

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 2439/Mum/2022

(Assessment Year 2018-19)

UPS Express Pvt. Ltd.
(Formerly Known as UPS Jetair
Express Pvt. Ltd.
6-A, Shyam off JVLR, Majas
Village, Jogeshwari(E)
Mumbai-400060

(Appellant)

DCIT-3(1)(1)
Aaykar Bhavan, M.K. Road,
Mumbai-400020

Vs.

(Respondent)

PAN No. AAACU4322N

Assessee by : Shri Nitesh Joshi
Revenue by : Shri Dhiraj Kumar

Date of hearing: 18.07.2023

Date of pronouncement : 16.10.2023

ORDER

PER PRASHANT MAHARISHI, AM:

1. ITA No. 2439/Mum/2022 is filed by UPS Express Pvt. Ltd. (Formerly Known as UPS Jetair Express Pvt. Ltd.) against assessment order passed by the assessment unit (the Ld. AO) for A.Y. 2018-19 dated 25.07.2022 wherein the transfer pricing adjustment of ₹ 16,66,66,521/- is under challenge.
2. Brief facts of the case shows that the assessee is a company engaged in the business of logistics, supply chain management and e-commerce by combining



flow of goods, information and funds. Assessee filed return of income on 30.11.2018 at Rs 55,09,95,353/-. The return of income was picked up for scrutiny under the transfer pricing risk parameter of international transactions of intangible property. The AO made reference to the Transfer Pricing Officer (TPO) for verification of arm's length price of international transaction of payment for fees of technical knowhow of ₹ 15,91,88,056/- and recovery expenses of Rs 74,78,465/-. The assessee has paid ₹ 15,91,88,056/- to United Parcel Services America on account of technical knowhow fees. The assessee used transactional net margin method as most the appropriate method adopting profit level indicator of operating profit to operating income, taking itself as the tested party and indentified 7 comparable companies. The assessee's profit level indicator is 9.47%, PLI of seven comparable companies adopting three year weighted average net profit margin falls into the range of 2.15% to 3.12% with median of 2.29%, and accordingly, the transaction was stated to be at arm's length. The Ld. TPO asked the assessee to justify the payment on need, evidence, and benefit test with suitable evidences. The assessee submitted the technology license agreement wherein assessee was granted exclusive right to use technical information in India. The assessee also submitted that technical knowhow fees



is paid at the rate of 2% of gross export revenue subject the maximum of 50% of net profit before tax. The assessee also submitted calculation of the fees. With respect to the need test, it is submitted that the assessee actual compete with time and hence the use of information technology is crucial to efficiently manage the business and its competitiveness. It was stated that the group of company provides the infrastructure for an internet presence to the several customers. The assessee also demonstrated capital investment made by the service provider by showing the consolidated financial statement. The assessee also explained that the technology provided permits to the assessee to track the shipment as well as required for performing various activities. For the receipt of service and benefit test, the assessee submitted that illustrative list of samples of IT technology, information received from the AE along with user guides and user manuals. The assessee also submitted that these services provided to the assessee are intangible in nature. It was further stated that all these advance management technical and technical knowhow are used in the day-to-day business activities. This technology is relevant and used for real time tracking of shipment, to manage schedule of delivery, account creation etc. The assessee also submitted several presentations and updates. Accordingly, the assessee



submitted it fulfills need, rendition and benefit test. The Ld. TPO after examining the details furnished by the assessee held that:

- i. There is no evidence with respect to receipt of employees training.
- ii. No details with respect to the specific of program, technical support or information technology along with the characteristic attributes of them were submitted.
- iii. Technological vintage of the software and hardware are provided in general terms.
- iv. There are several alternatives available, which are cost effective for tracking and capture data and therefore large payment made by the assessee is not justified.
- v. The assessee is in the business of courier parcel services, which does not need special technical knowhow.
- vi. The technology license agreement is self-serving document.



- vii. The statement recorded u/s 131 of general manager shows that software is 7-8 years old and tracking technology was 22-25 years old, therefore, the technology is very old and therefore the hefty payment does not appear to be at arm's length price.
- viii. The fee determined is in form of profit distribution.
3. Accordingly, the TPO held that as in earlier years, the assessee has failed the benefit test, he adopted 'other method' and determined the arm's length price at ₹ Nil and made an adjustment of ₹ 15,91,88,056/-.
4. The second international transaction was that the assessee has made payment to third parties on behalf of its associated enterprises amounting to ₹ 22.39 crores in the nature of airline payment and export facilitation. The assessee did not benchmark this transaction separately as this sum was recovered from associated enterprises on cost-to-cost basis. The Ld. TPO noted that why transaction net margin method has been used for bench marking instead of cost plus method. He further noted that as similar adjustment made in the earlier year, why



should it not be made this year also. Assessee explained that the above recovery of expenses relates to freight and related charges paid by the assessee on behalf of other group entities and is for purely administrative convenience, those are recovered from cost to cost basis. The Assessee also submitted copy of invoices where above sum was recovered. The Ld. TPO rejected the contention of the assessee holding that there is a service element involved incurring those expenses and by not charging, any mark up the assessee has flouted the transfer pricing rules. According to him, no independent party would have agreed to bear these transactions without mark up. Accordingly, the Id. TPO held that as the margin of comparable companies is 3.34%, the mark up on the detail expenditure requires an adjustment of ₹ 74,78,465/- of total expenditure of ₹ 22.39 crore, the order u/s 92CA(3) was passed on 21.07.2021 by the ACIT transfer pricing 4(2)(1) Mumbai.

5. Consequent to that draft of assessment order was made on 27.09.2021 determining total income of the assessee at ₹ 71,76,61,874/- against the returned of income of ₹ 55,09,95,353/- making an adjustment on account of arm's length price of international transaction as per the TP order of ₹16,66,66,521/-.



6. The assessee preferred objection before the Ld. Dispute Resolution Panel (DRP). The Ld. DRP issued direction on 01.06.2022 wherein both the transfer pricing adjustment was upheld. The learned dispute resolution panel in paragraph number 6 of its direction held that identical issue came for direction before the DRP in assessment year 2017 - 18 wherein it was held that material facts remaining the same during the year under reference following the consistent view and findings of the DRP on this issue in earlier years the grounds of objection raised by the assessee were rejected thus for this year also in paragraph number 7 the learned DRP held that the material facts and circumstances in the instant case for assessment year 2018 - 19 remain the same and accordingly rejected the objections of the assessee and upheld the benchmarking at Rs. Nil made by the TPO.
7. Consequently, the assessment order u/s 143(3) of the Act r.w.s 144(C) (13) was passed on 21.07.2022 determining total income at ₹ 71,76,61,874/-
8. Therefore, the assessee is in appeal before us.
9. The Ground no. 1 of the appeal is against the transfer pricing adjustment in respect of technical knowhow fees of ₹ 15,91,88,056/-. The Ld. Authorized Representative (the Ld. AR) submitted



that the Ld. DRP has followed its direction in assessment year 2017-18 wherein directions for earlier years were followed. He submitted for A.Y. 2013-14 in ITA No. 6318/Mum/2017 the co-ordinate bench has decided this issue as per the order dated 07.07.2019 wherein Para No. 6.1 decides this issue holding that TPO in determining arm's length price of ₹ Nil has not adopted any method and therefore, the assessee was granted relief on this aspect. For A.Y. 2014-15 in ITA No. 7320/Mum/2018-dated 04.03.2020 the co-ordinate bench vide Para no. 09-13 the issue was restored back to the file of the Ld. TPO/AO for fresh bench marking. For A.Y. 2014-15 the Miscellaneous Application was filed wherein by order dated 04.02.2021 Para No. 14 of the order restoring matter back to the file of Ld. TPO/AO was deleted. He further referred the order of co-ordinate bench for A.Y. 2016-17 dated 29.07.2022 in ITA No. 1221/Mum/2021 wherein as per Para No. 9 the claim of the assessee was allowed an adjustment was deleted. He therefore submitted that this issue is squarely covered in favour of the assessee as the Ld. TPO without following any method has determined arm's length price of international transactions at ₹ Nil. He also submitted that for this year TPO has adopted other method but benchmarked in similar manner determining Alp at Rs Nil.



10. On the merits he referred the transfer pricing study report Para 4.1.3 with respect to the payment of technical assistance fees. He also referred UPS technical license agreement placed at page no. 193 of the paper book and referred to Para No. 2 and No. 3 of that agreement. He further referred the presentation made before the Ld. DRP on the various objection of determination of arm's length price at ₹ Nil. He further extensively referred to his paper book volume 2 which consists of letter dated 09.07.2021 submitted before the Ld. TPO containing 980 pages demonstrating the need test, the receipt and benefit test and also why the arm's length price approach adopted by the assessee taking the transactional net margin method is most appropriate method and international Transactions are at arm's length price. According to him, the international transaction of payment of technical knowhow is made inextricably linked and is wholly necessary for the business of the assessee and therefore it is required to be aggregated with other business transactions. In the end, He submitted that the determination of arm's length price by the AO/TPO is not proper.
11. The learned departmental representative supported the order of the learned TPO and the direction of the learned dispute resolution panel. It was further stated that as the material facts and circumstances



in the instant case are identical to the facts, circumstances in case of the assessee for earlier years are identical, and therefore there is no infirmity in the direction of the learned dispute resolution panel.

12. We have carefully considered the rival contention and perused the orders of the lower authorities.
13. Facts show that assessee is part of UPS group, which is the largest package delivery company in the world. It is into the business of providing door-to-door, time definite guaranteed delivery services across more than 220 countries and territories worldwide in shipping delivery more than 20 million packages a day more than 9.1 million customers are served. Each packages passes through the UPS network, which is designed and engineered to provide speed, reliability and efficiency. The assessee is rendering transportation services within India for international shipments while UPS worldwide renders international transportation service outside India for international shipments.
14. Under the terms of transportation agreement dated 26th of March 2013 between assessee and UPS worldwide forwarding incorporation wherein it provides services with respect to the export of the guarantee delivery by 8 AM – 8:30 AM to major cities



in the United States, Canada and major Asian cities. With respect to import, it guarantees delivery by 9 AM to selected areas in India. This is UPS worldwide express plus. With respect to UPS world express, for export cargo it guarantees delivery by 10:30 AM most parts of the US, Canada Europe and Asia and selected areas in America with respect to import it guarantees delivery by 12 noon to selected areas in India. UPS worldwide express guarantees delivery by end of the day over 220 countries and territories worldwide. For UPS worldwide expedited it delivers within three business days within a share and from a sure to major business centers in Europe or North America and South America. It handles letters, documents and non-document packages in excess of five KG. Thus, it is apparent that assessee is providing package delivery services door-to-door time definite manner. It is submitted that assessee is also engaged in providing express delivery services for the international delivery of documents/parcels and packages having 3 hubs and 19 collection centers across the country.

15. It has entered into a technology license agreement on 30 October 2000 with United Parcel Service of America incorporation wherein that company has granted assessee in a) to use the technical information in India. According to that agreement it



was stated that the licensor possesses valuable advanced management technique and technology and know-how relating to international integrated transportation services including the technical information and other materials such as business travel up and techniques of marketing and business development analysis systems, proactive notification systems, customer service and telephone centre systems, security and international shipment resolution group such as full visibility tracking system, automated delivery information system, total track system, package claim report system, incident report system. With respect to the industrial engineering operation it provided FDC/RS and ITS key entry systems, IAS PS and OPSYS operation system, DIAD, HHDC, with respect to the finance and accounting services such as general ledger accounts payable enterprise billing system etc. therefore such services as per the agreement were to be provided with application programs, data communication, technical support, user training and other information technology et cetera further the licensor will also ensure that the technical information will not provided to any other person or company so as to compete with the business of the assessee. As per article number 3 of the agreement in addition to the technical information licensor agrees during the term of these agreement to provide licensee technical



assistance, skill seller expert eyes to enable licensee to apply licensor's advanced management techniques and technology and know-how in relation to the licensed activities in the territory. It shall also provide to the assessee such technical assistance, skill and other expert eyes within and outside the territory, which are specified therein. Which are namely:-

- a. outside the territory, assistance relating to work methods and procedures, terminal layout plans, sorting equipment layout and specifications, safety and security methods, medical standards and procedures, work measurement and operational is control, customer service procedures, personnel forms and procedures, automatic maintenance systems and procedures, financing and accounting systems
- b. outside the territory, assistance relating to developing and maintaining a customer network in the territory



- c. within the territory, assistance relating to maintenance by license of its buildings, facilities, machinery and equipment
 - d. the outside the territory, assistance relating to forecasting and scheduling by license of sale and production and related calculation of cost
 - e. research and analysis of customer needs in order to ensure appropriate application of technology which will respond to these needs
 - f. training of managerial, supervisory and technical personnel and
 - g. Assistance with planning and implementation by licensee of cost saving projects.
16. As per the agreement there are certain information which licensor shall not provided to the licensee. Further according to article 12 of the agreement there is a staggered fees to be payable by the assessee to the licensor. For the impugned assessment year according to Parramatta 12.6 the



technical assistant for shall be calculated at the rate of equal to 2 percentage of gross export revenue but shall not exceed 50% of the net profit before tax subject to the licensee meeting its business plan for the period covered. As per annexure, 2A details were provided of capital investment made by the UPS group and information technology over a period of years starting from year 2008 to 2017. With respect to each year there is an exhibit providing the details in support of the same. For year, 2017 capital investment in information technology segment was US\$ 560 million and in 2008, it was \$ 277 million. In annexure 2B the summary of I software licenses of UPS group over a period of years are provided with supporting documents. Gross carrying amount for year 2008 was US\$ 1775 million and for 2017, it is US\$ 3387 million.

17. As it is an intra group services provided by the associated enterprises to the assessee is necessary for the assessee to establish before the transfer pricing officer as well as in its transfer pricing study report that assessee has requirement of the above technical services (need test), such services have been rendered by the associated enterprises as per the agreement (rendition test), by obtaining such services they assessee has been benefited in its business operations by utilizing those services



(benefit test) and those services are not which assessee is already having available with it (duplicity test) and those are not the services which are required to be provided by the shareholder for safeguarding its one interest as a shareholder (shareholders activity test).

18. When questioned by the learned TPO assessee submitted a letter dated 9 July 2021 containing 918 pages with respect to the above aspect. By that letter, first assessee explained the nature of the business of the assessee and then what the technology fees agreement is along with the mode of Calculation of such fees. With respect to the need test, assessee submitted that express delivery companies actually compete with the time and hence use of information technology is crucial for companies in this industry to efficiently manage its business and maintain its competitiveness in the industry. As AE is a global leader in developing technology that helps its customers optimizing their shipping and logistic business processes to lower cost, improve service and increase efficiency, such use of latest technology and information is essential in providing reliable express services. The associated Enterprises provide the infrastructure for an Internet presence that extends to thousands of customers who have integrated UPS tools directly into their own



websites. UPS has made significant investments in information technology over a period of years as well as is having unique software for handling the business which assessee carry on. Assessee is one of the affiliate company of the UPS groups it utilizes advanced management technique and technology know-how received from a in its day-to-day business activities. These techniques/and know-how enables assessee to render a comprehensive list of package delivery services to its customers in more convenient and efficient manner. For real-time tracking of shipments and providing delivery information systems for the statements to the customers, these capabilities are required.

19. With respect to the receipt and benefit test, assessee explained the use of technology received from its associated enterprises, assessee narrated by paragraph number one point and of that letter that how the services have been utilized by the assessee in each of the segment from pickup to delivery. Assessee submitted that:-

- i. The first step in the delivery of a package is the pickup operation. UEPL delivery drivers are assigned a specific route, making regularly scheduled stops along such route. Customers with urgent shipments



can call UEPL for On-Call Air Pickup or schedule a pick-up online. Using communication technology tool, On-Call Air dispatchers locate the nearest package car and electronically dispatch it to the customer location for "just in time" pickup. The driver likely uses a hand-held computer device, called a Delivery Information Acquisition Device ('DIAD'), to electronically capture information about each package picked up.

- ii. A "hub" is the central sort operation responsible for the unloading, sorting and re-loading of packages received from package centers or other sort locations. At hub, thousands of packages are sorted by postal zip code and consolidated. UPS Tundra is a web-based pick up/ delivery scanning software application used in the electronic scanning devices. This application is used by UEPL's operation department at various pick-up and delivery Hubs. The



details scanned through this application such as address, arrival / departure date and time, exceptions, etc. automatically gets uploaded in the UPS systems. This also helps to create and/or edit a pick-up and delivery manifests.

- iii. In respect of delivery, Technology helps ensure that the package has arrived at the correct address and provides customers with useful information. The driver uses the DIAD, to electronically capture information for each package delivered, including the time of delivery, and the signature of the person receiving the package. This information is transmitted via cellular telephone technology directly from the package car to UPS computers where it is available for customers to trace their packages or to verify proof of delivery.
- iv. Other operational technology includes package measurement, sorting, and



other accounting and controlling systems necessary to ensure resource (financial, human, facilities, etc.) management at all levels. For example, UPS' Enterprise Billing System ("EBS") is the billing system employed by UPS accounting team. Further, bridging technology performs critical tasks of linking various systems, for example, the EBS to interface with accounting systems or DIADs to link to customer on-line tracking systems.

20. Assessee submitted to support its contention of rendition and benefit test samples of information technology, technical information, applications, etc. received from UPSAI along with sample user manuals, user guides, etc. evidencing the receipt of such technical know-how services .

21. It was also submitted that aforesaid technical know-how rendered by the AE to UEPL are intangible in nature, it would be difficult to place on record concrete evidence which would irrefutably prove to the hilt rendering of such services.



22. It was also submitted that UEPL utilizes these advanced management techniques and technology know-how in its day-to-day business activities. For instance, the IT systems/ applications provided by UPSAI via the internet enable the external customers to perform online shipping, real time tracking of shipments, manage their schedule for deliveries, enable creation of accounts for billing shipping charges and services and many more other services (<https://www.ups.com/in/en/Home.page>). One can read at the bottom of the UPS website the following statement "Copyright©1994-2021 United Parcel Service of America, Inc. All rights reserved."
23. Assessee submits that the technologies have regularly been upgraded to provide more real-time tracking information, expandable memory, etc. it also technology during FY 2017-18:
- Global deployment of UPS Tundra update and Beta schedule with additional user-friendly functionality.
 - Various other trainings were conducted during the year for up gradation of technology. For instance, training conducted in July 2017 in relation to



Enhancement made in Tundra Pick- up and Delivery System to incorporate new service and to fix defects in services provided to the customers. Training invite, presentations and manuals related to the trainings conducted for up gradation of technology by UPS was also produced.

- To improve the customer experience, UPS (including India) has introduced a contractual solution known as 'Worldwide Express Freight Time of Day' that allows provides a guaranteed, end of day delivery service via UPS Small Package. The presentation shared by UPSAI giving an overview of the enterprise release and steps to navigate this new feature is attached as Annexure 7C.
- During FY 2017-18, various operational upgrades were undertaken to improve customer experience/services and



increase revenue; such as introduction amid day commit time of delivery, the dimension length for acceptance of courier /small packages were changed, additionalcategoryofshipmentsfordange rouscargoes/goodsweremadeavailableto the shippers /customers, newer markets / services available for various markets were introduced which allowed customers faster delivery. These operational changes were reflected in the international customer resource information system through updates and enterprises releases. Assessee also submitted various presentations discussing some of the system updates in regard thereto.

24. Therefore, assessee stated that these technical updates help assessee in developing and maintaining customer network, safety and security methods, operation control, customer services procedures and training of personal et cetera. Assessee also stated that various standard practice manuals, work methods, procedures and standard operating procedures with respect to packaging techniques, shorting equipment layout and specification etc. were also provided to the assessee because of this



practice manuals it help assessee to increase its skill and provide quality services to various customers. Assessee also submitted the simple standard practice manuals. Thus in the end assessee submitted that it has received the benefit of running the business effectively using best in class information technology systems, able to attract business from various renowned companies across various industries and sectors, support in cost efficiencies through best practices and operational processes, ongoing technology enhancement has not only made the operations more connected but also more efficient with improved customer experience and an ability to charge a premium price for certain services.

25. The benefit was also substantiated by the fact that assessee has been able to retain consistent high margin vis-à-vis this comparable companies. Assessee submitted a chart as under:-

FinancialYear	NPMof UEPL	NPM of Comparable Companies as per TP study
FY2017-18	9.47%	3.34%
FY2016-17	10.6%	1.90%
FY2015-16	9.29%	2.14%
FY2014-15	9.80%	2.59%
FY2013-14	6.36%	2.48%
FY2012-13	3.57%	(-)2.29%

26. It was also the claim of the assessee that if such information technology and services were not provided by UPSAI, UEPL would have been



required to use external third parties to procure similar services / IT systems, or alternatively to hire appropriately qualified personnel to undertake similar services or develop similar IT system, themselves. It was further stated that assessee has not paid any amount to its associated enterprises during the years wherein the assessee incurred the operating losses.

27. On carefully looking at the submission of the assessee, we find that assessee has submitted adequate evidences to show that the services were required for the business of the assessee and those services were rendered by the associated enterprises coupled with the benefit received by the assessee in financial terms as well as in the operational terms.
28. In the submission before the learned that lower authorities, the assessee substantiated that
29. For carrying out business of the assessee, and as assessee is part of MNE, which is providing such services worldwide, to remain in sync with that, the assessee would have needed the identical platform, structure.
30. The services provided by the associated enterprises are supported with the agreement wherein the identified obligations and rights of the parties are crystallized along with the remuneration structure.



31. As the intra-group services availed by the assessee is intertwined in each of the activities of the assessee, apparently, the assessee has received those services.
32. Had these intragroup services not availed by the assessee, the assessee has shown that it would not have received the financial benefit and operational benefit that it has received. Further, when the assessee was not earning profit, even after provision of these services, no amount was charged by the associated enterprises.
33. Now the question arises about the benchmarking of the transaction. The assessee has benchmarked using the transactional net margin method computed is not rocket margin at 9.47%, which is found to be, higher than the arithmetic mean of net profit margin of comparable companies. Against this, the learned transfer-pricing officer has adopted the other method and computed the arm's-length price of this international transaction at nil. Further, when the issue reached before the learned dispute resolution panel, the learned dispute resolution panel abdicated its duty to benchmark the international transaction and merely followed its own direction in earlier years.



34. As the intra-group services utilized by the assessee are supporting the core activities of the assessee, we do not find any infirmity in the assessee adopting transactional net margin method as the most appropriate method. In view of this, we do not find any reason to sustain the transfer pricing adjustment made by the lower authorities.
35. We have also perused the orders of the coordinate bench of earlier years wherein the transfer pricing adjustment has been deleted for the single reason that the learned transfer-pricing officer has failed to adopt any of the method as the most appropriate method. However, for this year the learned transfer-pricing officer has adopted the other method as the most appropriate method therefore all those decisions does not have any relevance for deciding the issue for this year.
36. Furthermore, intragroup services or for that matter any international transaction is required to be benchmarked each year based on the facts and circumstances prevailing in that year considering the economic conditions. Therefore, the findings of the previous year will have only persuasive value, if any, while deciding the transfer pricing adjustment for any year.



37. Accordingly, ground number 1 of the appeal of the assessee is allowed.
38. Ground number 2 of the appeal is against the incorrect computation of the markup of 3.34% of ₹ 7,478,465 on recovery of expenses by the appellant from its associated enterprises. Assessee has made payment to 3rd parties on behalf of its associated enterprises amounting to ₹ 22,39,06,124/- which are in the nature of airline payments, export facilitation et cetera. The assessee did not benchmark the impugned transaction as it was claimed that it is on cost-to-cost basis. The learned transfer-pricing officer questioned the same and stated that no independent party would have made such payment on behalf of any person and therefore the assessee should have benchmarked this transaction with the margin. The learned transfer-pricing officer found that cost plus markup should have been charged at 3.34% wherein the margin of the comparable was also found to be at arm's-length price at 3.34%. Accordingly and adjustment of ₹ 7,478,465/- was made. The learned dispute resolution panel also found the adjustment made by the learned transfer-pricing officer is correct and followed its own direction for earlier years. The learned authorized representative submitted that issue is squarely covered in favour of the assessee



by the decision of the coordinate bench in assessee's own case for assessment year 13-14 in ITA number 6318/M/2017 dated 27 September 2019 wherein it has been held as under:-

"9. We have heard rival submissions. The primary facts are that the transaction being recovery of expenses from AE by the assessee, is not in dispute and hence, the same are not reiterated herein for the sake of brevity. It is not in dispute that the entire transaction of recovery of expenses is a pass through transaction, which had been categorically accepted by the Id. TPO in his order. Once, it is a pass through transaction, it is only a balance sheet item for the assessee. Hence, there cannot be any mark-up on the same. We find that assessee also reimburses certain expenses incurred by the AE without any mark-up. These facts are also accepted categorically by the Id. TPO. We hold that there cannot be any mark-up on income side of the transaction alone as contemplated by the Id. TPO. Hence, the entire issue herein is only academic. We find that the Co-ordinate Bench decision of Bangalore Tribunal in the case of Tesco Hindustan Service Centre Pvt. Ltd., vs. DCIT in IT(TP)A No. 1317/Bang/2010 for A.Y. 2006-07 dated 26/05/2015 in the context of



ALP adjustment on reimbursement had held as under:-

"29. We have already seen that the Assessee received a sum of ₹ 2,32,47,077 from its AE and the same has been shown as an international transaction with AE by the Assessee in the report u/s. 92CE of the Act.

According to the TPO, the Assessee did not give any details with regard to reimbursement of expenses (received) to the extent of ₹ 2,32,47,077.

According to the TPO, the Assessee only took a stand that the transfer pricing provisions do not provide any detailed guidelines or framework on the method of computation of ALP in respect of reimbursement. The TPO therefore called upon the Assessee vide letter dated 22-07-2009, to give nature of reimbursement of expenses and also clarify whether such expenses are routed through the profit and loss account, if yes, to specify the head(s) under which it is shown, If no, specify as to why such expenditure should not be included as part of the Assessee's operating cost and thus for mark-up. According to the TPO, the Assessee did not offer any comments. Therefore, the TPO presumed that the reimbursement of expenses



received is not routed through profit and loss account and these expenses are incurred in connection with rendering software development services. According to the TPO, no independent party would render such services without any mark up. The TPO therefore added the reimbursement of expenses (received) of ₹ 2,32,47,077/- to the operating revenues as well as the operating costs for the purpose of aggregation of transactions and determining arm's length price under TNMM. Further, the TPO observed that the reimbursement of expenses pertaining to each segment is not available. He proceeded to apportion the expenses between the software development and ITES segments in the ratio of segment turnover (67.48%: 32.52%). Thus the reimbursement of expenses were added to the revenues and costs in the above ratio i.e. ₹ 1,56,87,128/- in the software development segment and ₹ 75,59,948 in the ITES segment for comparability analysis under TNMM.

30. Before DRP, the Assessee submitted that the reimbursement of expense received are nothing but expenses incurred on behalf of related parties for administrative convenience. The Assessee pointed out that during the previous year, it had paid expat tax for the employees deputed by Tesco Stores Limited, UK (parent company) to work as



part of various projects conducted by the assessee. The assessee also paid a certain amount as interest for the delay in the payment of Tax Deducted at Source (TDS). All these expenses were cross-charged by the assessee to Tesco Stores Limited, UK who reimbursed the same at cost, without any mark up. The details of expat tax and interest paid on delay in the payment of TDS were also provided as given below:-

<i>Expat Tax Details for the financial year 2005-2006</i>				
<i>Sl. No.</i>	<i>Name of the Expat</i>	<i>Tax (Rs)</i>	<i>Interest (Rs)</i>	<i>Total Income Tax (Rs)</i>
1	Tim Sea	2,240,802	145,652	2,386,454
2	Sangenu Park	2,101,111	136,572	2,237,683
3	Henry Kang	239^23lr	155,690	2,550.920
4	Philip Greenwood	4,806,569	312,247	5,118,996
5	Ushir Bhatt	2,572,258	67,197	2,739.45
6	David Briggs	3,911,924	254,275	4,166,199
7	Peter Hanlon	1,654,880	107,567	1,762,447
8	Roger Morgan	1,360,427	88,428	1,448,855
9	Sarah Morgan	878,935	57,131	936,066
	Total	21,922,137	1,424,939	23,347,076

31. The ledger entries pertaining to the abovementioned transactions were provided as Appendix 25A to the objections filed before the DRP. The challans in support of the payment of the abovementioned expat tax and the interest on



delayed payment of TDS were also provided as Annexure to the objections before the DRP. Sample invoice copies of the reimbursements received were also provided as Annexure to the objections filed before the DRP.

32. The assessee also placed reliance on Circular No. 87-2R dated 27 September 1999 of the Canada Customs and Revenue Agency wherein it has been stated that often the price the recipient is willing to pay for the service does not exceed the cost of supply to the service supplier.

"163. Arm's length service suppliers would usually expect to recover their costs plus an element of profit. However, in determining an Arm's Length charge for service, one must also take into account the economic alternatives available to the recipient of the service. Often, the price the recipient is willing to pay for the service does not exceed the cost of supply to the service supplier."

The above has been explained by means of an example:

"For example, in many cases, the services provided through intra-group arrangements are administrative or ancillary in nature, and the participants would only have been prepared to centralize the activity if they could share in the



cost savings. Cost may represent an arm's length charge in such situations.

164. Determining whether a mark-up is appropriate and, where applicable, the quantum of the mark-up, requires careful consideration of factors such as:

- the nature of the activity;
- the significance of the activity to the group;
- the relative efficiency of the service supplier; and
- any advantage that the activity creates for the group.

For example, the relative efficiency of arm's length service suppliers may not be comparable to the intra-group services where the intra-group services are offered as a convenience to the group and not as an ordinary and recurrent activity."

"165. As discussed in paragraph 7.36 of the OECD Guidelines, it is important to distinguish between the situation of a taxpayer who renders services for the other members of a group; and a taxpayer who acts solely as an agent on behalf of the group to acquire services from an arm's length party. In the latter situation, the arm's length compensation would be limited to rewarding the agency role. In



such a case, it would not be appropriate to determine an arm's length charge by referring to a markup on the cost of the services acquired from an arm's length party. Whether a taxpayer is providing a service or merely acting as an agent on behalf of the group is a question of fact."

33. The DRP however did not agree with the submissions of the Assessee and held as follows:

"The reason why the TPO has considered a mark up is that arm's length service suppliers would usually expect to recover their costs plus element of profit. Therefore, in determining arm's length charge for service one must also take into account the economic alternatives available to the recipient of the service. We agree with the reasoning of the TPO."

34. Aggrieved by the order of the DRP, the Assessee has raised Ground No. 36 before the Tribunal. We have heard the rival submissions. The learned counsel for the Assessee reiterated submissions made before the DRP. The learned DR relied on the order of the DRP.

35. We have considered the rival submissions. As observed in the OECD commentaries referred to in the Circular of the Canada Customs and Revenue Agency, it is important to distinguish between the



situation of a taxpayer who renders services for the other members of a group; and a taxpayer who acts solely as an agent on behalf of the group to acquire services from an arm's length party. In the latter situation, the arm's length compensation would be limited to rewarding the agency role. In such a case, it would not be appropriate to determine an arm's length charge by referring to a mark-up on the cost of the services acquired from an arm's length party. Whether a taxpayer is providing a service or merely acting as an agent on behalf of the group is a question of fact.

36. In the present case, the details given before the DRP clearly shows that what the Assessee received as reimbursement from the AE is nothing but the expat tax paid and interest paid on delay in the payment of TDS. There can be no element of service in such payment. The taxpayer should be considered as having acted solely as an agent on behalf of the group to acquire services from an arm's length party. In such cases, it would not be appropriate to determine an arm's length charge by referring to a mark-up on the cost of the services acquired from an arm's length party. We therefore hold that the reimbursement of expenses be excluded from the revenues and costs in the ratio i.e. ₹ 1,56,87,128/- in the software



development segment and ₹ 75,59,948 in the ITES segment for comparability analysis under TNMM as was done by the TPO and direct the TPO to compute the ALP after such exclusion. Ground No. 36 is accordingly allowed."

9.1. Respectfully following the said decision, we direct the Id. AO/TPO to delete the ALP adjustment made on recovery of expenses. The other arguments made by the Id. AR and DR on inclusion/exclusion of comparables are not adjudicated herein as the relief is granted on preliminary issue. Accordingly, the Ground No. 2.1 raised by the assessee is allowed."

39. The learned authorized representative further submitted an affidavit from the director confirming the nature of recovery of expenses wherein it is submitted that line haul charges of ₹ 22,12,53,003 and 93 in the nature of haul freight, appellate shipping charges, accident and facilitation fees of custom mount package is paid on behalf of its associated enterprises to the third parties. Further sum of ₹ 2,652,731 is with respect to the Visa charges, conveyance etc of the employees seconded. Further sum of ₹ 55,375,000 is an income tax paid on behalf of its associated enterprises. It is claimed that the learned transfer-pricing officer has not considered the amount of taxes for the purpose of



computing the margin. Further it was stated that the charges primarily to freight component and does not include any element of service. It was therefore submitted that this issue is covered in favour of the assessee as well as, even on the facts and merits of the case also, the adjustment deserves to be deleted.

40. The learned departmental representative vehemently submitted that those decisions are rendered without considering more precisely the transfer pricing provisions. There is no answer in the decision that whether any independent party would have made a payment of ₹ 223,906,124/- on behalf of the assessee or not. Therefore, it should be benchmarked by putting an appropriate margin to that. He further submitted that assessee is consistently saying that it is an administrative convenience for which these payments have been made on behalf of its associated enterprises, he submitted that administrative convenience does not have any role to play in case of transfer pricing adjustment. He further submitted that it is not a pass through costs at all and challenged argument of the assessee. It was further the claim of the learned departmental representative that merely because the transaction are cost to cost basis, it can be no reason to not to benchmark such international transaction



because no independent party would have paid on cost to cost basis by imputing its own capital, own manpower and resources. He submitted that the principles of the functional analysis, assets employed and risks assumed have not been considered for benchmarking this transaction by the assessee. He therefore submitted that the earlier year decision should not be followed because of the above reasons, as those decisions do not have any answer on these aspects. In addition, for these reasons only the learned transfer pricing officer and the learned dispute resolution panel has not followed the decision of the coordinate bench. He submitted that the assessee itself and submitted that coordination, licensing with the airlines is an activity incidental to the assessee is export pickup services for which it is already being compensated and incidental cost if any are considered under the transactional net margin method analysis, therefore the assessee submits that these transaction needs to be benchmarked.

41. We have carefully considered the rival contention and also perused the order of the coordinate bench in assessee's own case for earlier year. We find that repeatedly for several assessment years, the coordinate benches have deleted the addition with respect to the markup on reimbursement of expenditure. Naturally, it needs to be tested whether



independent party would have incurred these expenditure or not.

42. However, because of the concurrent finding by the coordinate benches in assessee's own case for earlier years, we are constrained to take the similar view. In view of this, respectfully following the decision of the coordinate bench, we also direct the learned TPO to delete the above adjustment.
43. Though, the arguments led by the learned departmental representative have some force in that, however even if the alternative argument is accepted of benchmarking this transaction in the transactional net margin method, even then no adjustment could have been made as the assessee has better margins compared to the comparable companies.
44. Accordingly, ground number 2 of the appeal of the assessee is allowed.
45. Ground number 3, 4 were not pressed before us therefore those are dismissed.
46. Ground number 5 is with respect to the interest on dividend distribution liability the relevant fact shows that the dividend of ₹ 168 lakhs was declared in the annual general meeting held on 22 September 2017. The tax under section 115O of the act including surcharge and cess thereon on the amount of



dividend was paid of ₹ 3,420,085/-. The amount of tax or to have been deposited to the credit of the central government was on or before 10 October 2017 being 14 days from the date of declaration of the dividend. The above sum was deposited in two installments on 31 October 2017 and on 14 November 2017 of ₹ 2,936,172 and 5,23262 respectively. However, in the challenge deposited by the assessee, the assessment year mentioned was 2017 – 18 instead of assessment year 2018 – 19. Therefore the learned assessing officer in the computation is seated has not granted credit for payment of dividend distribution tax and accordingly interest was charged. Therefore, it is the claim of the assessee that the learned assessing officer may be directed to verify the liability of dividend distribution tax including the date of payment and consequently allow credit for payment of dividend distribution tax in charge interest only up to the date of payment.

47. The learned departmental representative vehemently stated that the assessee has wrongly mentioned the assessment year therefore, there is no fault on the part of the learned assessing officer in not granting credit of dividend distribution tax paid and accordingly the interest is correctly charged.
48. We have carefully considered the rival contention and perused the order of the lower authorities. In



fact the assessing officer should have passed the draft of the assessment order complete involve respect wherein even the computation of tax should have been made, if that is not made therefore such issue has arisen. However, in the present case it has happened due to the mentioning of the wrong assessment year by the assessee. In view of this we set-aside the whole issue back to the file of the learned assessing officer with a direction to the assessee to 1st get the assessment year corrected in the challan and then learned assessing officer should grant credit of the same. There is no claim with respect to the interest under section 234C though mentioned in ground number 5. Accordingly, ground number 5 of the appeal of the assessee with respect to dividend distribution tax is allowed with above direction.

49. Ground number 6 is with respect to the short grant of tax deducted at source of ₹ 49,985/-. As this issue was not before the learned assessing officer at the time of passing of the draft assessment order, we restore this issue back to the file of the learned assessing officer with a direction to the assessee to reconcile form number 26AS with the tax return, the learned assessing officer after verification may grant the due credit to the assessee of tax deduction at



source. Accordingly, ground number 6 of the appeal of the assessee is allowed.

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

Order pronounced in the open court on 16.10.2023.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated:16.10.2023

Aniket/Steno

Copy of the Order forwarded to :

BY ORDER,

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai