

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

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
ITA No. 5906/Mum/2018 (A.Y.2014-15)**

**GE Subsidiary Inc, 63  
(Successor in interest of Monogram Licensing International Inc.)**

C/o. PwC House,  
Plot No. 18 A, Guru Nanak Station  
Road, Bandra,  
Mumbai- 400050  
PAN: AADCM6233F

Appellant

Vs.

**ACIT (Intl taxation) - 3(2) (2), Mumbai,**

Room no. 1615, Air India Building,  
Nariman Point,  
Mumbai- 400 021

Respondent

Appellant by : Shri Dhanesh Bafna, Shri Pratik  
Shah & Shri Amol Mahajan, Ld. ARs  
Respondent by : Shri Abhishek Tharwal, Ld. DR  
Date of hearing : 10/04/2024  
Date of pronouncement : 26/06/2024

**ORDER**

**PER GAGAN GOYAL, A.M.:**

This appeal by Assessee is directed against the order of AO and Ld. (DRP-3),  
Mumbai dated 31.07.2018 and 27.06.2018 respectively passed u/s. 143(3) r.w.s.

144C (13) and 144C (5) of the Income Tax Act respectively, 1961 (in short 'the Act') for A.Y. 2014-15. The assessee has raised the following grounds of appeal:-

*The grounds hereinafter taken by the Appellant are without prejudice to one another.*

- 1. On the facts and circumstances of the case and in law, the learned Dispute Resolution Panel - III ('DRP'), Mumbai erred in confirming the adjustment of Rs. 7, 94, 80,630/- made by the learned Assessing Officer ('AO')/ learned Transfer Pricing Officer (TPO) and further making an enhancement of Rs. 1, 15, 97,802/- to the total income of the Appellant on account of value of the international transaction of receipt of royalty by the Appellant.*
- 2. on the facts and circumstances of the case and in law, the learned DRP/learned AO erred in;*
  - 2.1. disregarding the transfer pricing analysis carried out by the Appellant by failing to appreciate that none of the conditions set out u/s. 92C(3) of the Income-tax Act, 1961 ('the Act') are satisfied.*
  - 2.2. referring the Appellant's case to the learned TPO even though none of the criteria mentioned in Instruction No. 3 of 2016 dated 10 March 2016, issued by the Central Board of Direct Taxes are satisfied.*
  - 2.3. Not appreciating that Chapter X provisions are not applicable in the Appellant's case as the international transactions of receipt of royalty do not result in tax avoidance by way of shifting of any profits from India.*
  - 2.4. in making transfer pricing adjustment on account of the differences between the amount reported by the Appellant in its Form 3CEB and that reported by the AE(s) in their respective financial statements without appreciating that the majority of these amounts are considered by the Appellant in its computation of income in A.Y. 2015-16.*
- 3. On the facts and circumstances of the case and in law, the learned TPO erred in tinkering with the value of international transaction of receipt of royalty, which matches with the gross revenue as appearing in computation of income / financial statement of the Appellant, which is beyond the jurisdiction of the learned TPO.*
- 4. erred in making a total transfer pricing adjustment of INR 91,078,432/- which was on account of the differences between the amount reported by the Appellant in its Form 3CEB and that reported by the AE(s) in their respective financial statements though accepting the*

*benchmarking/ comparability analysis undertaken by the Appellant to be at arm's length without appreciating the fact that the majority of these amounts are considered by the Appellant in its computation of income in A.Y. 2015-16.*

*5. Without prejudice to above, on the facts and circumstances of the case and in law, the learned DRP/ learned AO/ learned TPO erred in adopting an inconsistent approach by not granting credit of amounts pertaining to the transactions with AE's namely Indo Tech Transformers Limited; Advanced Systek Private Limited and Power Control/ Industrial solutions division of GE India Industrial Private Limited wherein the Appellant has reported higher amount in its Form 3CEB but correspondingly no/less amount has been reported by the AEs in their financial statements.*

*6. On the facts and circumstances of the case and in law, the learned DRP/ learned AO erred in levying interest u/s. 234B of the Act.*

*The Appellant craves leave to add, to alter, to amend or to 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 time of hearing.*

**Additional Grounds:-**

*7. On the facts and in the circumstances of the case and in law, the final assessment order dated 31.07.2018 passed by the 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.*

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

2. The brief facts of the case are that assessee is a non-resident company registered in the USA and a part of the GE group. The Assessee filed its return of income on 22.01.2016. The assessee is earning Royalty income for the use of Trade name of Rs. 18, 16, 64,724/- from its group entities in India.
3. The case of the assessee was picked up for scrutiny and during the assessment proceedings, it was noticed that during the year under consideration, the assessee had international transactions with its associated enterprises in India of Rs. 18, 16, 64,724/- and hence a reference was made

to the TPO u/s. 92 CA (3) of the Act to determine the ALP of the international transactions of the assessee. The TPO proposed an adjustment of Rs. 7, 94, 80,630/- on account of royalty vide his order dated 31.10.2017. Based on this order of TPO, the Assessing Officer issued a draft order u/s. 144C of the Act. Against this draft order, assessee preferred a petition before the Ld. DRP, which in turn affirmed the draft order of AO and made a further addition of Rs. Rs. 1,15,97,802/- in consequence to the adjustments proposed by the TPO u/s. 92CA(3) of the Act. Ultimately a final assessment order u/s. 143(3) r.w.s. 144C (13) of the Act was passed making an adjustment /addition of Rs. 9, 10, 78,432/-. The assessee being aggrieved with the order of AO and directions of the Ld. DRP passed u/s. 144C (5) preferred the present appeal before us.

4. During the course of the hearing before us, it was submitted that the assessee has earned royalty Income for the use of trade name for the year under consideration from its group entities in India. The Assessee had benchmarked the said international transactions by adopting CUP as the most appropriate method. During the course of the transfer pricing assessment proceedings, the TPO compared the amount reflected by the Assessee in the Form 3CEB with the amounts reflected by the AEs in their Form 3CEB and found that there were certain mismatches in the amounts. Based on such differences in the reported amounts, he proceeded to make a transfer pricing addition.
5. Before us, the learned AR submitted that transfer pricing addition should be deleted in entirety since the impugned transactions were duly reported in the Form 3CEB in the relevant years as per applicable accounting principles

and there was only a **timing difference as regards the recognition of income by the Assessee vis-à-vis the group entities**. Accordingly, the Assessee had not under reported its income as was alleged by the TPO by comparing year-wise reported amounts. In support of the same, the TP study reports along with the computation of income and the financial statements of the group entities were submitted before the TPO. Further, reconciliation was also provided in relation to the said receipts wherein substantial amounts were matched by the Assessee but was not accepted by the TPO.

6. It was further submitted that the TPO had not computed the ALP of the international transactions by following any of the prescribed methods under section 92C of the Act but had proceeded to determine the ALP on the basis of differences in reporting amounts by the assessee and its AEs which is not prescribed under any method and hence amounts to an ad-hoc addition, which was not permissible under transfer pricing provisions. The Assessee also relied on various judicial precedents in support of its contentions.
7. Per contra, the Ld. DR vehemently argued that the additions were rightly made by the AO/TPO/DRP and relied upon the orders of the lower authorities.
8. We have gone through the draft assessment order along with the report of TPO, directions of the Ld. DRP, final assessment order and submissions of the assessee along with grounds raised in Form No. 36. On a careful perusal of the grounds, the single issue which arises for our consideration is whether the TPO was correct in making a transfer pricing addition to the Assessee merely on account of differences in the amounts reflected in Form 3CEB of the Assessee vis-à-vis its group entities.

9. The TPO, during the assessment proceedings, compared the amounts reflected in Form 3CEB of the Assessee, with the amounts reflected in the Form 3CEB of the group entities and accordingly made an addition by adding the difference in the Form 3CEB to the income of the Assessee, wherever the assessee had reported amounts lower than the group entity. However, it is pertinent to note that no corresponding relief was provided where the assessee had reported amounts higher than the group entity. The TPO made a transfer pricing adjustment and determined the ALP of the impugned transactions solely on the basis of such differences in reporting. Such an approach is unfound in law as it is not prescribed under any of the methods for benchmarking the ALP of an international transaction.
10. We observe that the assessee is earning royalty income for allowing the use of the Trade name. The Assessee is registered in the USA and therefore follows accounting principles in accordance with the relevant US GAAP and follows calendar year of accounting. Therefore, there are bound to be some differences when it prepares its accounts and files return of income in India, as the method of revenue recognition for the USA entity and the provisioning of expenditure for the Indian entities are bound to be different.
11. When we peruse the agreement in relation to the royalty placed before us, it is evident from Article VI (A) of the agreement on page 299 of the Paperbook that the method of computation of royalty for the assessee is also different and is based on the financial year sales of the group entities that end within the calendar year. However, when the group entities compute their royalty payments, it would be based purely on financial year figures on a real time basis as they have complete visibility regarding their external sales on which

they have to pay royalty. Further, the group entities would also need to record royalty expenses following the accounting principle of conservatism irrespective of whether the assessee has disclosed the said figures as income in its books of accounts.

12. We also note that the India – USA DTAA allows **taxability of royalty on a receipt basis and therefore for this reason also, there are bound to be differences in the amounts reported by the Assessee in Form 3CEB and the amounts reported by the group entities on an accrual basis.**
13. We have also examined the reconciliation submitted by the Assessee before the lower authorities and it is borne from record that the Assessee has been able to reconcile substantially the impugned differences and the major reason for the differences was only on account of timing differences in recognition of revenue.
14. We are thus of the considered view that transfer pricing additions on royalty receipts by the assessee made by the TPO only on account of timing differences are not sustainable in law, since the same does not affect the arm's length determination of a transaction and in any case, there is no or very minimal loss actually caused to the exchequer on account of such differences so as to warrant any income addition to the total income of the assessee. We derive support from the decision of the Hon'ble Supreme Court in the case of **CIT v. Excel Industries Ltd. [2013] 262 CTR 261 (SC)**, extract of which is reproduced hereunder:

*“32. Thirdly, the real question concerning us is the year in which the assessee is required to pay tax. There is no dispute that in the subsequent accounting year, the assessee did make imports and did derive benefits*

*under the advance license and the duty entitlement pass book and paid tax thereon. Therefore, it is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present assessment year as well as in the subsequent assessment year. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers.”*

*(Emphasis supplied)*

15. Even otherwise, the Ld. TPO has not determined the ALP of the international transactions by following any of the prescribed methods but has made the transfer pricing addition by determining the ALP of the royalty receipts merely on the basis of the differences in the amounts reflected in the Form 3CEB/financial statements of the assessee and the AEs. Such an approach of the TPO is quite alien to transfer pricing provisions and is nothing but *ad-hoc* in nature. Thus we hold that such an *ad-hoc* approach of the TPO, without appreciating the functions, assets and risks in relation to the international transactions and without following the methods prescribed under section 92C of the Act, is completely contrary to law and does not serve the purpose of the Legislature in introducing Chapter X under the Income-tax Act. We derive support from various decisions including that of the Hon'ble Jurisdictional Bombay High Court in **CIT v. Johnson and Johnson Limited (2017) 80 taxmann.com 337** and **CIT v. Lever India Exports Limited [2017] 246 Taxman 133 (Bombay)** which clearly lay down that the Ld. TPO has to determine the ALP by following any one of the prescribed methods alone and the transfer pricing addition cannot be made on an ad-hoc basis.
16. Thus, on account of the reasons as discussed above, we are of the view that

the addition of Rs. 9, 10, 78,432/- made in the final assessment order deserves to be deleted and we order so, accordingly. Accordingly, Ground nos. 2 to 5 of the Appeal is allowed.

17. Ground No. 6 is consequential and therefore no separate adjudication is warranted.
18. We observe that the Assessee had also raised certain additional grounds of appeal. During the course of the hearing, it was submitted that the said grounds need not be adjudicated if the issue is decided on merits. Accordingly, the same are considered as academic and are left open.
19. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 26<sup>th</sup> of June, 2024.

Sd/-  
(AMIT SHUKLA)  
JUDICIAL MEMBER  
Mumbai, दिनांक/Dated: 26/06/2024  
Sr. PS (Dhananjay)

Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)  
ITAT, Mumbai