessee contended that the assessee has bench marked the international transaction related to management fees availed by the assessee from its AE by taking TNMM method as a most appropriate method. The ld. AR further stated that the contention of the TPO that payment of management fees cannot be combined with other trade transaction in distribution and service segment is unacceptable for the reason that it is not a separate

transaction but is closely associated with primary business activity of the assessee. The ld. AR further stated that these services are necessary for the benefit of the assessee's business which impact the profit earned by the assessee. The ld. AR further stated that it is highly improbable to bifurcate the said transaction owing to the nature of the services availed by the assessee. The ld. AR further contended that the TPO has applied CUP method without any justification or finding and has also failed to considered the quarterly invoice raised by the AE for the services rendered to the assessee. The ld. AR further contended that the payment of management fees has to be considered in total and the same cannot be segregated for determining the ALP. The ld. AR also contended that the ld. TPO/A.O. has failed to considered the umbrella agreement entered into by the assessee with its AE for the purpose of availing various services. The ld. AR relied on the decision of the Hon'ble Jurisdictional High Court in the case of *Merck Limited* TS-608-HC-2016(BOM)-TP and also the assessee's case in A.Y. 2011-12 on identical issue.

8. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said facts and stated that these were bouque of transactions which has to be bench marked considering each of the said services availed by the assessee. The ld. DR further stated that these are intra group services and the assessee has failed to prove that the said services were rendered by its AE and has also failed to quantify the same for determination of the ALP. The ld. DR further stated that the assessee has failed to furnish all the details and further brought our attention to the fact that the assessee has not reported the said transaction in Form 3CEB and that it is merely said to be a deemed international transaction. The ld. DR relied on the decision of the Tribunal in the case of

Akzonobel India Ltd. [2022] 137 taxmann.com 369 (Del-Trib), *MWH India Pvt. Ltd. vs. Dy. CIT* (in ITA No. 1009/Mum/2015 vide order dated 27.02.2023). The ld. DR also stated that the ld. AR relying on the decision of the earlier orders is not applicable as the principle of resjudicata does not apply to the TP proceedings.

9. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee has entered into the international transactions with regard to the payment of management fees to its associated enterprises namely NTT Asia Pacific Holding Pvt. Ltd. and had bench marked the said transaction using TNMM method. The assessee contends that it had filed documentary evidence with respect to various categories of services which are regularly availed by the assessee and out of which the assessee had received overall benefit which are much higher than the cost charged by the AE for the management services, thereby justifying the benefit test. The assessee has further contended that the payment of management fees was for the bundle of services for which the benefit should also be considered in totality and the same cannot be categorized as specified services. The assessee further stated that the said services were availed by an umbrella agreement entered into by the assessee with its AE, which also included the corporate guarantee extended by the AE. It is also observed that the assessee has furnished details of third party costs incurred by the AE with regard to the management services and had allocated Rs.8,58,91,740/- to the assessee for similar services. The assessee further contended that the ld.TPO/A.O. has also interlinked IT support service rendered with technical support along with the maintenance services which according to the assessee was separate category of transactions. The assessee has

relied on the decision of the Tribunal in assessee's case for A.Y. 2011-12 where on similar grounds the Tribunal has held that for determining ALP on umbrella of services, even a few services out of all the services, if availed by the assessee during the year consideration then the TPO ought not to have rejected the TP study of the assessee on the ground that it had not availed all the services or rather majority of services entered into by the assessee with its AE as per the umbrella agreement. The Tribunal further held that it is not prerogative of the TPO to decide if the assessee has availed the entire services of a consolidated agreement but has to merely consider whether the payment made to the AE for availing the said services is at ALP or not. The relevant extract of the said decisions is cited hereunder for ease of reference:

> *5. We have heard the rival submissions and perused the material before us. We find that the assessee is part of the dimension Data Group and is a subsidiary of Dimension Data Asia Pacific Pte. Ltd., that the Group is a dealer for CISCO Networking Products, that as per the agreement entered into between the assessee and its AE the assessee was to be rendered services by its AE under ten different heads, that the assessee had availed certain services from its AE under then different heads, that the assessee had availed certain services from its AE as per the agreement and had made payment accordingly, that the AE had similar type of agreements with other entitites of the group, that the allocation key used for charging management fee to various entities of the group by the AE was turnover of an entity vis-à-vis turnover of the entire Asia Pacific group for the year under consideration. We are of the opinion that the basic issue to be decided in the matter before us is as to whether the payment made by the assessee under the head management service should be allowed or not. It is a fact, assessee had, during the year under consideration, not availed services under the heads (i) Corporate communication & brand management services (ii) Human resources services and (iii) Sales and marketing services. It is also a fact that as per the agreement the assessee was entitled to avail all the services. We find that similar issue has been deliberated upon and decided by the Hon'ble Bombay High Court in the case of Merck Ltd. (supra). In that matter the assessee had entered into an agreement with its AEs to provide technical know-how or consultancy in 12 fields, as indicated therein, for a consideration of Rs.1.57 crores. During the previous year relevant to the A.Y. 2003-04, the assessee availed of services of its AEs only in three out of twelve fields listed in the agreement. The TPO proceeded to hold that the entire consideration of Rs.1.57 crores was attributable to the three technical services which the assessee availed of and held that no consideration was payable in respect of nine services provided for in the agreement. Thus the entire payment of Rs.157 crores was attributable only to the three services availed out of the twelve listed in the agreement. He further held that only Rs.40 laksh could be considered as arm's length price attributable to three services and made adjustment of Rs.1.17 crores resulting in its addition to the taxable income. The FAA confirmed the order of the A.O. The Tribunal held that the AE was obliged to provide technical assistance in the 12 areas listed in the agreement and it was for the availability of the assistance in all twelve areas that the consideration was paid and thus, no adjustment was required. Dismissing the appeal filed by the department the Hon'ble High Court held as under:*

".... (c) The grievance of the Revenue before us is that services only in three areas had been availed of by the respondent-assessee from its associated enterprises out of the twelve areas listed in the agreement. Therefore, the consideration paid to the associated enterprises is only attributable to the services received/avail

(d) The finding of the Tribunal that the Transfer Pricing Officer has not applied any of the method prescribed under section 92C of the Act to determine the arm's length price in respect of fees for technical know how /consultancy fee paid by the respondent-assessee to its associated enter prices is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where the respondent-assessee had availed the services, no exercise to bench mark the same with similar transactions entered into between independent parties was carried out before holding that the arm's lenth price in the three areas availed of is Rs.40 lakhs, is not disputed. The finding of the Tribunal that the agreement for technical know-how/consultancy was in respect of all the twelve services and the respondent- assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose. We find the agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the respondent-assessee in the present facts was not justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the arm's length price in respect of fees for technical services payable by the respondent-assessee to its associated enterprise, makes the entire transfer pricing agreement unsustainable in law.

(e) In view of the above, the finding of fact arrived at by the Tribunal that Rs.157 crores paid by it to its associated enterprises is in respect of its right to avail and the obligation of the associated enterprises to provide technical assistance in any of the twelve services listed out in the technical know-how agreement entered into between the respondent-assessee with its associated enterprises is not shown to be perverse. The view taken by the Tribunal in the present facts is a possible view."

Here, we would also like to refer to the matter of AC Nielsen (India) Private Ltd. (supra). Relevant portion of the order reads as under:

"2.2 The TPO found that during the year the assessee had paid Rs.11.14 crores to its AE, that the said payment was made in view of business support services received from the AE. It was claimed that above-mentioned payment was in the nature of intra-group services payment. He found that the first was signed on 02/06/2003 and its specified a Mark up of 5% in accordance with Article 4 whereas the second agreement was signed on 28.11.2007 and was stated to be effective from 01.01.2007. He found that the assessee had paid Euro 113315 + 339945 + USD103385 under the head Regional GSA (Business Support Services) for Client Services. He further found that under the heads Finance (Euro 19,000+ 5700+ US dollar 45. 713) and IT (Euro 48,851+ Euro 146552 plus US dollar 18, 759) thè assessee had made payments to its AE.

The TPO directed the assessee to justify the ALP in respect of the GSA charges paid to its AE and to submit the gross allocation base, computation of allocation base, key of allocation and the basis of the key of allocation. The TPO examined the regional expenses allocation of Rs. 9.01 crores. After considering the submissions of the assessee dated 25/09/2010, 11/10/2010, 12/10/2010 and 19/10/2010, the TPO held that the IT was based upon components of costs that the assessee had not disclosed the basis for the allocation, that no details of special marketing Support was brought on record to show that specialist marketing and complication suppori service have been provided by the AE to the taxpayer, that the cost allocation included expenses on regional information technology team consisting of hundreds of employees located in New

Zealand Australia and India and 140 people in other countries, that the assessee had not brought any evidence on record regarding employees located in India, that no customized research was conducted for the year for the assessee by the regional centre, that it had paid certain amounts towards business support services to its AE 's, that the total allocation could not be accepted to be India specific, that the submission of intra-group invoices could not be construed as sufficient compliance to show that payments made for GSA services were at arm 's length, that actual working for general costs incurred and its components were not produced for verification, that it was not proved that the assessee had really benefited out f the services of the regional team. That no one would pay any amount without knowing the actual basis and also the actual allocation figures in a third-party situation, that the assessee had its own client/server system, that total allocation could not be accepted to be India specific. He held that adjustment had to be made in the TP order. Accordingly, he made an adjustment of Rs. 4.50 crores (50% of Rs. 9.01 crores).

2.8. It is not denied by the TPO/DRP that expenses incurred by ACNielsen Corporation were not allocated to all the group entities on the basis of revenue. The assessee had made a claim that ACNielsen Asia Pacific has prepared a master file to determine an arm's length mark-up to be charged for the intra-group services. Both the authorities has not commented upon the said evidence and alleged errors,jf any, of the method approved by the Group. In short,the assessee had proved with documentary evidences that charges paid by the assessee were at arm 's length and that other arm 's length entity was prepared to pay for such services in comparable circumstances.

2.9 We are not agreeable to the proposition, advanced by the TPO/DRP, that when expenditure is incurred for the benefit of the group as a whole no charge of such expenditure is required Services rendered by AE help not only the group as a whole, but also helps others. Therefore, there is nothing wrong in charging cost for such services. As the cost incurred by the AE had been allocated to all the group companies on the basis of the revenue and detailed workings was shared with the TPO and DRP, so, it cannot be held that requisite information was not made available. It is other thing that both of them did not take notice of the details field, as discussed earlier. We are unable to understand the logic behind the argument of both the authorities that if the assessee had its own client service team then why costs of client service teams was included. According to us, it is gross violation of the 'Laman-Rekha- drawn by the basic and fundamental taxation jurisprudence. No authority is required to hold that the jurisdiction of the A.O. u/s. 37 of the Act and that of the TPO u/s. 92CA are distinct. The authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether or not there is a service from which the assessee benefits. So, when the TPO holds that the assessee did not benefit from these services it amounts to disallowing expenditure. Such a decision is outside the authority of the TPO. The decision as to whether the expenditure was "laid out or expended wholly and exclusively for the purposes of the business" is a fact determination or verification and that exercise is to be undertaken by the A0. That determination is not and cannot be made by the TPO. The Hon 'ble Delhi High Court in the case of Ekl Appliances Ltd. (345 ITR 241) has held as under:

"It is not open to the Transfer Pricing Officer to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. t is entirely the choice of the assessee as to from whom it contemplates to source its technology or technical know-how and as to what steps should be taken to meet the competition prevalent in the market and to stave off the competitors. This is the domain of the businessman and the Transfer Pricing Officer has no say in the matter. As held by the Supreme Court in S. A. Builders Ltd. v. CIT (Appeals) (2007] 289 ITR 26 (SC) the Revenue cannot justifiably claim to place itself in the arm chair of businessman or in the position of the board of directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case.

22. Even rule TOB(T)a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the Continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of rule 10B. Whether or not to enter into the transaction is for the assessee to decide.....So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Transfer Pricing Officer to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on been given by the Transfer Pricing Officer is not contemplated or authorized."

In the case under consideration actually the TPO had DRP have completely taken over the role of GHP AO. Instead of deciding the ALP of the IT.s reported by the assessee, they have decided the issue of allowability of expenditure incurred by it. Therefore, in of opinion, their order are not in accordance with the provisions of the Act...."

From the above, it is clear that while deciding the ALP of umbrella of services what has to considered is the right of assessee that it is entitled to avail.If it avails only a few services out of the boquet of services the TPO should not reject the TP study of the assessee on the ground that it did not avail all the services or the majority of services as mentioned in the agreement. Availing selected services from a composite agreement is sufficient for claiming the deduction. For rejecting the TP study of the assessee the TPO should prove that price shown by the assessee from the services availed was not at arm's length. Non-availing of services cannot be the basis for rejecting the claim. These are two different things and are fundamentally separate. In the case under consideration the TPO or the DRP has not stated that payment made by the assessee to its AE were not at Arm's length. Therefore, respectfully following the above mentioned cases, we decide the first ground of appeal in favour of the assessee.

As far as cases relied upon by the DR are concerned, we would like to state that both of then do not deal with the issue. Dispute before us, as stated earlier, is as to whether any TP adjustment can be made if an assessee avails only certain services out of the bunch of services mentioned in an agreement specially when the TPO does not doubt the arm's length price of availed services. Both the cases are not helpful to decide the issue before us.

10. From the above observation, it is evident that the Tribunal in assessee's case for AY 2011-12 has considered the decision of the Hon'ble Jurisdictional High Court in the case of *Merck Ltd.* 389 ITR 70 and the Tribunal's decision in the case of *Nielsen (India) Pvt. Ltd.* (in ITA No. 8799/Mum/2012) and where on identical facts, it has been held that if the assessee availed even some of the services listed out in the composite agreement is suffice to prove the consideration paid to the AE's and in case of intra group service payment, the TPO does not have an authority to decide whether the assessee has derived

any benefit from these services or not and whether the said expenditure was incurred for the purpose of business of the assessee was to be determined by the A.O. and not by the TPO. Further it was held that the TPO is restricted only to determine whether the international transaction was at ALP. The issue in the present case is whether TP adjustment can be made in case where the assessee has availed only limited services out of bundle of services specified in the umbrella agreement, is answered in favour of the assessee. It is also pertinent to point out that the ld.TPO /A.O. has not given any justification for rejecting the TNMM method adopted by the assessee and in considering CUP as a most appropriate method. We, therefore, allow ground no. 1 raised by the assessee and hold that the same is at ALP. As this ground has been decided in favour of the assessee, ground no. 2 raised by the assessee becomes academic in nature.

11. Ground no. 3 pertains to the short guarantee of tax deducted at source credited to Rs.1,44,58,550/-. As this ground requires factual verification, as per the revised return of income filed by the assessee, we hereby remand this issue back to the file of the A.O. for verifying the TDS credit and to allow the same on the merits of the case.

12. Ground no. 4 being consequential ground, requires no further adjudication.

13. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 04.09.2023.

Sd/-	Sd/-
(B R Baskaran) Accountant Member	(Kavitha Rajagopal) Judicial Member

Mumbai; Dated : 04.09.2023
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai