

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI**

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER

AND

SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.1760/MUM/2015 (A.Y. 2010-11)

The Boston Consulting Group (India) Private Limited 14 th Floor, Nariman Bhavan 227, Nariman Point Mumbai - 400021 PAN: AABCB3524G	v.	DCIT – 3(3)(2) Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee Represented by	:	Shri J.D. Mistri
Department Represented by	:	Shri Rajesh Pardeshi
Date o Conclusion of Hearing	:	11.01.2024
Date of Pronouncement	:	28.02.2024

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against the final Assessment Order and directions of the Dispute Resolution Panel-II, Mumbai [hereinafter in short "Ld.DRP"] dated 28.11.2014 for the A.Y.2010-11 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

2. Brief background of the case is, Assessee is a global management consulting firm and the world's leading advisor on business strategy and is a wholly owned subsidiary of BCG Holding Corporation, USA ('BCG USA). The Assessee's case for A.Y. 2010-11 was referred to the Transfer Pricing Officer (TPO) and the Transfer Pricing Officer passed an order under section 92CA(3) of the Act proposing certain Transfer Pricing adjustments (TP Adjustment) on following accounts:

- Payment of fees for time and billing software-₹.2,64,23,881
- Provision of regional co-ordination services- ₹.3.11.195
- Information Technology Cost allocation (IT Cost allocation) – ₹.4,25,00,327

3. Aggrieved, Assessee filed objections before the Dispute Resolution Panel ("Ld.DRP") against the draft assessment order dated 26.02.2014 passed by the Assessing Officer incorporating the TP Adjustments proposed by the Ld. TPO. The Ld. DRP confirmed the additions proposed in the draft assessment order vide DRP Directions dated 28.11.2014. In pursuance to the Ld. DRP's directions, the Assessing Officer passed the final assessment order dated 22.11.2015 making total additions of ₹.6,92,35,403/-.

4. Aggrieved, the Assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and in the circumstances of the case and in law, the learned Deputy Commissioner of Income tax 3(3) (2) ('the learned AO')/ the learned Additional Commissioner of Income-tax Transfer Pricing II(5) ('the learned TPO'), under the directions of the Hon'ble Dispute Resolution Panel-II ('the Hon'ble DRP'), erred in holding the arm's length price of the Appellant's international transaction of payment of license fees for time and billing software at Nil instead of Rs. 2,64,23,881 as determined by the Appellant.

The Appellant, therefore, prays that the aforesaid adjustment be deleted.

2. On the facts and in the circumstances of the case and in law, the learned AO/TPO, under the directions of the Hon'ble DRP, erred in holding the arm's length price of the Appellant's international transaction of provision of regional co-ordination services at Rs. 29,10,539 instead of Rs. 25,99,344 as determined by the Appellant and thereby making an adjustment of Rs. 3,11,195.

The Appellant, therefore, prays that the aforesaid adjustment be deleted.

3. On the facts and in the circumstances of the case and in law, the learned AO / TPO, under the directions of the Hon'ble DRP, erred in determining the arm's length price of the Appellant's international transaction of payment of information technology cost allocation at Nil instead of Rs. 4,25,00,327 as determined by the Appellant.

The Appellant, therefore, prays that the aforesaid adjustment be deleted.

4. On the facts and in the circumstances of the case and in law, the learned AO erred in short-granting TDS credit by Rs.1,13,95,411.

The Appellant, therefore prays that the learned AO be directed to grant TDS credit of Rs. 1,13,95,411.

5. On the facts and in the circumstances of the case and in law, the learned AO erred in short-granting interest under section 244A of the Act by Rs. 42,87,958.

The Appellant, therefore, prays that the learned AO be directed to grant the interest under section 244A of the Act as per the law.

6. On the facts and in the circumstances of the case and in law, the learned AO erred in charging interest under section 234D of the Act of Rs. 24,09,942.

The Appellant, therefore, prays that the learned AO be directed to delete the interest charged under section 234D of the Act.

7. *On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceeding under section 271(1)(c) of the Act.*

The Appellant, therefore, prays that the learned AO be directed to drop the initiation of the aforesaid penalty proceeding.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

5. Further, assessee has raised following additional grounds: -

"8. On the facts and in the circumstances of the case and in law, the Learned Assessing Officer erred in not granting deduction in respect of Education Cess and Secondary and Higher Education Cess payable on the income tax payable for AY 2010-11 while computing the Income from Business and Profession.

9. On the facts and in the circumstances of the case and in law, the final assessment order dated 22 January 2015 passed by the Learned Assessing Officer (Ld. AO) under section 143(3) read with section 144C(13) of the Act is barred by limitation and therefore, is void-ab-initio, bad in law and is liable to be quashed."

6. At the outset, Ld. Counsel for the assessee submitted that the above additional grounds of appeal are purely legal grounds, however, he submitted that the additional ground no.1 is not pressed at this stage due to subsequent amendments in the provisions of the Act and with regard to additional ground no.2, the assessee has good case on merit, hence not pressed at this stage. Requested to keep the issue alive.

7. Considered rival submissions and the issue under consideration, we proceed to admit the above additional grounds and dismiss the additional ground no.1 as not pressed and the other additional ground no.2 is not adjudicated at this stage as the same are not pressed, at the same time, requested to keep this issue open, accordingly the second additional ground is kept open without any adjudication at this stage.

8. Coming to the main grounds of appeal, at the time of hearing, Ld.AR of the assessee submitted that Ground No. 1 and 3 are of similar nature. He submitted that similar directions may be required from the Bench and accordingly, he brought to our notice relevant facts of each ground.

9. Relevant facts relating to Ground No. 1 which is in respect of TP adjustment on account of payment of fees for time and billing software are, The Boston Consulting Group (BCG) has developed a state-of-the-art time and billing system with electronic timesheet capabilities. This system enables BCG entities including the Assessee to take care of all its accounting and data processing needs and hence it is extremely important for the smooth functioning of the Assessee. BCG USA has the rights to license the aforesaid system. Accordingly, BCG USA has

granted the right to use the system to BCG affiliates across the world. BCG USA has also provided the license to BCG India vide Technology Licensing and Assistance Agreement dated 1.01.2005 for a license fee of USD 2,750 per employee per annum [Refer Pg No. 411 to 415 of the Paper book (PB')]. During the year under consideration, Assessee made a payment of ₹.2,64,23,881 to the Associated Enterprises ('AE') for using this license. In its Transfer Pricing Study Report (the TPSR") the Assessee benchmarked the transaction following Comparable Uncontrolled Price Method (CUP) as the most appropriate method. Further, Assessee had obtained a report from an independent expert for valuation of the said license fees to be charged. Accordingly, relying on the report of an independent expert, which certifies the license fee payment at the rate of USD 2750 per employee, the transaction was held to be at arm's length (Refer Pg No. 224 to 227 of the PB).

10. Ld AR submitted before us that during the course of assessment and appellate proceedings before authorities, assessee has made following submissions: -

"2.5. In the course of TP proceedings, the Assessee submitted all the relevant documents to demonstrate the rendition need and benefit of the time & billing software. Further, the Assessee also submitted the relevant reports of the independent expert in support of its benchmarking analysis.

2.6. *The list of documents submitted by the Assessee in the course of TP proceedings is as under:*

- *Form 3CEB- (Pg No. 142 of the PB)*
- *TPSR containing functional and economic analysis of the transaction – (Pg No. 224 to 227 of the PB)*
- *Technology Licensing and Assistance Agreement between BCG USA and BCG India dated 1 January 2005 Annexure C1 to submissions dated 11 October 2013- (Pg No. 409 to 415 of the PB)*

Apart from the above, it was submitted before us that further documents were filed with the Ld. TPO as Annexure C to its submissions dated 11 October 2013 (Pg No. 409-410 of the PB):

- *Screenshots of the system to demonstrate its functionalities and benefits thereto to the Assessee.*
- *Employee wise break-up basis which license fee payments have been made by the Assessee to BCG USA.*
- *Report obtained from the independent expert dated May 2009 certifying the valuation of royalty for time and billing system.*
- *Confirmation from the independent expert dated 26 July 2010 confirming the validity of the earlier report for AY 2010-11.*
- *Emails/correspondence demonstrating the assistance received by the employees of the Assessee Annexure IB to submissions dated 23 December 2013-Pg No. 445 of the PB:*

2.7. *Without prejudice to the Assessee 's contention that the benchmarking analysis conducted by the Assessee was proper, the Assessee submitted additional benchmarking analysis vide letter dated 23 December 2013 before the TPO [Refer Pg no. 110 of the appeal set (TPO order Page 9-11) and Pg No. 445-446 of the PB).*

2.8. *The Assessee carried out a benchmarking analysis on an external database namely Royalty Stat and identified certain comparable agreements. The additional benchmarking analysis as per Royalty Stat showed that the Royalty payment for usage of time and billing system should be 3% of revenue or less to meet the arm's length requirements. It is noteworthy to mention that during the year under consideration, the Assessee has made a license fee payment of 1.61% of its total revenue.*

2.9. Accordingly, the Assessee humbly submits basis the additional benchmarking analysis conducted by it, the international transaction ought to be held at arm's length."

11. After considering the above submissions of the assessee, Transfer Pricing Officer rejected the submissions made by the assessee and held that the payment of ₹.2,64,23,881/- made by the Assessee to its AE is unwarranted and treated the arm's length price (ALP) of the captioned international transaction at NIL, without following any of the prescribed methods u/s 92C of the Act. Aggrieved by the above adjustment, the Assessee raised objections before the Ld. DRP and provided one more additional comparable for benchmarking the transaction under dispute (refer Pg No. 32 of the Appeal set). However, the Ld. DRP rejected all the contentions as well as additional comparability provided by the Assessee and sustained the adjustments made by the Ld. TPO.

12. In Ground No. 3, which is in respect of TP adjustment with respect to IT Cost Allocation, Ld. Transfer Pricing Officer has made similar TP Adjustments which are similar to the facts in Ground No. 1, for the sake of clarity, the relevant facts submitted before us are reproduced below: -

"3.1. During the year under consideration the Assessee paid an amount of Rs. 4,25,00,327 to BCG USA towards IT Cost allocation. BCG USA acts as a hub for providing centralized licensing network & project management and other aspects of Information Technology.

3.2. *These costs were charged by BCG USA to all the beneficiary companies including the Assessee on cost-to-cost basis without any mark-up.*

3.3. *During the year under consideration BCG USA provided various services such as Information Technology Services, Information Technology Infrastructure, Information Technology Software, WAN Costs, Information Technology Projects, Factiva etc. to the Assessee (Refer Pg No. 115-116 of the PB).*

3.4. *The IT Support provided by BCG USA benefitted the Assessee in increasing its efficiency, expansion, accessibility, and service quality.*

3.5. *BCG USA has dedicated personnel for providing these services across the globe to all its group companies.*

3.6. *In the TPSR, the Assessee considered CUP as the most appropriate method and since the costs were charged without any mark-up, the transaction was held to be at arm's length (Refer Pg No. 233 of the PB).*

B. Submissions before the Ld. TPO and the Ld. DRP:

3.7. *In the course of TP proceedings, the Assessee submitted all the relevant documents to demonstrate the rendition, need and benefit of the various services provided by BCG USA under IT Cost allocation. A list of these documents is provided as under for ease of reference:*

- *Form 3CEB-Pg No. 147 of the PB*
- *TPSR containing functional and economic analysis of the transaction - Pg No. 231 to 233 of the PB*
- *Cost Allocation agreement entered into with BCG USA dated 1 January 2007 for Information technology cost allocation - Pg No. 419 to 422 of the PB.*

Apart from the above, following documents were filed with the Ld. TPO as Annexure E to submissions dated 11 October 2013 (Pg No. 409-10 of the PB):

Details of expenditure incurred world-wide, and expenditure allocated to India with respect to a) Information Technology Services, b) Information Technology Infrastructure, c) Information Technology Software, d) WAN Costs, e) Information Technology Projects, f) Factiva - Pg No. 37-40 of the Appeal Set

- Certificate issued by BCG USA dated 19 July 2010 certifying the amount of worldwide information technology cost allocation charged to BCG India

Supporting third Party invoices for:

WAN costs

IT Software costs

IT Projects and Outsourcing

Factiva (database)

IT Infrastructure costs

IT Service costs

Emails/correspondence demonstrating the assistance received by the employees of the Assessee from BCG USA

C. Action by the Ld. TPO and the Ld. DRP

3.8. The Ld. TPO rejected the Assessee 's contention and commented that most of these software's are easily available for cheap or competitive prices. Further, the TPO challenged the need of this expenditure and held that this is more of a shareholder function.

3.9. Having said that, the Ld. TPO computed the arm's length price (ALP) as NIL for this transaction without following any of the prescribed methods u/s 92C of the Act and proposed an adjustment of Rs. 4,25,00,327/-

3.10. The Ld. DRP upheld the adjustment proposed by the Ld.TPO."

13. At the time of hearing, Ld.AR of the assessee brought to our notice relevant facts relating to the Ground No. 1 and 3 which are of similar nature. Further, he brought to our notice the written submissions and vehemently contended to the adjustments sustained by the lower authorities. For the sake of clarity, the submissions of the Ld.AR are reproduced below: -

"4. **Assessee 's submissions with respect to Ground No. 1 and 3:**

4.1. *At the outset, the Assessee humbly submits that it has provided detailed documentation to demonstrate need-benefit-remuneration of the impugned services. However, the Ld. TPO and DRP having taken cognizance of the documents, erred in rejecting the benchmarking analysis conducted by the Assessee for both the services.*

4.2 *In the instant case, as mentioned above, the Ld. TPO has determined the ALP as NIL for the services received by the Assessee from its AE without following any of the prescribed methods u/s. 92C of the Act read with Rule 10B of the Income Tax Rules, 1962 (the Rules").*

4.3. *With respect to time and billing software, the Assessee has obtained a report from an independent expert, conducted additional benchmarking and provided additional comparables, however, the Ld. TPO and DRP rejected all the submissions made by the Assessee without providing any valid reason and arbitrarily made the TP Adjustment of Rs. 2,64,23,881 and the same is in contravention to provisions of the section 92C of the Act r.w. Rule 10B of the Rules*

4.4. *With respect to IT Cost allocation, the Assessee humbly submits that since the actual cost is allocated to the Assessee without any mark-up no adjustment can be made. Without prejudice to this, the Assessee humbly submits that on the one hand Ld. TPO has alleged that the software applications provided to the Assessee by BCG USA are available at cheap and competitive prices, however, on the other hand, he has not brought any comparable on record and proceeded to treat the ALP as NIL. and making an adjustment of Rs. 4,25,00,327 without following any of the prescribed methods u/s 92C of the Act.*

4.5. *At this stage, the Assessee humbly submits that the provisions of the section 92C of the Act read with Rule 10B of the Rules have provided the list of the prescribed methods to be used for determination of ALP. The Assessee as well as the Ld. TPO are bound by the provisions of the law and ought to follow the prescribed methods by the law.*

4.6. *While the Assessee has used one of the prescribed methods i.e., CUP, the Ld. TPO has erroneously not followed any of the prescribed methods and has determined ALP at NIL. for the services received by the Assessee which is against the ratio laid down by the Hon'ble Jurisdictional High Court and Hon'ble Tribunal in various cases including the Assessee 's own case.*

47. *The captioned transactions are completely covered by the decision of the Hon'ble Jurisdictional Tribunal in the Assessee 's own case for earlier assessment years, wherein all the arguments taken were duly considered and the Hon'ble Tribunal had decided in favour of the Assessee by holding that where the TPO has failed to follow any of the prescribed methods u/s 92C of the Act, the adjustment made by the TPO in contravention of the law ought to be deleted. The decisions in the Assessee 's own case are as under:*

- *AY 2008-09-ITA No. 7600/Mum/2012 (Para 7/Page 10)*
- *AY 2009-10-ITA No. 1870/Mum/2014 (Para 10/ Page 6)*

The copies of these decisions were tendered in the course of hearing before Your Honours.

.9. *The Assessee reliance is placed on the compilation of judgements submitted in the course of hearing before the Hon'ble Bench such as:*

- *CIT v. Johnson & Johnson Ltd [ITA No. 1030 of 2014 (Bom. HC)]*
- *CIT v. Lever India Exports Ltd. (ITA No. 1306, 1307 & 1349 of 2014 (Bom. HC)]*
- *Transporter Industry International Gmbh v. DCIT (ITA No. 1240/Mum/2021 (Mum. Trib))*
- *Rolls-Royce Marine India Pvt. Ltd v. DCIT [ITA No. 689/Mum/2017 (Mum. Trib)], etc.*

4.10. *Further reliance is placed on the following decisions separately submitted in the course of hearing:*

- *ACIT vs. Caparo Engineering India (P.) Ltd (91 taxmann.com 330 (Delhi. Trib))*
- *CLSA India (P.) Ltd vs. DCIT [152 taxmann.com 255 (Mumbai. Trib)]"*

14. On the other hand, Ld. DR objected to the submissions of the Ld.AR of the assessee and agreed that Ld TPO has not applied the CUP method properly and prayed that these issues under consideration may be remitted back to AO/TPO to redo the bench marking as per law.

15. In the rejoinder, Ld AR objected to the submissions of the Ld. DR to remit the issue back to the file of TPO and submitted that it need not be remitted to the file of TPO and reliance is placed on the decision of the Hon'ble Jurisdictional High Court in case of CTT *v.* Kodak India Pvt Ltd. (ITA No. 15 of 2014) (Bom HC) which affirms the decision of the Jurisdictional Tribunal in case of Kodak India (P.) Ltd *v.* ACIT (155 TTJ 697) wherein the Tribunal apart from holding that the TP adjustments ought to be deleted where the TPO has not followed any of the prescribed methods, it was further held that there is no requirement to restore the matter back to the file of the TPO. The relevant para is reproduced as under:

"69. We also cannot agree with the DR that the issue be restored to the TPO because the methods, as prescribed by the Legislature are mandatory, not directory. When mandatory provision is either superseded or ignored, it straightaway affects the jurisdiction. In the instant case, we have to mention that it was a case of suo moto reference to the TPO and it is the case of the revenue authorities, to import the provisions of Chapter X. In this circumstance, since the TPO did not adhere to the prescribed methods consciously, another innings to rectify the mistake cannot be allowed, as the TPO infringed the relevant provision of the Income-tax Act and Rules."

16. Accordingly, Ld AR submitted that given the facts of the present case and in view of the position of law, humbly requests Your Honours

to consider the abovementioned contentions of the Assessee and allow Ground No. 1 and Ground No. 3.”

17. Considered the rival submissions and material placed on record, we observe from the record that similar issue was considered by the coordinate bench in the case of assessee’s own case in the AY 2008-09 held as under:

"7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

An examination of the order of the TPO made u/s 92CA(3) dated 20.10.2011 clearly indicates that while making the adjustment of Rs.1,62,74,359/- (payment for time and billing software license), Rs.3,73,07,488/- (regional and worldwide training) and Rs.2,10,06,610/- (payment for information technology cost allocation), he has not adopted any of the prescribed method.

In the case of M/s Lever India Exports Ltd. (supra), the Hon’ble Bombay High Court has held that the jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an international transaction in terms of Chapter X of the Act r.w. Rule 10A to 10E of the Income Tax Rules. It further held that the ad-hoc determination of ALP by the TPO de hors section 92C of the Act cannot be sustained.

In M/s Merck Ltd. (supra), the respondent-assessee had entered into an agreement with its AE to provide technical knowhow/consultancy in 12 fields as indicated therein for a consideration of Rs.1.57 crores. The respondentassessee availed services of its AE during the subject year (AY 2003-04) only in 3 out of 12 fields listed in the agreement. The TPO, therefore, proceeded to hold that the entire consideration of Rs.1.57 crore is attributable to the 3 technical services which the respondent-

assessee availed of and held that no consideration was payable in respect of 9 services provided for in the agreement. Thus the entire payment of Rs.1.57 crore was attributable only to the 3 services availed out of the 12 listed out in the agreement. It further held that only Rs.40 lacs could be considered as ALP attributable to 3 services and made adjustment of Rs.1.17 crore resulting in its addition to the taxable income. In appeal, the CIT(A) upheld addition of Rs.1.17 crores made and taxable income consequent to the adjustment made on account of technical knowhow/consultancy agreement. On further appeal, the Tribunal upheld the submissions of the respondent-assessee and recorded further the fact that no transfer pricing exercise was done by the AO/TPO to determine the value of the services received by the respondent-assessee in respect of the 3 services which it had availed from its AE before holding that the ALP in this case is Rs.40 lacs. The Tribunal further held that "consideration payable for the services availed of by the respondent-assessee to determine the ALP was not carried out". On appeal by the Revenue, the Hon'ble Bombay High Court held that :

"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 ALP in respect of fees of technical services payable by the Respondent-Assessee to its AE, make the entire Transfer pricing Agreement unsustainable in law."

In M/s Johnson & Johnson Ltd. (supra), the Tribunal allowed the respondent-assessee's appeal before it by deleting the addition of Rs.200.82 lacs being the transfer pricing adjustment on account of sales promotion and publicity expenses being payable by the respondent-assessee's parent M/s Johnson & Johnson, USA. This on the ground that the TPO has, while holding that the parent company should share this expenditure on publicity and sales promotion as it

benefits therefrom, as higher sales result in higher royalty, has not determined the ALP by following any of the methods prescribed u/s 92C(1) of the Act r.w. Rule 10B. On appeal by the revenue, the Hon'ble Bombay High Court held that :

(ii) The TPO is obliged under the law to determine the ALP by following any one of the prescribed methods of determining the ALP as detailed in Section 92C(1) of the Act. In this case, there is nothing on record to indicate that the TPO had applied any one of the prescribed methods in Section 92C(1) of the Act to determine the ALP before disallowing the payment of Rs.200.82 lakhs incurred by the Respondent on account of publicity and sales management as being excessive and/or payable by its parent, M/s. Johnson & Johnson, USA.

(iii) The impugned order holds that transfer pricing adjustment done by disallowing the payment, on the basis of an assumption that it is excessive, is an action completely dehors the provisions of transfer pricing adjustment found in chapter X of the Act. The determination of the ALP has to be done only by following one of the methods prescribed under the Act.

(iv) In view of the above, as the Revenue has not acted in accordance with the clear mandate of law, the questions as proposed does not give rise to any substantial question of law. Thus, not entertained."

In M/s Kodak India Pvt. Ltd. (supra), the above position of law is reiterated by the Hon'ble Bombay High Court.

As mentioned earlier, we notice that the TPO/AO has arrived at the ALP by not adopting any of the methods prescribed u/s 92C of the Act in respect of (i) payment of license fees for time and billing software, (ii) payment of regional administration and

regional co-ordination cost allocation and (iii) payment of information technology cost allocation.

In view of the above factual scenario, we are of the considered view that the ratio laid down by the Hon'ble Bombay High Court in Lever India Exports Ltd.; Merck Ltd.; Johnson & Johnson Ltd. and Kodak India Pvt .Ltd. mentioned hereinabove is squarely applicable to the facts of the case. Therefore, following the same, we allow the 1st, 2nd and 3rd ground of appeal."

18. Respectfully, following the above decision, we observe that the facts in the present case are exactly similar and hence, we are inclined to allow the grounds Nos. 1 and 3 raised by the assessee.

19. With regard to Ground No. 2 the relevant facts relating to provisions of regional coordination services are, the various functions performed by the assessee in this regard are as below:

- *Assistance with maintaining and developing client relationships at a regional level*
- *Providing co-ordination and support on matters such as regional training and conferences*
- *Providing co-ordination and support on recruitment and compensation related matters within the region*
- *Providing co-ordination and support on executive and operational matters concerning the Asia Pacific Region.*
- *Assistance on other support and co-ordination matters pertaining to Asia Pacific Region*

20. In this regard, it was submitted that BCG GmbH compensates the assessee of the direct and indirect cost incurred for providing above said services along with appropriate reward to meet with the arm's length standard. It was also submitted that the agreement was entered into in October 2009, there were no services rendered by the assessee till January 2010. It was submitted that assessee follows Transaction Net Margin Method ("TNMM") as the most appropriate method to substantiate the Arm's Length Price. The Assessee has earned an OP/TC of 7.5% in this transaction against 10.92% of comparable companies. Assessee has selected following comparables to benchmark the same:

Sr.No	Company Name	PLI(OP/TC) FY 2009-10
1.	Akruti Center Infotech Ltd.	-2.43%
2.	Brainpoint Infotech Ltd.	NA
3.	Greenacre Holdings Ltd.	41.57%
4.	The Hindustan Housing Co. Ltd.	19.59%
5.	Lancor Maintenance & Services Ltd.	22.76%
6.	Chellaram Shipping Pvt Limited	NA
7.	Vatika Marketing Ltd.	1.89%
8.	Dusters Hospitality Services Pvt Ltd	NA
9.	Tata Services Ltd.	1.39%
	Mean	14.13%

21. After considering the same, Transfer Pricing Officer rejected the same and has retained following four (4) comparables to benchmark the transaction as under: -

Sr.No	Company Name	PLI(OP/TC) FY 2009-10
1.	Akruti Center Infotech Ltd.	-2.43%
2.	Greenacre Holdings Ltd.	41.57%
3.	The Hindustan Housing Co. Ltd.	19.59%
4.	Lancor Maintenance & Services Ltd.	22.76%
	Mean	20.37%

Determined the ALP adjustments as under:

Operating Income as submitted by the assessee	2599344
Cost as per the Assessee	2417994
Operating Profit	181349
OP/OC	7.499977
OP/OC of Comparables	20.37
Arms' Length Profit	492545.4
Arm's Length Value of transaction	2910539
5% of International transaction	129967.2
Difference in the Actual Value and Arm's length value	311195.4

22. Aggrieved, assessee preferred objection before Ld. DRP and before Ld. DRP assessee has submitted the annual reports of the various comparables selected by the assessee. However, it was submitted that Ld. DRP has not considered the same before disposing off the objections raised by the assessee. It was prayed that this issue may be remitted

back to the file of the Transfer Pricing Officer to consider the submissions and additional informations submitted by the assessee relating to Vatika Marketing Limited which was excluded by the Transfer Pricing Officer.

23. On the other hand, Ld. DR objected to the above submissions and relied on the orders of lower authorities.

24. Considered the rival submissions and material placed on record, we observe that assessee has benchmarked this transaction selecting Nine (9) comparables out of which Transfer Pricing Officer has selected four (4) comparables namely Akrti Center Infotech Ltd., Greenacre Holdings Ltd., The Hindustan Housing Co. Ltd., Lancor Maintenance & Services Ltd. Transfer Pricing Officer has rejected other comparables in particular Vatika Marketing Limited by observing as under : -

*"5.2.1 **Vatika Marketing Limited:** This comparable selected by the assessee is not comparable. This comparable is in the business of Building Maintenance. This activity is not at all functionally comparable to the activity of the assessee. The FAR is not comparable. Also this comparable has earned Income from realty Commission which is like broking income. Assessee do not have any such activity. Therefore, the FAR of this comparable is not comparable with that of the assessee. Hence it is rejected as comparable."*

25. However, at the time of proceedings before Ld. DRP the assessee has filed annual reports of this comparable substantiating the reasons for selecting this comparable in their study. Since Ld. DRP has not considered the above submissions and not given a clear finding in this regard. In our considered view, this issue may be analysed afresh by the Transfer Pricing Officer. Accordingly, we deem it fit and proper to remit this issue back to the file of Transfer Pricing Officer to consider the additional submissions/documents made by the assessee before Ld DRP and determine the Arm's Length Price as per law. It is needless to say that assessee may be given a proper opportunity of being heard. Accordingly, Ground No. 2 is allowed for statistical purpose.

26. With regard to Ground No. 4 which is in respect of short granting of TDS Credit, at the time of hearing, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed.

27. With regard to Ground No. 5 which is in respect of short granting interest under section 244A of the Act, Ld. AR of the assessee brought to our notice that identical issue in appeal has been considered by the Co-ordinate Bench of this tribunal in the case of M/s. Small Industries v.

DCIT in ITA No. 3707/MUM/2012 dated 15.09.2017 and prayed that similar direction may be given.

28. On the other hand, Ld. DR relied on the order of the lower authorities.

29. Considered the submissions and material placed on record, we observe from the record that identical issue has been considered by the coordinate bench of this Tribunal in the case of M/s. Small Industries v. DCIT (supra) and decided the issue in favour of the assessee, observing as under: -

"7. We have carefully considered the rival submissions. Notably, the only issue in dispute is the period for which assessee is entitled to interest u/s 244A of the Act. According to the assessee, the CIT(A) erred in granting interest upto the date of issuance of refund voucher, i.e. 29.3.2010 whereas as per the assessee, it is entitled to interest upto April, 2010 (i.e. upto the date of receipt of refund voucher on 6.4.2010). In this context, we find that the Hon'ble Bombay High Court in the case of Pfizer Limited, 191 ITR 626 (Bom) has held that assessee is entitled to interest upto the date of receipt of the refund order. Similarly, our coordinate bench in the case of M/s. Novartis India Limited, ITA No. 1249/Mum/2010 dated 18.3.2011 has decided a similar issue in favour of the assessee by referring to an unreported judgement of the Hon'ble Bombay High Court in the case of Citi Bank vs. CIT in ITA No. 6 of 2001 dated 17.7.2003, wherein the claim of the assessee for interest was upheld upto the date when the Pay Order is "actually received by the assessee pursuant to the order sanctioning the refund". Therefore, following the aforesaid precedents, in our view, the assessee is justified in seeking interest u/s 244A of the Act upto the date of receipt of the refund order, i.e. 6.4.2010. Thus, on this aspect, assessee succeeds."

30. Respectfully following the above decision, the issue raised by the assessee is allowed with the direction that the Assessing Officer may consider extending the benefit to the assessee upto the date of actual receipt of refund. Accordingly, Ground No. 5 raised by the assessee is allowed.

31. With regard to Ground No. 6 which is in respect of incorrect interest computation under section 234D of the Act, at the time of hearing, Ld.AR of the assessee submitted that this ground is not pressed, accordingly, the same is dismissed.

32. With regard to Ground No. 7 which is in respect of penalty levied under section 271(1)(c) of the Act, this ground is premature and requires no specific adjudication, accordingly, the same is dismissed. Ground No. 7 raised by the assessee is dismissed.

33. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 28th February, 2024.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 28.02.2024
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum