

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “D” BENCH, AHMEDABAD**

**BEFORE Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**ITA No.1316/Ahd/2015
Assessment Year: 2010-11**

Dy. CIT, Circle-1(1)(1),
A wing, Room No. 309,
3rd floor, Pratyaksha Kar Bhavan,
Ambawadi, Ahmedabad-380015.

(Appellant)

vs. M/s Invida India Pvt. Ltd.
B-801, Safal Pegasus,
Pralhad Nagar Road,
Anand Nagar, Satellite,
Ahmedabad - 380015
[PAN – AAACI 9822 K]
(Respondent)

Appellant by : Shri Ankit Jain, Sr. DR
Respondent by : Shri Tushar Hemani, Sr. Advocate &
Shri Parimalsinh B. Parmar, AR

Date of hearing : 06.03.2024
Date of pronouncement : 30.05.2024

ORDER

PER SUCHITRA KAMBLE, JUDICIAL MEMBER :

This appeal is filed by the Revenue against the order dated 20.02.2015 passed by the CIT(A)-2, Ahmedabad for the Assessment Year 2010-11.

2. The grounds of appeal raised by the Revenue are as under :

- “(1) *The CIT(A) has erred in law and on facts in deleting the addition of Rs.2,41,23,181/- made on account of payment of royalty, management fees and IT allocation cost account treating it as not at arm’s length price against the assesses treatment as arm’s length price.*
- “(2) *The CIT(A) has erred in law and on facts in deleting the addition of Rs.67,14,490/- on account of royalty expenses without appreciating the facts of the case.*
- “(3) *The CIT(A) has erred in law and on facts in deleting the addition of Rs.61,29,520/- being the claim payable to the customers for non-achievement of the targets fixed for sales.*

On the fact and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the Assessing Officer to the extent mentioned above since the assessee has failed to disclose his true income/book profit.

The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored to the above extent. The appellant craves, to leave, to amend or alter any ground or add a new ground which may be necessary.”

3. The assessee company is engaged in the business of trading in pharmaceutical products on a wholesale basis in respect of phone products. The return of income for A.Y. 2010-11 was filed on 30.09.2010 declaring total income at Rs. 7,66,12,650/-. The return was processed u/s 143(1) of the Income Tax Act, 1961 on 10.08.2011. Subsequently, the case was selected for scrutiny by issuing notice u/s 143(2) of the Act on 29.08.2011 and duly served upon the assessee company. Thereafter, notices u/s 142(1) of the Act were issued on various dates. In response to the notices, the authorized representative of the assessee attended the hearings and furnished the details. The Assessing Officer observed that the assessee company has obtained rights by way of assignment to manufacture market and distribute tow products namely Distraclor and Pyridium from its associated enterprise under an agreement of brand licensing. These products are manufactured by third-party manufacturers using the know-how obtained pursuant to the license agreement. The products so manufactured are then marketed along with the other two products and sold two independent customers on wholesale basis. During the year under consideration the assessee company entered into following international transactions with its associated enterprises, the details of which are as under:

S No.	Name of Associated Enterprise	Description	Amount
1.	Invida Holdings Private Limited	Royalty Payment	Rs. 67,14,490/-
2.	Invida (Singapore) Pvt. Ltd.	Management Fees	Rs. 1,38,65,200/-
3.	Invida (Singapore) Pvt. Ltd.	IT Service, Technical	Rs. 21,48,067/-

		Support and Maintenance	
4.	Invida (Singapore) Pvt. Ltd.	Expenses Reimbursement	Rs. 43,800/-
5.	Invida Group Pvt. Ltd.	IT Service, Technical Support and Maintenance	Rs.13,95,424/-
6.	Invida Group Pvt. Ltd.	Expenses Reimbursement	Rs. 8,955/-
7.	Invida Holdings Private Limited	Expenses Reimbursement	Rs. 5,32,238/-
8.	PL Asia Pacific (Phils) Inc.	Expenses Reimbursement	Rs. 1,16,146/-

During the assessment proceedings, the authorized representatives of the assessee filed Transfer Pricing documents and filed detailed submissions. The Assessing Officer observed that in respect of the international transactions representing payment of royalty, management fees and IT allocation cost, the conclusion arrived by the assessee, in respect of the arm's length nature of the transaction was not found to be acceptable. Accordingly, show cause notice was issued to the assessee for which the assessee submitted written reply dated 28.03.2013. The Assessing Officer taken note of the assessee's contentions relating to payment of royalty that the same has been benchmarked by the assessee by applying Comparable Uncontrolled Price (CUP) method in the Form 3CEB report. The Assessing Officer observed from the same that for the purpose of benchmarking this payment the assessee has considered CUP as most appropriate method. The Assessing Officer observed that the assessee has not provided any record of the uncontrolled transactions taken into account for analysing their comparability with the international transaction including a record of the nature, terms and conditions of the comparable transaction. The Assessing Officer further held that by simply relying on RBI approval, the assessee did not produce any documentary evidence as per provisions of sub rule (1)(h). The Assessing Officer further held that the approval given by RBI would not suffice as CUP rate as RBI does not fix the rate at which a domestic company can pay royalty. Thus, the Assessing Officer held that

determination of ALP for the royalty payment made by the assessee by relying on RBI approval was incorrect and erroneous. During the course of proceedings, the assessee submitted a search process after taking TNMM as the most appropriate method and conducting a search for which the details were submitted vide letter dated 08.03.2013. The Assessing Officer also held that TNMM analysis is also incorrect and unreliable. The Assessing Officer held that since the arm's length price for the royalty payment has been incorrectly determined by the assessee, the same is required to be correctly determined in this year, which is done by the Revenue and thus, made adjustment of Rs. 67,14,490/-. In respect of payment of management fees, the Assessing Officer observed that the agreement entered into by the assessee with its associated enterprise allow the payment of costs along with a markup of 15%. The assessee claimed in the submission dated 08.03.2013 that the payment for the year under consideration was USD 293995, which included the actual costs incurred by the assessee along with a markup of 15% thereby stating that it was nominal and reasonable having regard to the type of service. The Assessing Officer observed that the certificate submitted by the assessee shows that the amount was stated to be lower/below the actual costs incurred by the associated enterprise. The Assessing Officer held that since no documentary evidence were produced, the determination of ALP for management fees as mentioned in the 3CEB report was erroneous and therefore, as discussed in the case of royalty payment, such an analysis was not contemporaneous and did not exist by the specified date, the same cannot be taken into consideration for the purpose of justification of arm's length price determined by the assessee. Thus, the Assessing Officer made adjustment of Rs. 1,38,65,200/-. In respect of payment of IT support fees, the Assessing Officer observed that the same principles which applied to the payment of management fees, also applied to the payment of IT support fees and assessee did not provide the details in respect of the actual cost incurred by the Associated Enterprise and how the same was allocated to the assessee. The Assessing Officer made adjustment of Rs. 35,43,491/-. Thus, total adjustment of Rs. 2,41,23,181/- was made

to the total income of the assessee in respect of international transactions. The Assessing Officer further made addition of Rs. 67,14,490/- towards payment of royalty expenditure claimed by the assessee, thereby disallowing the same. The Assessing Officer further made disallowance of Rs. 61,29,520/- towards expenses on account of claim of non-achievement of targets. Thus, the assessee's total income was assessed at Rs. 10,68,65,351/-.

4. Being aggrieved by the Assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal.

5. As regards Ground No.1 relating to addition of Rs. 2,41,23,181/-, made on account of payment of royalty, management fees and IT allocation cost account, the Ld. DR submitted that the payment of royalty was benchmarked by the assessee by applying CUP method for which the assessee relied upon the RBI's approval. The Ld. DR submitted that for the purpose of determination of ALP, the assessee is required to keep documentary evidence as described under Rule 10D(a) to (m). But except RBI approval nothing was placed on record by the assessee. This fact was totally ignored by the CIT(A). In fact, how the rate of 5% of net sales for royalty determination arrived by the CIT(A) was also not explained.

6. The Ld. AR submitted that as regards the payment of royalty, the assessee entered into a "Brand Licensing Agreement" with "Asia Pacific Pharmaceutical Investment Pte. Ltd." (Singapore AE) on 01.07.2006 for 5 years whereby assessee was assigned the right to manufacture, market and distribute two products namely, "Pyridium" & "Distaclor". Pursuant to the aforesaid agreement, assessee was required to compensate the Singapore AE with royalty @ 5% of net sales of the products. The Assessing Officer took a view that such transaction was not at ALP and hence, instead of determining the ALP on his own, the Assessing Officer made 100% upward TP adjustment of Rs. 67,14,490/- in respect of payment of royalty. The Ld. AR submitted that the assessee has paid royalty @ 5.05% to Singapore AE and the said fact was not disputed by the Assessing Officer. The royalty

payment was also in consonance with the rate at which royalty is allowed by the Indian Regulatory Authority i.e. RBI. Thus, rate of 5% is comparable with the rate at which Government of India / RBI allows such payment. Hence such rate was taken by the assessee as external CUP for determination of the ALP. The Ld. AR relied upon the following decisions:

- a) DCIT vs. SI Group India Ltd. – ITA 813/Mum/2013
- b) DCIT vs. Owens Corning Industries (India) P. Ltd. – 51 taxmann.com 276 (Hyd. Tri.)
- c) DCIT vs. Sona Okegawa Precision Forgings Ltd. – 49 SOT 520 (Del.)
- d) ThyssenKrupp Industries India (P) Ltd. vs. ACIT – 25 ITR (T) 243 (Mum).

In alternate, the Ld. AR submitted that TNMM must be adopted as Most Appropriate Method at the Entity Level in assessee's case. As per the search process carried out using Prowess database, Profitability of comparable company (Operating Profit/Operating Revenue) came to be 7.04% as against which assessee's operating margin is 12.75%. Since assessee's margin is better than margin of the comparable company transactions with AE are undoubtedly at ALP. The assessee derives 55% of revenue from "CSO"(Contract Sales Organization) and balance 45% from trading of pharmaceutical products. The assessee has generated 36.50% Net Profit margin on trading activities in relation to which royalty in question has been paid to the Singapore AE. Thus, assessee could generate NP of 36.50% (Trading segment) and in turn, overall operating margin of 12.75% (Entity Level) which is better than operating margin of comparable being 7.04%. The Ld. AR relied upon the following decisions:

- a) Castrol India Ltd. vs. ACIT – 55SOT 521(Mum)
- b) Toyota Kirloskar Motor P. Ltd. – 33 ITR (1) 700 (Bang.)
- c) Merek Ltd. vs. DCIT – 148 ITD 513 (Mum)
- d) SC Enviro Agro India Ltd. vs. DCIT – 59 SOT 109 (Mum)

The Ld. AR further submitted that similar payments was made in A.Y. 2007-08 to 09-10 and accepted in those years at the price declared by the assessee i.e. no TP adjustment has been made. Hence, following principles of consistency, no TP adjustment is warranted as held in CIT vs. Excel Industries – 358 ITR 295 (SC).

7. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that as per “Brand Licensing Agreement” with “Asia Pacific Pharmaceutical Investment Pte. Ltd.” (Singapore AE) on 01.07.2006 for 5 years whereby assessee was assigned the right to manufacture, market and distribute two products namely, “Pyridium” & “Distaclor”. The terms and conditions of the said agreement requires that the assessee has to compensate the Singapore AE with royalty @ 5% of net sales of the products. This has been benchmarked by the assessee by applying Comparable Uncontrolled Price (CUP) method as most appropriate method in the Form 3CEB report. For applying the CUP method the assessee has not found identical comparable and therefore, used external CUP as it is the suitable method for determining the ALP. The Assessing Officer has not pointed out as to why external CUP method will not be applicable in assessee’s case. In fact, the assessee has given all the relevant documents and fulfilled all the criteria of Rule 10D especially giving details as envisaged in Rule 10D(l), (g), (h) and (j) which are most crucial while applying external CUP method. It is not disputed by the revenue that the assessee has paid royalty @ 5.05% to Singapore AE. From the perusal of records it can be seen that the royalty payment was in consonance with the rate at which royalty is allowed by the Indian Regulatory Authority i.e. RBI. Thus, rate of 5% is comparable with the rate at which Government of India / RBI allows such payment. Therefore, the CIT(A) has rightly allowed the rate at 5% of net sales for royalty determination. Hence, the contentions of the Ld. DR are not justifiable. There is no need to interfere with the findings of the CIT(A). As regards the alternate submissions of the Ld. AR, the same are rejected as we have not interfere with the findings given by the CIT(A). Thus, the aspect of royalty payment of Ground No. 1 is dismissed.

8. As regards to management fees, the Ld. DR submitted that the agreement entered into by the assessee with its associated enterprise allow the payment of costs along with a markup of 15%. The assessee claimed that the payment for the year under consideration was USD 293995, which included the actual costs incurred by the assessee along with a mark up of 15%. However, the CIT(A) overlooked the aspect that certificate produced by the assessee stated to be lower/below the actual costs incurred by the associated enterprises. Thus, assessee was trying to justify the non-existent markup which clearly shows that the ad hoc nature of payment made to the associated enterprise. The CIT(A) totally ignored these facts.

9. The Ld. AR submitted that assessee had entered into "Management Service Agreement" with "Pacific Asia Singapore Pte. Ltd." (Singapore AE) on 01.04.06 with addendum dated 05.01.09 to obtain expertise, methods and procedures, availability of information, development of work force, project administration, financial planning and control, etc. for utilizing the same in corporate functions, marketing and sales of the assessee. Pursuant to said agreement, the assessee paid Rs. 1,38,65,200/- to the concerned AE. The Ld. AR submitted that the amount paid by the assessee for management fees in question were merely reimbursement of the expenditure incurred by the AE for and on behalf of the assessee and there was no mark-up over and above the cost actually incurred for providing such services. The Ld. AR further submitted that certificate in respect of the same clarifies that there is no mark-up charged as well as no such services offered to any company other than the group company. The certificate also reiterate that management fees were on the same basis which are charged by AE from other entities to whom such services are rendered. The Ld. AR submitted that the Assessing Officer/TPO cannot question the business decision of the assessee as to payment or hold that no service was rendered. The Ld. AR relied upon the following decisions:

- a) CIT vs. EKL Appliances Ltd. 345 ITR 241 (Del.)
- b) Cadbury India Ltd. vs. ACIT – 147 ITD 487 (Mum)

The Ld. AR submitted that assessee has mentioned in the TP Study Report that the transaction in question is also comparable with the amount charged to other associates. Even otherwise, it is no possible for the parent company to fix margin for all associates in respect of management support services. The Ld. AR further submitted that TNMM at entity level may be adopted as MAM, but the Assessing Officer should have not made 100% upward adjustment. The Ld. AR further submitted that similar payments was made in A.Y. 2007-08 to 09-10 and accepted in those years at the price declared by the assessee i.e. no TP adjustment has been made. Hence, following principles of consistency, no TP adjustment is warranted as held in CIT vs. Excel Industries – 358 ITR 295 (SC).

10. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee entered into “Management Service Agreement” with “Pacific Asia Singapore Pte. Ltd.” (Singapore AE) on 01.04.06 with addendum dated 05.01.09 to obtain expertise, methods and procedures, availability of information, development of work force, project administration, financial planning and control, etc. for utilizing the same in corporate functions, marketing and sales of the assessee. Pursuant to said agreement, the assessee paid Rs. 1,38,65,200/- to the concerned AE. The contention of the Ld. DR that the certificate produced by the assessee stated to be lower/ below the actual costs incurred by the associated enterprises, appears to be incorrect as per the supporting evidences produced by the assessee. Thus, the mark up of 15% was given as per the actual cost incurred by the assessee while providing the services. Besides this the Revenue has accepted the similar payment in the earlier three years and Ld. DR could not point out the factual discrepancy in the present assessment year to that of earlier assessment years. Thus, the CIT(A) has rightly deleted the addition and there is no need to interfere with the findings of the CIT(A). Hence, the aspect of management fee payment of Ground No. 1 is dismissed.

11. As regards to the payment of IT services, Technical support and management fees, the Ld. DR submitted that the assessee did not provide any details in respect of the actual cost incurred by the AE and how the same was allocated to the assessee. The Ld. DR submitted that the CIT(A) erred in giving finding that it is not possible for parent company to fix margin for all associates in respect of management support services. Thus, this upward adjustment was rightly done by the Assessing Officer.

12. The Ld. AR submitted that the assessee entered into an agreement with "PL Pacific Asia (Singapore) Pte Ltd." (Singapore AE) on 01.05.06 for Information Technology Services, Technical Support and Maintenance. The Ld. AR submitted that the amount paid by the assessee for IT services and maintenance fees were merely reimbursement of the expenditure incurred by the AE for and on behalf of the assessee and there was no mark-up over and above the cost actually incurred for providing such services. The certificate produced by the assessee indicates the following aspects:

- i) I.T. support and maintenance charges and other expenses charged are merely reimbursement of expenses incurred by the AE
- ii) There is no mark-up over the actual cost incurred by the AE
- iii) It was pure allocation of actual cost amongst various beneficiaries and users
- iv) IT support and service charges include use of various equipment and systems installed in AEs premises for providing of support services for all Information Technology related matters, use of various I.T. based systems, including enterprise, email, enterprise financial, etc., availability of network, etc.

The Ld. AR further submitted that while making 100% upward adjustment, the Assessing Officer has wrongly observed that assessee could not show any evidence to suggest that the payment was made on account of requirement of the assessee. The Ld. AR further submitted that TNMM at

entity level may be adopted as MAM, but the Assessing Officer should have not made 100% upward adjustment. The Ld. AR further submitted that similar payments was made in A.Y. 2007-08 to 09-10 and accepted in those years at the price declared by the assessee i.e. no TP adjustment has been made. Hence, following principles of consistency, no TP adjustment is warranted as held in CIT vs. Excel Industries – 358 ITR 295 (SC).

13. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee entered into an agreement with “PL Pacific Asia (Singapore) Pte Ltd.” (Singapore AE) on 01.05.06 in respect of Information Technology Services, Technical Support and Maintenance. The reimbursement of the expenditure incurred by the AE was in detail given by the assessee before the Assessing Officer/ TPO. The finding of the Assessing Officer that IT services, Technical support and maintenance fee was not actually incurred and no details given appears to be not correct facts. In fact, the assessee in the certificate given by the AE has given the details of the services provided by the AEs and also the reimbursement expenses incurred by the assessee and paid to AE. The CIT(A) has verified the same and after taking cognizance of the same allow the payment/expenses. It is not the case of fixing margin for all associates in respect of management support services as contemplated by the Ld. DR but actual cost incurred by the assessee company which has been identified and allowed by the CIT(A). There is no need to interfere with the findings of the CIT(A). Besides this the Revenue has accepted the similar payment in the earlier three years and Ld. DR could not point out the factual discrepancy in the present assessment year to that of earlier assessment years. Hence, the aspect of IT services, Technical support and Maintenance fee payment of Ground No. 1 is dismissed.

14. As regards Ground No. 2 relating to deletion of addition of Rs. 67,14,490/- on account of royalty expenses, the Ld. DR submitted that the CIT(A) totally ignored the consistent stand taken by the Revenue in A.Y. 2008-09 and A.Y. 2009-10 and this year is also identical.

15. The Ld. AR submitted that the Assessing Officer has followed the assessment order of A.Y. 2008-09 and 2009-10 which has been decided in assessee's favour by the Tribunal in assessee's own case.

16. We have heard both the parties and perused all the relevant material available on record. Since the Tribunal in assessee's own case in ITA No. 537 & 1560/Ahd/2012 for A.Y. 2008-09 and 2009-10 ACIT vs. Invida India Pvt. Ltd. already decided this issue in favour and the Ld. DR could not distinguish the facts for the present assessment year, Ground No. 2 is dismissed.

17. As regards to Ground No. 3 relating to deletion of addition of Rs. 61,29,520/- being the claim payable to the customers for non-achievement of the targets fixed for sales, the Ld. DR submitted that the CIT(A) totally ignored the consistent stand taken by the Revenue in A.Y. 2008-09 and A.Y. 2009-10 and this year is also identical.

18. The Ld. AR submitted that the Assessing Officer has followed the assessment order of A.Y. 2008-09 and 2009-10 which has been decided in assessee's favour by the Tribunal in assessee's own case.

19. We have heard both the parties and perused all the relevant material available on record. Since the Tribunal in assessee's own case in ITA No. 537 & 1560/Ahd/2012 for A.Y. 2008-09 and 2009-10 already decided this issue in favour and the Ld. DR could not distinguish the facts for the present assessment year, Ground No. 3 is dismissed.

20. In result appeal of the Revenue is dismissed.

Order pronounced in the open Court on this 30th day of May, 2024.

Sd/-
(WASEEM AHMED)
Accountant Member

Sd/-
(SUCHITRA KAMBLE)
Judicial Member

Ahmedabad, the 30th day of May, 2024

PBN/*

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad