IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I' NEW DELHI

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.2014/Del/2022
Assessment Year: 2018-19

M/s. Intertek India Pvt. Ltd., E-20, Block B-1, Mathura Road, Mohan Co-operative Industrial Area, New Delhi	**Vs.**	DCIT, Circle-10(1), Delhi
PAN :AAACI6890F		
(Appellant)		**(Respondent)**

Assessee by	S/sh. Nageswar Rao & Parth, Advocate
Department by	Sh. Rajesh Kumar, CIT(DR)

Date of hearing	06.03.2024
Date of pronouncement	20.03.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

The present appeal has been filed by the assessee challenging the final assessment order dated 29.07.2022 passed under section 143(3) read with section 144C(3) read with section 144B of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment year 2018-19 in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. In ground nos. 1 to 8, the assessee has challenged the addition of Rs.1,77,95,000/- on account of Transfer Pricing Adjustment.

3. Briefly the facts are, the assessee is a resident corporate entity and is stated to be engaged in the business of provision of testing, inspection, quality assurance and certification of products standards across wide range of safety, regulatory, quality and performance standards in various industrial segments, such as, textile, pharmaceuticals, toys and gifts, food and water, cosmetics and toiletries, pesticides, footwear, surgical testing, medical devices, disinfectants and packaging industries etc. In the year under consideration, the assessee had entered into various international transaction with its overseas Associated Enterprises (AEs), which are as under:

International Transaction	Method selected	Value
Provision of testing and inspection services to AEs	TNMM using OP / OR as a PLY	315,416,7562
Availing of testing and inspection services from AEs		343,859,227
Payment of License Fee		183,843,214
Provision of other support services to AEs		163,236,482
Availing of other support services from AEs		155,962,102
Intercompany balances written back		10,347,876

Intercompany balances written off		1,899,552
Payment for consumables		21,822
Reimbursement of expenses to AEs[3]		33,341,165
Reimbursement of expenses from AEs[4]		4,522,922
Provision of IT support services	TNMM using OP / OC as a PLI	174,381,940
Reversal of 'Provision of IT support services'		137,073

4. Treating all the transactions with the AEs as closely linked transactions, the assessee aggregated them and for the purpose of demonstrating the arm's length nature of such transaction benchmarked them by adopting Transactional Net Margin Method (TNMM) as the most appropriate method. Since, the profit margin shown by the assessee was found to be more than the profit margin of the comparables, the transactions with AE was claimed to be at arm's length. While examining the TP study report of the assessee, the Transfer Pricing Officer (TPO), though, accepted assessee's aggregate approach under TNMM for all transactions, however, he was of the view that the transactions relating to availing of other support services from AEs being an independent and separate transaction, should not have been clubbed with other transactions. Accordingly, he issued a show-cause notice to the assessee to explain why the payment of management fees to

the AE should not be benchmarked independently. In the said show-cause notice, the TPO observed that, though, the assessee is receiving certain services from the AE, however, he is providing similar services to other AEs under the same agreement. Therefore, there was no need for availing such services from the AE. He observed that the assessee failed to identify services actually received, the cost benefit thereof and the impact of profitability. Thus, he called upon the assessee to explain, as to why the payment of Rs.5,39,08,831/- to the AE towards management fee should not be disallowed, by determining the Arm's Length Price (ALP) of such transaction as nil.

5. In response to the show-cause notice, the assessee furnished its reply objecting to the proposed adjustment. However, the TPO was not convinced with the submissions of the assessee. After verifying the details, the TPO observed that the services availed towards taxation and treasury, finance, human resources, legal, internal audit, executive and information technology are auxiliary to the functioning of the core business of any operation. He observed that though every business requires such services to function but they are not essential. Therefore,

such kind of services can be segregated from the main business of the company and benchmarked separately. He further observed that under a singular inter-company agreement, assessee avails and offers same support services to/from AEs. On going through the agreement, the TPO observed that certain services availed by the assessee from the AE are also provided by the assessee to AEs. Hence, they are overlapping services. Hence, there is duplication.

6. On going through the details, he observed that the assessee has availed services relating to taxation, human resources and finance and has itself provided such services to other AEs. Thus, he held that when the assessee is capable of providing such services to others there is no need for availing such services to the AE. Thus, in the aforesaid premises, the TPO held that none of the benefits stated to have been received by the assessee are tangible or real. He observed that the payment made for availing intra-group services is only an arrangement to change the tax base without any economic substance in the transactions. Thus, he concluded that the overlapping intra group services payout of Rs.1,77,95,000/- has to be treated as transfer pricing adjustment

by determining the ALP at nil. In terms with the adjustment suggested by the TPO, the Assessing Officer proposed the draft assessment order adding back the TP adjustment. Though, the assessee raised objections before learned DRP challenging the transfer pricing adjustment, however, it was confirmed. Accordingly, the final assessment order was passed.

7. Before us, learned counsel appearing for the assessee submitted that all the transactions, being closely linked, has been benchmarked at entity level under TNMM. He submitted, once the TPO accepts assessee's benchmarking in respect of all other transactions, he cannot single out one transaction relating to payment of management fee and treat it differently. He further submitted, while determining the ALP at nil, the TPO has not followed any specific method. He submitted, while determining the ALP of an international transaction relating to intra-group services, the TPO cannot apply need and benefit test. He submitted, in the year under consideration, the assessee has huge turnover of about 432 crores. He submitted, the TPO has not found any defect or deficiency in respect of such huge transaction, except a miniscule amount of Rs.1.77 crores. He

submitted, when the TPO has accepted assessee's TP study report in respect of majority of transaction, how can he say that assessee's transfer analysis is wrong only because of the benchmarking of the management fee amounting to Rs.1.77 crores.

8. He submitted, in the year under consideration, the assessee has also provided intra-group services to other AEs, which has been benchmarked under TNMM. He submitted, when other international transactions relating to receipt from AE are tested under TNMM analysis, the transaction of payment of management fee to the AE cannot be separately tested, but has to be clubbed together. In support of such contention, he relied upon the decision of the Coordinate Bench in case of ACIT Vs. M/s. Yokogawa India Ltd., I.T (T.P.)A. No.342/Bang/2015, dated 09.06.2017. He submitted, the aforesaid decision of the Coordinate Bench has been upheld by the Hon'ble Karnataka High Court. Copies of the decision was placed before the Bench. Further, he submitted, while determining the ALP of the transaction at nil, the TPO has not followed any particular method, which is invalid. In support, he relied upon a decision of

the Hon'ble Jurisdictional High Court in case of Magneti Marelli Powertrain India (P.) Ltd. Vs. DCIT [2016] 389 ITR 469 (Delhi).

9. Per contra, learned Departmental Representative submitted that so called intra-group services claimed to have been availed by the assessee are merely shareholder activities, which any parent company will do for its subsidiary. He submitted, the assessee has not furnished any evidence on record to demonstrate that the services were actually sought and received. He submitted, the assessee further failed to furnish any evidence to demonstrate the benefit derived, if at all, the services were availed. Drawing our attention to the observations of the TPO, learned Departmental Representative submitted that various services claimed to have been received by the assessee are mere duplication and overlapping, as, the assessee itself has provided such services to itself and other AEs. Therefore, there is no need for availing such services from the AE.

10. With regard to the contention of learned counsel for the assessee that the evidences relating to delivery of services were furnished, learned Departmental Representative submitted that such evidences do not demonstrate actual delivery of specific

services as the mails are of routine and general nature and the guidance notes are mere templates. He submitted, applicability of benefit test is not foreign to determination of ALP of intra-group services. In support of such contention, he relied upon a decision of the Coordinate Bench in case of Lintax India Pvt. Ltd. Vs. ACIT in ITA No.398/Mum/2019, dated 09.12.2022. He also relied upon a decision of Coordinate Bench in case of EOS Power India (P.) Ltd. vs. JCIT [2023] 154 taxmann.com 131 (Mumbai – Trib.). Thus, in sum and substance, learned Departmental Representative justified the determination of ALP at nil.

11. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. There is no dispute regarding the basic fact that in the year under consideration the assessee had entered into a number of international transactions with its AEs. It is also a fact on record that for benchmarking purpose the assessee has clubbed all the transactions and benchmarked them by applying TNMM as the most appropriate method. It is further observed, the transactions with the AEs during the year are of about 432 crores. It is a fact on record that after examining the TP study

report of the assessee, the TPO has accepted arm's length nature of all transactions, except the transactions relating to payment of management fees, amounting to Rs. 5,39,08,830/- out of the payment made towards other support services amounting to Rs.15,59,62,102/-. Even, out of the total management fees of Rs.5,39,08,830/- segregated by the TPO vide separate benchmarking, the TPO disputed payment of Rs.1,77,95,000/- made towards support services relating to Business Line Support Services, Legal, Risk, Compliance, internal audit, Finance, Human Resources, Treasury and Tax. Rest of the payments towards support services have been accepted by the TPO to be at arm's length. Reasons for which the TPO has not accepted the payment of Rs.1,77,95,000/- can be summarized as under:

(i) Certain services such as finance, human resources, treasury and tax are duplication and overriding as the assessee, though, has availed such services from the AE, however, assessee itself provided such services to other AEs. Therefore, the need for such services and benefit derived is not established.

(ii) The basis for cost allocation not provided.

12. Thus, broadly on the aforesaid reasoning, the TPO has held that the ALP of the payment of Rs.1,77,95,000/- towards intra-group services has to be determined at Nil. On a careful reading of the impugned order of the TPO, it is observed that in paragraph 6.2.8, the TPO has clearly acknowledged that the documentation submitted by the assessee purportedly demonstrates the need for availing such services. He has also acknowledged that the assessee has provided email correspondences to show requisitioning and delivery of management services. In paragraph 6.2.10, TPO has observed that to demonstrate the need for services availed, the assessee has submitted extracts of agreement with the respective AEs. He has further observed that the extracts highlight the functions that the respective AEs will perform and the remuneration to be paid with sample copies of invoice. In paragraph 6.2.11, the TPO has observed that the assessee has also tabulated certain services, which it has received during the year and corresponding benefits derived alongwith documentary evidences in the nature of email correspondences/invoices. He has observed that he has scrutinized the evidences, which pertained to email trails and

invoices raised by the AEs. However, he has observed that the submissions by themselves do not discharge the burden of proof of quantifying benefit. At the same breath, he again observed that he is not questioning the commercial wisdom of the assessee, but such wisdom must rest on some tangible rationale wherein a cost-benefit analysis would have been done so as to choose what is being shown as commercially wise.

13. In our view, such observations of the TPO are prima facie contradictory, as he himself has admitted that the assessee has furnished the details of services received and the benefits derived. In paragraph 6.2.13, the TPO admits that the documentation submitted by the assessee satisfy the requirement for demonstrable request. However, at the same breath, he observes that they do not satisfy the requirement of demonstrable need and demonstrable benefit. Thus, from the aforesaid observations of the TPO, it is quite evident that he is not sure what he wants to do. On one hand he admits that the assessee has furnished the requisite documentary evidences to demonstrate requisition of service as well as delivery of service, again he contradicts himself by saying that need and benefit tests have not been satisfied.

14. Thus, a reading of TPO's order certainly gives an impression that he has approached the issue in a biased manner. Moreover, when assessee's TP analysis in respect of majority of the transactions has been accepted, merely, due to non-acceptance of miniscule transaction of Rs.1,77,95,000/-, the TPO cannot level the TP analysis as wrong. This, in our view, is contradictory. One more glaring error committed by the TPO after rejecting the TP analysis under TNMM qua the transaction of Rs.1,77,95,000/- is, he has not benchmarked the transaction adopting any other method, even Comparable Uncontrolled Transaction (CUP) method but has simply determined the ALP at nil without following any specific method. This, in our view, is against the provisions of the statue, hence, unacceptable. In case of Magneti Marelli Powertrain India (P.) Ltd. (supra), while dealing with similar issue, the Hon'ble Jurisdictional High Court has held as under:

> *"17. As far as the second question is concerned, the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee of 38,58,80,000 only for which Comparable Uncontrolled Price ("CUP") method was sought to be applied. Here, this court concurs with the assessee that having accepted the TNMM as the most appropriate, it was not open to the TPO to subject only one element, i.e payment of technical assistance fee, to an entirely different (CUP)*

> *method. The adoption of a method as the most appropriate one assures the applicability of one standard or criteria to judge an international ITA 350/2014 Page 20 transaction by. Each method is a package in itself, as it were, containing the necessary elements that are to be used as filters to judge the soundness of the international transaction in an ALP fixing exercise. If this were to be disturbed, the end result would be distorted and within one ALP determination for a year, two or even five methods can be adopted. This would spell chaos and be detrimental to the interests of both the assessee and the revenue. The second question is, therefore, answered in favour of the assessee; the TNMM had to be applied by the TPO/AO in respect of the technical fee payment too."*

Similar view has been expressed by the Coordinate Bench in case of ACIT Vs. M/s. Yokogawa India Ltd. (supra).

15. It is relevant to observe, in paragraph 3.1.23 of the directions, learned DRP has also acknowledged the fact that the documentation submitted by the assessee merely demonstrates the need for availing such services. Learned DRP has further observed that the assessee has provided email correspondences to demonstrate requisitioning and delivery of management services. However, in paragraph 3.1.26, learned DRP has contradicted itself by observing that the assessee could not show as to when and how the various services were requisitioned from the AEs, whether the services were actually needed by it and whether the same were actually received. Such contradictory observations by the departmental authorities reveal non-application of mind. It is a fact on record that the margin shown by the assessee is far

more than the average margin of the comparables. The TPO has not made any adverse comments with regard to selection of comparables by the assessee. In these circumstances, the rejection of assessee's benchmarking qua the payment made towards intra-group services and determination of ALP at nil, that too, without following any specific method, in our view, is unjustified.

16. More so, when the TPO has not found any defect or deficiency with regard to assessee's benchmarking in respect of rest of the transaction running into more than Rs.400 crores. Though, learned Departmental Representative has relied upon certain decisions of the Coordinate Bench before us to justify the reasoning of the TPO and learned DRP, however, on careful analysis, we have found them to be factually distinguishable, hence, not applicable to assessee's case. Accordingly, we delete the adjustment.

17. Ground no. 9 is not pressed, hence, dismissed.

18. In ground no. 10, the assessee has challenged the addition of Rs.1,20,09,948/- claimed as deduction towards secondary and higher education cess.

19. It is the case of the assessee before us that in the return of income, the assessee has not claimed any deduction of the amount under dispute. He submitted, in course of assessment proceedings, the assessee made an additional claim of the deduction. He submitted, while rejecting the additional claim, the Assessing Officer has made addition of the amount while computing income.

20. Having considered rival submissions, we direct the Assessing Officer to verify assessee's claim in the context of facts and materials on record. In case, it is found that the assessee has not claimed the deduction in the return of income, there can be no question of adding back the amount as additional claim made by the assessee during assessment proceeding was rejected by the Assessing Officer. The Assessing Officer is directed accordingly.

21. In ground no. 12, the assessee has challenged the disallowance of gratuity of Rs.50,62,990/-

22. It is the case of the assessee before us that in the year under consideration, the assessee has created the provision for gratuity amounting to Rs.85,28,007/- out of which, an amount of Rs.34,65,017/- paid before the due date of filing of return of

income was claimed as deduction and the balance amount of Rs.50,62,990/- was disallowed by the assessee itself under section 43B of the Act. He submitted, while completing the assessment, the Assessing Officer has again disallowed the amount, which amounts to double disallowance.

23. Having considered rival submissions, we direct the Assessing Officer to verify the relevant facts and, in case, it is found that the amount in dispute has been disallowed by the assessee, no further disallowance can be made.

24. In ground No. 11, the assessee has claimed refund of excess Dividend Distribution Tax (DDT) paid amounting to Rs.6,06,53,118/-. Before us, it is a common point between the parties that the issue is decided against the assessee in the Special Bench decision rendered in case of Deputy Commissioner of Income Tax vs. Total Oil India, ITA No.6997/Mum/2019, dated 20.04.2023.

25. In view of the aforesaid, we dismiss the ground raised by the assessee.

26. In ground no. 13, the assessee has raised the issue of incorrect computation of Minimum Alternate Tax (MAT) liability.

27. Having considered rival submissions, we restore the issue to the Assessing Officer with a direction to factually verify assessee's claim and correctly compute the MAT liability.

28. In ground no. 14, the assessee has raised the issue of short credit of TDS.

29. Having considered rival submissions, we direct the Assessing Officer to factually verify assessee's claim and allow TDS credit, as per law.

30. Ground no. 15, being consequential, and ground 16, being premature, are dismissed.

31. In the result, appeal is partly allowed.

Order pronounced in the open court on 20th March, 2024

Sd/-	***Sd/-***
(PRADIP KUMAR KEDIA)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 20th March, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi