IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SMT. BEENA PILLAI (JUDICIAL MEMBER)

AND

SHRI OMKARESHWAR CHIDARA (ACCOUNTANT MEMBER)

I.T.A. No.5777/Mum/2024

AND

S.A. No.122/Mum/2024

Arising out of I.T.A. No.5777/Mum/2024

Assessment Year: 2021-22

NGA HR (India) Private Limited 10th Floor, Vishwaroop IT Park, Plot No. 34, 35 & 38, Sector 30A off Vashi International Info Tech Park, Navi Mumbai- 400705 **PAN:AACCN5957G**	Vs.	**Assessment Unit, Income Tax Department(Jurisdictional Assessing Officer Deputy Commissioner of Income Tax, Circle 7(1)(1))** Deputy Commissioner of Income Tax, Circle 7(1)(1) Mumbai-400021
(Appellant)		**(Respondent)**

Appellant by	Shri Darpan Kirpalani
Respondent by	Shri Pankaj Kumar, CIT D.R.

Date of Hearing	27/01/2025
Date of Pronouncement	31/01/2025

ORDER

Per: Smt. Beena Pillai, J.M.:

Present appeal arises out of the final assessment order dated 30/09/2024 passed by assessment unit for assessment year 2021-22 on following grounds of appeal:

"Appeal under section 253(1)(d) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). against the order dated September 30, 2024 (received on September 30, 2024), passed by Assessment Unit of the income Tax Department under section 143(3) read with Section 144C(13) and 1448 of the Income-tax Act.

The following grounds are independent of and without any prejudice to one another

1. That on the facts and circumstances of the case and in law, Assessment Unit of the Income Tax Department ("AO") has erred in enhancing the total income of the Appellant under section 143(3) read with section 144C(13) and 144B of the Act, for the assessment year ("AY") 2021-22 by 29.36,84,752 as against the returned income of 13,03,30,000 under the normal provisions of Act.

2. That on the facts and circumstances of the case and in law, the AO has erred in not completing the assessment proceedings as per time limit prescribed u/s 153(1) read with section 153(4) of the Act, thereby making the assessment proceedings barred by limitation.

3. That on the facts and circumstances of the case and in law, the AO/DRP/TPO erred in determining NIL price for the international transaction of payment of management fee, as against the actual transaction value of INR 29,36,84,752 by the Appellant to its AE. In doing so, AO/DRP/ TPO grossly erred in:

a. disregarding the benchmarking approach adopted by the Assessee in its TP documentation using transactional net margin method ('TNMM') without providing any cogent reason for the same

b. not appreciating the fact that once cost-plus 15 percent mark-up is held to be at arm's length (for the international transaction of the Appellant's provision of services to its AEs), reducing any component of the cost base for the service provider, viz management charges paid in this case, will result in reducing profits offered for tax in India. Therefore, the AO/DRP/TPO erred in ignoring that the transfer pricing

adjustment proposed leads to erosion of tax base in India which is in contravention to the provisions of section 92(3) of the Act.

c. not appreciating the ratio laid down by the Hon'ble Income Tax Appellate Tribunal in the matter of Mercer Consulting India Private Limited vs DCIT (ITA No 1085/Del/2016). The same has also been upheld by Hon'ble Delhi High Court (ITA 217/2017).

d. not taking cognizance of the benefits derived by the Assessee from receipt of services in dispensing its day-to-day operations efficiently;

e. not resorting to any of the prescribed methods under section 92C of the Act while proposing the transfer pricing adjustment; and

f. not appreciating the commercial expediency and business needs of the Assessee and completely ignoring all submissions with rationale and documentary evidences placed on record to show the arm's length nature of the transaction.

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

The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case."

2. At the outset the Ld.AR submitted that, Ground no. 2 raised in above grounds is a legal issue, challenging limitation to pass the assessment order as per section 153(1) read with section 153(4) of the Act.

2.1. The Ld.AR submitted that, assessee seeks to withdraw the said ground and furnished letter on behalf of the assessees with a prayer to withdraw the same. The letter filed by the Ld.AR is scanned and reproduce as under:

"MAY IT PLEASE YOUR HONOUR

> We wish to state that the above-referenced appeal is posted for hearing before your Honors on 27 January 2025. Furthermore, we respectfully submit that, the counsel hereby prays to withdraw grounds on Roca upon the hearing of subject line appeal ITA 5777/Mum/2024 & SA 122/Mum/2024."

Accordingly, Ground no. 2 raised by the assessee is dismissed as withdrawn.

Brief facts of the case are as under:

3. The assessee is a company and file its return of income on 05/03/2022 declaring total income of Rs.13,03,30,000/-. The assessee also declared book profits under 115JB of the Act at Rs.22,20,93,482/-. The return was processed u/s. 143(1) of the Act and subsequently the case was selected for complete scrutiny Subsequently, notice u/s.143(2) of the Act was issued. In the scrutiny assessment the Ld.AO observed that the assessee had international transactions with its AE. Accordingly a reference was made to the Ld.TPO to determine ALP of international transactions entered into by assessee with its AE.

3.1. The Ld.TPO upon receipt of the reference issued notice to the assessee calling upon the assessee to furnish the details of the international transactions in FORM 3CEB. The assessee in response to the same furnished the details as called for. After considering various submissions and transfer pricing study report filed by the assessee, the Ld.TPO noted that, the margin of the assessee in respect of information technology service segment(hereinafter referred to as ITeS segment) was 15%, which was higher than the range of the weighted average of the margin

of comparable companies. Therefore, the Ld.TPO accepted the arms length determined by the assessee under the ITES segment.

3.2. However, the Ld.TPO determined nil price for the international transaction of payment towards management fees amounting to Rs 29,36,84,752/- by disregarding the bench marking approach adopted by the assessee in its TP documentation using transactional net margin method(hereinafter referred to as TNMM). Before the Ld.TPO the assessee placed reliance on pleathora of decision most particularly reliance was placed on decision of *Hon'ble Delhi Tribunal* in case of *Mercer Consulting India Pvt. Ltd. vs.DCIT,* reported in *(2016) 72 taxmann.com 323*. The Ld.TPO denied following the decision of *Hon'ble Delhi Tribunal* by noting that, revenue has preferred appeal before *Hon'ble Delhi High Court* which was pending at the relevant stage. The Ld.TPO thus proposed addition in the hands of the assessee at Rs.29,36,84,752/-.

3.3. On receipt of the transfer pricing order draft assessment order was passed by the Ld.AO proposing addition in the hands of the assessee.

Aggrieved by the draft assessment order, assessee filed objections before the DRP .

4. Before the DRP, the assessee furnished additional evidence explaining the need benefit of the services which was admitted under Rule 9 of the DRP rules and was forwarded to the Ld.TPO calling for the remand.

4.1. The Ld.TPO vide remand report is reproduced in the DRP direction. The Ld.TPO observed that, in the absence of copies of agreement, certificate from AE showing total cost at allocation to the assessee and documentation and support of various services availed, evidences in regard to expenses incurred by the AE and basis of allocation, proof of rendering of services and benefit derived by the asssessee from such services, payments for intra group services cannot be treated as arms length the Ld.TPO thus noted that assessee failed to proof substantially that such services were actually rendered and received by the assessee.

4.2. In response to the remand report, the assessee relied on the documents filed that enumerated on the details. However, the DRP upheld the additions proposed by the Ld.TPO.

5. On receipt of the DRP direction, the Ld.AO passed the impugned order by making addition in the hands of the assesee.

Aggrieved by the order of the Ld.AO, the assesee is in appeal before this *Tribunal*.

6. At the outset, the Ld.AR submitted that, for all the services that was rendered under the category of ITES segment that included the alleged management service fees, the assessee was compensated at cost plus 15% mark up. He submitted that margin of 15% declared by the assessee includes the management support services received from AE. He placed reliance on the computation submitted before the authorities below as under:

Particulars	*Amount in INR*
Total Operating Revenue [A]	*1,73,38,33,722/-*
Employee benefit expenses	*97,95, 48,695/*
Depreciation/ amortization on tangible/intangible assets	*2,37,12,356/*
Finance Cost	*18,83,000/-*
Management support services from AE	*29,36,84,752/*
Other operating expenses	*20,88,52,855/*
Total Operating Expenses [B]	*1,50,76,81,658/-*
Operating Profit [C=A-B]	*22,61,52,064/-*
*Operating Profit/ Operating Cost [D=C/B*100]*	*15%*

6.1. The Ld.AR submitted that, the Ld.TPO did not challenged the functional analysis or bench marking approach of the business operations regarding provisions of support services. He submitted that, if the management support service fee from AE is treated to be nil, profitability would go down leading to lesser taxation he thus submitted that, since the management support for service fee received from AE is included in the cost based, treating the same to be at nil, would actually result in the erosion of tax based.

6.2. The Ld.AR placed reliance on section 92(3) of the Act, that reads as under:

> ***Section 92***
> *(1)……..*
> *(2)…….*
> *(3) The provisions of this section shall not apply in a case where the computation of income under sub-section (1) or sub-section (2A) or the determination of the allowance for any expense or interest under sub-section (1) or sub-section (2A), or the determination of any cost or expense allocated or apportioned, or, as the case may be, contributed under sub-section (2) or sub-section (2A), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in*

respect of the previous year in which the international transaction or specified domestic transaction was entered into.

6.3. He submitted that the above provision does not permit computation of income wherein an adjustment would lead to reduce the arms length price. In this context reliance was placed by the Ld.AR on the observation of *Hon'ble Delhi Tribunal* in case of *Merceer Consulting India Pvt. Ltd. (supra)* which was upheld subsequently by *Hon'ble Delhi High Court* in case of *PCIT vs. Merecer Consulting India Pvt. Ltd.* reported *(2024) 161 taxmann.com 420 (Delhi)*

6.5. On the contrary the Ld.DR placed reliance on order passed by the authorities below.

We have perused the submissions advance by both sides in the light of the records placed before us.

7. It is noted that in the present facts of the case the Ld.TPO accepted the TNMM applied by the assessee to the international transactions under ITeS segment. It is noted that, the ALP of intra group service being management support services from AE was included in the cost base for computing the margin at 15%.

7.1. It is observed that Ld.TPO determined ALP of management support services at NIL by applying CUP, vis-à-vis, ALP determined by assessee at aggregate level by using TNMM. Ld.TPO held that assessee did not obtain any benefit out of such services and that such services provided by AE were not required, as, assessee failed to provide evidence regarding receipt of services, alleged to be rendered by AE, necessitating any payment. It is observed that, Ld.TPO thus held that, as there is no benefit from services for which payments has been made, he

determined ALP of international transaction at Nil, without carrying out any FAR analysis of intra-group services. This approach of Ld.TPO is not acceptable, as once a transaction has been categorised as independent international transaction, it is necessary to determined ALP of such transaction. Ld.TPO cannot consider ALP at 'NIL' and value of transaction has to be computed as per law.

7.2. Admittedly, the Ld.TPO accepted the cost base of the transaction, wherein the intra group services rendered by the AE was included. Thereafter to the management support service fee from AE is treated to be nil would lead to erosion of the tax base and such kind of adjustment is not admissible in the eyes of law.

Section 92(3) enjoins that the provisions of section 92 shall not be applied in a case where the computation of income under sub-section (1) or the determination of the allowance for any expense or interest under that sub-section or the determination of any cost or expense allocated or apportioned, as the case may be, contributed under sub-section (2), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into.

7.3. As per the provisions of section 92(3) the said principle has been upheld by *Hon'ble Delhi High Court* in the case of *Mercer consulting India Pvt Ltd (supra)*. The relevant observation by *Hon'ble High Court* are as under:

2. We note that while considering the aforesaid aspects, the ITAT has observed as follows:-

> *"5. As a corollary to the ALP of the intra group services received by the assessee being treated as NIL, the price paid for these intra group services is required to be taken out from the computation of remuneration receivable in respect of IT enabled services rendered by the assessee. This is so for the reason that the pricing of IT enabled services is on the cost plus 20% basis, which. has been upheld to be at arm's length price by the DRP, and, therefore, anything removed from the cost will also have to be removed from the computation of amount receivable for the IT enabled services rendered by the assessee. Of course, as far as TPO is concerned, the action at that level was, from this perspective, could have been justifiable inasmuch as the ALP margin was taken at 29.53%, as against 20% taken by the assessee, and, therefore even after removing something from the cost base, due to increase in the mark-up rate, ALP of the services rendered could still be higher visa-vis the amount chargeable after including intra group services in the cost base. Once DRP deletes the adjustment in the mark-up rate on cost plus basis, such a possibility ceases to exist. Therefore, in the present circumstances, any ALP adjustment in the consideration for intra group service, which is includible in the cost base, paid by the assessee will actually result in erosion of tax base. The reduction in ALP of consideration of such intra group services by Rs 100 will also result in under realisation of revenue for IT enabled service by Rs 120 (i.e. recovery of cost of Rs 100 plus profit mark up of Rs 20). In effect thus, the taxability in the hands of the assessee, in such a situation, will go up by Rs 100 as an ALP adjustment, but then income of the assessee from IT enabled service revenue, will also stand reduced by Rs 120. Section 93(2) is quite clear and clear and categorical in this regard. It states that "(t)he provisions of this section shall not apply in a case where the computation of Income under sub-section (1). has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into". Section 92(1), in turn, states that "(a)ny income arising from an International transaction shall be computed having regard to the arm's length price". What follows is thus that when, as a result of computation of income on the basis of arm's length price, the income of the assessee is lowered or the loss is increased, the provisions of computation of income on the basis of arm's length price do not come into play. Viewed in this perspective, when we examine the facts of the present case, we find that the determination of ALP of the intra group service at NIL value does lower the profits of the assessee inasmuch as the revenue of the assessee from the IT*

enabled services will reduce correspondingly, and infact 20% more than the adjustment- as a result of loss of mark up as well. The ALP adjustment of Rs 8,40,95,610 by the revenue authorities is, therefore, essentially required to be coupled with reduction of 10,09,14,732. That would erode our tax base, rather than augmenting it. The computation of income from International transactions on the basis of arm's length price, in the given situation, would result in lowering the income of the assessee vis-a-vis the income "computed on the basis of entries made in the books of accounts in respect of the previous year in which the transactions were entered into". In the light of this factual position coupled with the relief granted by the DRP on the ALP adjustment in the mark-up rate of the cost plus basis billing to the AE in respect of revenues for the IT enabled services, and in the light of the provisions of section 92(3), the transfer pricing provisions cannot be invoked in respect of intra group services, which admittedly form part of the cost base of the assessee availed by the assessee. This is a case in which transfer pricing provisions cannot be applied because the application of ALP adjustment will indeed result in erosion of Indian tax base- as visualized by the scheme of Section 92(3) inasmuch for every rupee of ALP adjustment in intra group service, the revenue of the assessee on the basis of application of arm's length price will stand reduced by one and one fifth times of the ALP adjustment Section 92(3) does not permit computation of income on the basis of arm's length price in such a situation; as a matter of fact, it prohibits application of arm's length principle in such a situation. The plea of the assessee, as specifically taken up in ground no. 5 (g), is thus indeed well taken and merits our acceptance."

3. The fact that if the challenge as raised by the appellant were to be accepted, it would result in a reduction of the income chargeable to tax is not questioned or disputed before us.

7.4. Respectfully following the above ratio, we are of the opinion that the addition made in the hands of the assessee deserves to be deleted.

Accordingly grounds 3(a)-(f) raised by the assessee stands allowed.

8. As we have already decided the merits by deleting the addition the stay petition filed by the assessee becomes infructuous.

Accordingly, the Stay Petition filed by the assessee is dismissed as infructuous.

In the result the appeal filed by the assessee stands partly allowed and the stay petition filed by the assessee stands dismissed infructuous.

Order pronounced in the open court on 31/01/2025

Sd/-	**Sd/-**
(OMKARESHWAR CHIDARA)	**(BEENA PILLAI)**
Accountant Member	**Judicial Member**

Mumbai:
Dated: 31/01/2025
Poonam Mirashi,
Stenographer

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

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By order