

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE**

**BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
SHRI VINAY BHAMORE, JUDICIAL MEMBER**

**ITA No.658/PUN/2022
Assessment Year : 2018-19**

Rehau Polymers Private Limited Holewadi, Khed Pabal Road, Khed, Pune – 410505	Vs.	ACIT, Circle 8, Pune
PAN: AAACR7521E		
(Appellant)		(Respondent)

Assessee by : Shri Nikhil S Pathak
Department by : Shri Hitendra B Ninawe
Date of hearing : 24-12-2024
Date of pronouncement : 04-03-2025

ORDER

PER R. K. PANDA, VP :

This appeal filed by the assessee is directed against the order dated 30.06.2022 of the Assessing Officer passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to assessment year 2018-19.

2. Facts of the case, in brief, are that the assessee is a company. It is a fully owned subsidiary of Frankische Plastiks, GmbH and is engaged in manufacturing, trading and marketing of polymer based products in India. It filed its return of income on 30.11.2018 declaring income of Rs.21,77,19,280/-. The case was taken up under CASS for complete scrutiny. Accordingly, statutory notice u/s 143(2) of

the Act dated 22.09.2019 was issued to the assessee. Since the assessee company had entered into certain international transactions with its Associated Enterprises (AEs), the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions entered into by it.

3. The TPO during the course of TP proceedings noted that the assessee company had undertaken the following international transactions:

<i>S. No.</i>	<i>Nature of transaction</i>	<i>Amt as per 3CEB (in Rs)</i>	<i>Method</i>
1	<i>Sale of Goods</i>	96,35,736	<i>TNMM</i>
2	<i>Commission earned</i>	1,73,33,580	<i>TNMM</i>
3	<i>Reimbursement of expenses received</i>	27,11,487	<i>CUP</i>
4	<i>Cost sharing charges</i>	67,158,603	<i>TNMM</i>
5	<i>Purchase of traded goods</i>	32,51,47,883	<i>RPM</i>
6	<i>Purchase of Raw material</i>	5,68,30,646	<i>TNMM</i>
7	<i>Purchase of Fixed Assets</i>	13,92,23,545	<i>TNMM</i>
8	<i>Payment towards consultancy and professional services</i>	0	<i>NA</i>
9	<i>Payment towards technical services</i>	11,80,799	<i>TNMM</i>
10	<i>Purchase of Stores, spares and sample</i>	81,46,129	<i>TNMM</i>
11	<i>Expenditure Reimbursed Paid</i>	47,37,318	<i>CUP</i>
12	<i>Guarantee Commission Paid</i>	78,89,367	<i>OTHER METHOD</i>
	<i>Total</i>	63,99,95,093/-	

4. While the TPO accepted the various international transactions entered into by the assessee with its AEs, however, he did not agree with the ALP of the international transactions relating to Cost sharing charges of Rs.67,158,603/-. He

noted that during the year under consideration the assessee has paid the cost sharing charges to its various AEs, the details of which are as under:

<i>Sl. No.</i>	<i>Name of AE</i>	<i>Amount in INR</i>
1	<i>Rehau Pte. Ltd., Singapore</i>	<i>2,06,26,689</i>
2	<i>Rehau Polymers (Suzhou) Co. Ltd.</i>	<i>76,01,305</i>
3	<i>Rehau AG</i>	<i>3,89,30,609</i>
	<i>Total</i>	<i>6,71,58,603</i>

5. The TPO asked the assessee to justify the ALP computed in respect of international transactions. From the details / documents / information furnished by the assessee, the TPO noted that the assessee has not been able to specify the services received by it from its AEs and failed to furnish any contemporaneous documentary evidence to substantiate its claim. Regarding furnishing of documentary evidence as to when and how these services were requisitioned from AEs, the assessee submitted that these services are requisitioned from time to time and are billed by AEs in terms of the agreements. The assessee had submitted some sample invoices. The TPO held that the sample invoices only substantiate that the invoice is raised by the AEs to assessee, but it cannot be substantiated by the invoices that the services would have actually received and tangible benefit derived from the services. He, therefore, asked the assessee to furnish the cost benefit analysis (a) with reference to the cost of the services and benefit received therefrom and (b) services received from AEs vis-à-vis independent parties. According to the TPO, any independent person would not avail such kind of services unless it is examined as to what is the payment for each and every services and whether the person can avail of such services at a price lower than what is

offered by the group companies. The assessee submitted that it does not perform the services availed on its own as it did not have the capability to perform the said service in-house. It was submitted that these services pertained to the internal systems and processes of the Rehau Group. It was submitted that the assessee has received various benefits by receipt of these services as without receiving such services, the assessee could not have carried out its business operations successfully in India, since Rehau India depends solely on technical support of Group Rehau world-wide through its AEs, which provides technical, marketing and Administrative support to entire Asia and Australia region.

6. Since the assessee, according to the TPO, was not able to provide the details of tangible benefit and was not able to demonstrate as to what amount an independent entity would have paid for each of the supposed services and since the assessee has not availed such services from an independent party nor has the AEs have provided these services to an unrelated party, the TPO proposed an upward adjustment of Rs.6,71,58,603/- by observing as under:

“However, in the present case, assessee failed to substantiate its claim. Assessee further has not demonstrated the receipt of services and tangible benefit derived from such a services as per the principles laid down by the hon'ble ITAT Assessee has also contended that no method is selected by TPO for considering the value of transaction as NIL.. In this regard, it is stated that TPO benchmarked the transaction pertaining to intra group services separately by applying CUP. Further. Department is in appeal before the Hon'ble High Court against the decision of Hon'ble ITAT in assessee's own case for AY 2012-13 & 2013-14 on the issue of intra group services. Since the assessee has failed to prove the receipt of above mentioned services and tangible benefit derived from such a services, the ALP of transactions related to said Services treated NIL and adjustment of Rs. 6,71,58,603/- is made.”

7. The assessee approached the Dispute Resolution Panel (DRP) but without any success.

8. The Assessing Officer in the final order made the addition of the same to the total income of the assessee.

9. Aggrieved with such order of the Assessing Officer / TPO / DRP, the assessee is in appeal before the Tribunal by raising the following grounds:

- 1] *The asst. order passed by the learned A.O. is bad in law and the same may be declared null and void.*
- 2] *The learned A.O. / DRP erred in making an addition of Rs. 6,71,58,603/- u/s 92C on the basis of the order of the TPO u/s 92CA(3) dated 29.07.2021 in the case of the appellant company.*
- 3] *The learned A.O. / DRP erred in determining the Arm's Length Price (ALP) of the international transactions pertaining to payments made to Associated Enterprises (AE) for intra group services (Product, Marketing and Corporate Support Services) at Rs. Nil and thereby erred in making an addition of Rs.6,71,58,603/-.*
- 4] *The learned A.O. / DRP erred in not appreciating that the determination of ALP by the learned TPO at Rs. NIL in respect of Intra Group Services paid by the assessee was not justified since he had made the adjustments without adopting any of the prescribed methods and hence, the addition made of Rs.6,71,58,603/- is invalid in law and the same may kindly be deleted.*
- 5] *The learned A.O. / DRP erred in holding that the assessee had failed to prove the receipt of Intra Group Services and the benefit derived therefrom and hence, the TPO was justified in determining the ALP of the Intra Group Services at Rs. NIL.*
- 6] *The learned A.O. / DRP erred in holding that the assessee had failed the Need Evidence Benefit Test in respect of Intra Group Services for which payment was made and hence, the determination of ALP at Rs NIL was justified.*
- 7] *The learned A.O. / DRP erred in holding that the determination of ALP at Rs. NIL in respect of Intra Group Services was justified since the assessee*

had failed to furnish details of the costs incurred by the AEs and the man hours spent by the employees of the AEs and hence, the addition made was justified.

- 8] *The learned A.O./DRP failed to appreciate that the appellant company had actually received intra group services in the form of Product, Marketing and Corporate Support Services from its AEs and hence, the payment made by the appellant to the AEs for the Intra Group Services was justified and there was no reason to determine the ALP of the said transactions at Rs. Nil.*
- 9] *The learned A.O. / DRP failed to appreciate that the assessee company had aggregated the transaction of Intra Group Services with other International Transactions entered into with the AEs and had determined the ALP by applying the TNMM and hence, there was no reason to separately benchmark the transaction of Intra Group Services to determine the ALP of the said International Transaction.*
- 10] *The learned A.O/ DRP erred in not appreciating that the appellant company had submitted various evidences to prove the receipt of Intra Group Services and the economic and commercial benefit derived by the appellant company and therefore, the determination of ALP of the said intra group services at Rs. Nil was not justified at all and the entire addition made should be deleted.*
- 11] *The learned A.O/DRP failed to appreciate that:*
- a. The appellant company had submitted independent evidences in form of certificate from Independent Accountant regarding the actual costs incurred by the AEs.*
 - b. The appellant company had submitted evidences of allocation of the costs by the AE on the basis of man hours spent by the employees of the AEs.*
 - c. On the basis of the various evidences submitted by the appellant of receipt of the services, the ALP determined at Rs. Nil was not justified at all and the addition made should be deleted.*
- 12] *The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.*

10. The Ld. Counsel for the assessee strongly challenged the order of the Assessing Officer in making the addition of Rs.6,71,58,603/- on account of cost

sharing charges. He submitted that for cost sharing charges of Rs.6,71,58,603/-, the assessee had adopted TNMM method as the most appropriate method. He submitted that the TPO while making the addition has relied on the orders passed by him for assessment years 2012-13 and 2013-14. He submitted that the TPO has worked out the ALP at Rs.NIL without considering any of the prescribed methods for determining the ALP. He submitted that such an approach of the TPO is not correct without applying any of the methods specified under the Act.

11. The Ld. Counsel for the assessee submitted that the TPO in his order in para 32, page 23 has made a reference of CUP method. As per the said para, there is only reference of CUP method which was selected in the earlier year. He submitted that as per Rule 10B, CUP method is a method, wherein the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction is identified. Thereafter, the said price is adjusted to account for differences, if any and the said price is taken to be the Arm's Length Price. Accordingly, as per the said rule, for applying CUP method, the price charged for property transferred or services provided is required to be identified. However, in the present case, the TPO has not carried out any such exercise. He submitted that simply referring to CUP method without any reference to the actual uncontrolled transaction and the price charged therein clearly indicates that no CUP method is adopted by him.

12. Referring to page 55, para 2.2.6 of the order of the DRP, he drew the attention of the Bench to the same which reads as under:

“2.2.6 The assessee has also contended that benchmarking of international transactions / specified domestic transactions are required to be done using any of the methods prescribed under the rules and that the TPO has not determined the ALP of the transactions in question using any such prescribed method. Apparently, the TPO has used 'Other Method' for determination of ALP of the transactions. The "Other Method" was introduced in the Income Tax Act / Income Tax Rules, w.e.f. AY 2013-14, under Rule 10AB of the Income-Tax Rules, 1962 (the Rules). The Hon'ble ITAT, Mumbai Bench, in the case of Toll Global Forwarding India (P) Ltd. Vs DCIT (ITA Number 3812/Mum/2015), has stressed upon the relevance and importance of this method and treated it at par with the other standard methods for determination of the ALP. In fact, Hon'ble ITAT, Mumbai, has approved application of this method in its recent decision in similar circumstances as well, viz. in the case of CLSA India (P) Ltd.-ITA-6748/M/17, 7257/M/2018 and 7246/M/2019 dated 20/8/20.”

13. Referring to the above, the Ld. Counsel for the assessee submitted that the DRP has stated that the TPO has used Other Method as the most appropriate method. However, there is a contradiction in the order of the TPO and the DRP. He submitted that in the order passed by the TPO, there is no reference of Other Method being adopted as the most appropriate method. Referring to the order passed by the TPO for A.Y. 2020-21 he submitted that the TPO has clearly stated that Other Method was considered as the most appropriate method. Therefore, in absence of any such reference in the order passed by the TPO for the year under consideration, the DRP was not justified in holding that the TPO had adopted Other Method as the most appropriate method. He submitted that since the TPO did not adopt any method but only there is a reference of CUP method and it is not clear as to whether the TPO has adopted the said method and since nothing has been brought on record regarding any uncontrolled transaction and the price

actually paid for the said transaction, therefore, the determination of ALP at Rs.NIL without applying any of the specified methods is invalid. He accordingly submitted that the addition made by the Assessing Officer should be deleted.

14. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT v. Johnson & Johnson Ltd. [80 taxmann.com 269 (Bom)], he submitted that the Hon'ble High Court in the said decision has held that the action of the TPO in determination of ALP without following any of the prescribed methods is incorrect and the addition made is to be deleted on the said reason.

15. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT v. Merck Ltd. [73 taxmann.com 23 (Bom)], he submitted that the Hon'ble High Court in the said decision has held that it is mandatory on the part of the TPO to adopt one of the prescribed methods for determining the ALP. The Hon'ble High Court has held in para (d) of the order that the adjustment made by the TPO without following the prescribed methods is unsustainable in law.

16. Referring to the decision of the Pune Bench of the Tribunal in the case of INA Bearings India Pvt. Ltd. [108 taxman.com 198 (Pune)], he submitted that the Tribunal in the said decision has held that the TPO has to determine the ALP by following one of the prescribed methods. Accordingly, if the TPO has not followed the procedure laid down, the transfer pricing addition has to be deleted.

17. Referring to the decision of the Pune Bench of the Tribunal in the case of East West Seeds India Pvt. Ltd. vide ITA No.469/PN/60, order dated 18.08.2020, he submitted that in this case the assessee had availed Intra Group Services from its AEs and the TPO determined the ALP at Rs.NIL without applying any of the prescribed methods. The Tribunal deleted the addition made by the TPO on the ground that it is mandatory on the part of the TPO to adopt one of the prescribed methods for determining the ALP. Accordingly, the addition was deleted.

18. Referring to the decision of the Hon'ble Bombay High Court in the case of Kodak India Pvt. Ltd. [79 taxmann.com 362 (Bom)], he submitted that the Hon'ble High Court in the said decision has held in para 10 of the order that since no method was adopted by the TPO for making the adjustment the addition has to be deleted.

19. Referring to the decision of the Pune Bench of the Tribunal in the case of India Kawasaki Motors Pvt. Ltd. [141 taxmann.com 22 (Pune)], he submitted that the Tribunal in the said decision has held that since the TPO has determined the ALP at NIL without applying any of the methods, the action of the TPO is not justified.

20. He accordingly submitted that since the TPO has not applied any of the prescribed methods for determining the ALP, therefore, in view of the principles laid down by the Hon'ble Bombay High Court and the Co-ordinate Benches of the

Tribunal cited (supra), the addition made by the Assessing Officer / TPO / DRP is not justified and therefore, the same should be deleted.

21. The Ld. DR on the other hand drew the attention of the Bench to the para 2.2.23 of the order of the DRP which reads as under:

“2.2.23 The assessee has also placed reliance on the decision of Hon'ble ITAT in its own case for A.Ys. 2009-10, 2011-12 and 2013-14. We find from the extracts of the relevant ITAT orders reproduced by the assessee that in A.Ys. 2011-12 and 2013-14, the issue was decided in favour of the assessee by following ITAT's decision in the case of the assessee for A.Y.2009-10. From the extracts of the order of Hon'ble ITAT for A.Y.2009-10, reproduced by the assessee in its submissions, it is seen that while deciding the issue in favour of the assessee, the Hon'ble Tribunal had observed that the authorities below had not pointed out any defect or shortcoming in the documents furnished by the assessee to substantiate the services provided by the parent company. The ITAT had also observed that the entire emphasis of the TPO/DRP in rejecting the assessee's claim was the benefit derived from the services and need of the services. Thus, it is obvious from the order for A.Y. 2009-10 that the Department had not disputed the receipt of the services by the assessee in that year. However, in this year, as discussed above, the main issue is that the assessee has not been able to substantiate the claim regarding receipt of the services. Therefore, the facts are different from the facts involved in A.Y. 2009-10, and, hence, in our view, the assessee cannot derive any support from the decision of Hon'ble ITAT for earlier years.”

22. He submitted that the DRP has given justifiable reasons for sustaining the addition made by the TPO. Therefore, the order of the Assessing Officer / TPO / DRP being in accordance with law should be upheld and the grounds raised by the assessee be dismissed.

23. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer / TPO / DRP and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We

find the assessee in the instant case has paid an amount of Rs.6,71,58,603/- to its AEs for the cost sharing charges. We find the TPO following his order for assessment years 2012-13 and 2013-14 has held that the assessee has not demonstrated the receipt of services and tangible benefit derived from such services for which he considered the ALP of the international transactions related to the said services as Nil and accordingly made an upward adjustment of Rs.6,71,58,603/-. We find when the assessee approached the DRP, the DRP rejected the contention of the assessee and the Assessing Officer in the final order made the addition of Rs.6,71,58,603/-. It is the submission of the Ld. Counsel for the assessee that although the TPO in his order at para 32, page 23 made a reference of CUP method, however, the TPO has not carried out any such exercise and therefore, simply referring to CUP method without any reference to the actual uncontrolled transaction and the price charged therein clearly indicates that no CUP method is adopted by him. Further, it is also his submission that in absence of any such reference in the order passed by the TPO for the year under consideration, the DRP is not justified in holding that the TPO has used Other Method as the most appropriate method especially when the TPO in the order for assessment year 2020-21 has clearly stated that the Other Method was being considered as the most appropriate method.

24. We find some force in the arguments of the Ld. Counsel for the assessee. A perusal of the order for assessment year 2020-21 of the TPO, copy of which is filed separately, shows that at para 21 of the order the TPO has observed as under:

“Assessee has failed to substantiate that transaction of cost sharing arrangement/intra group services is intrinsically linked to manufacturing activity by way of a package deal. Therefore, aggregation approach taken by assessee was found to be not reliable and considering facts of the case and nature of transaction, 'Other Method' is taken as MAM by the TPO.”

25. However, in the instant case, although the TPO has made a reference of CUP method in para 32, page 23 of his order which was selected in the earlier year, however, the TPO has not carried out any such exercise for the price charged or paid for the property transferred or the services provided in a comparable uncontrolled transaction. As per Rule 10B of the Income Tax Rules, CUP method is a method, wherein the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction is identified. Thereafter, the said price is adjusted to account for differences, if any and the said price is taken to be the Arm's Length Price. Thus, as per the said rule, for applying CUP method, the price charged for property transferred or services provided is required to be identified. However, in the present case, the TPO has not carried out any such exercise. Therefore, simply referring to CUP method without any reference to the actual uncontrolled transaction and the price charged therein clearly indicates that no CUP method is adopted by him. Under these circumstances, we agree with the contention of the Ld. Counsel for the assessee that no method has been adopted by the TPO for determining the ALP. The observations of the DRP that the TPO has adopted the Other method as the most appropriate method in our opinion is incorrect since there is no reference to any such method as the TPO has not specifically mentioned the Other method as the most appropriate method. Thus,

the question that is to be answered is as to whether any adjustment of ALP is in accordance with law if no method has been adopted by the TPO for determination of the ALP.

26. We find the Hon'ble Bombay High Court in the case of CIT v. Johnson & Johnson Ltd. (supra) has held that the action of the TPO in determination of ALP without following any of the prescribed methods is incorrect and the addition made is to be deleted on the said reason.

27. We find the Hon'ble Bombay High Court in the case of CIT v. Merck Ltd. (supra) has held as under:

“On further appeal, the impugned order of the Tribunal upheld the submission of Respondent-Assessee that in terms of the Agreement, the AE was obliged to provide technical assistance in the 12 areas listed in the Agreement. There was no obligation upon the Respondent-Assessee to obtain technical assistance in all the 12 areas listed in the Agreement. The Respondent-Assessee could ask for assistance in the areas required and the AE was obliged to give it. It is for the availability of the assistance in all twelve areas that the consideration was paid. Thus, no adjustment was required. It further held that the entire Transfer Price Adjustment was done by the Revenue without having been applied any of the methods prescribed under Section 92C of the Act to determine at the ALP. Consequently, the determination of ALP done by the Assessing Officer/TPO could not be justified. It further recorded the fact that no transfer pricing exercise was done by the Assessing Officer/TPO to determine the value of the services received by the Respondent-Assessee in respect of the three services which it had availed of from its AE before holding that the ALP in this case is Rs. 40 lakhs. This was because no exercise to bench mark it with comparable cases was done. Therefore, the consideration payable for the services availed of by the Respondent-Assessee to determine the ALP was not carried out. In the above view, the Tribunal allowed Respondent-Assessee's appeal on the above issue.”

28. We find the Hon'ble Bombay High Court in the case of Kodak India Pvt. Ltd. (supra) has observed as under:

“10. We must also record the fact that the ALP was arrived at by the Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under Section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1) (f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under Section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue.”

29. We find the Pune Bench of the Tribunal in the case of INA Bearings India Pvt. Ltd. (supra) has held as under:

“27. Now we turn to the second issue by which the TPO determined Nil ALP of the international transaction without applying any specific method. In this regard, section 92(1) of the Act provides that “Any income arising from an international transaction shall be computed having regard to the arm's length price”. Section 92C of the Act deals with the computation of ALP. Sub-section (1) of 92C, at the material time, provides that: “The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely:-

- (a) Comparable uncontrolled price method;*
- (b) resale price method;*
- (c) cost plus method;*
- (d) profit split method;*
- (e) transactional net margin method;*
- (f) such other method as may be prescribed by the Board.”*

28. A perusal of the provision divulges that the ALP in relation to an international transaction “shall” be determined by any one of the prescribed methods, which is most appropriate method for the transaction under consideration. The term `shall' used in the provision gives it a status of mandatory character and it cannot be construed here as directory so as to empower the TPO to determine the ALP of an international transaction in an arbitrary manner. He has to confine himself to one of the prescribed methods for determination of the ALP of international

transaction, for which mechanism has been prescribed in Rule 10B of the Income-tax Rules, 1962. Thus, it is evident that the ALP of an international transaction can be determined only by applying one of the prescribed methods given under section 92C(1) of the Act. If the ALP is determined by TPO by not applying any method at all or by choosing a method which is not prescribed u/s.92C(1) of the Act, then such a determination of ALP frustrates the transfer pricing addition. Since the methods prescribed for determining the ALP are statutory prescription, it is absolutely essential for the TPO to compute the ALP by adhering strictly to one of such methods.

29. The Hon'ble jurisdictional High Court in CIT (Large Tax Payer Unit) vs. Johnson & Johnson Ltd. (2017) 247 Taxman 136 (Bom) vide its judgment dated 3rd April, 2017 has held that transfer pricing adjustment is refuted if the TPO does not follow any of the prescribed method. Similar view has been taken by the Hon'ble Bombay High Court in CIT Vs. Johnson & Johnson Ltd. (2017) 297 CTR 480 (Bom) vide its judgment dated 07.03.2017. On going through the above two judgments of the Hon'ble jurisdictional High Court it becomes patent and the ratio decidendi squarely applies to the instant case as well since the TPO did not follow any of the prescribed methods for determining the ALP. He simply held that : "Based on the above, arm's length price of the services provided to the assessee by AE is held to be NIL.". The transfer pricing addition deserves to be deleted on this count as well.

30. Notwithstanding the above, we now proceed to examine if the ALP of the international transaction of payment of 'Management support services fees', is at ALP?

31. The assessee has placed on record a benchmarking analysis for provision of Management services by Ernst & Young (China) advisory limited, China for the financial year ending on 31st December, 2009. There is another Cost Verification Procedure Report by Ernst & Young for the financial years ending 31st December, 2009 to 2011, a copy of which is available at page 1326 onwards of the paper book. This Cost Verification Procedure Report also covers the year under consideration. It has been mentioned in this report that the services fee charged to INA India is determined based on hourly rates and time taken for the services. It further provides total invoices amount includes service fees calculated above as well as business tax and surcharges. It has been mentioned in the Cost Verification Procedure Report, that "the invoices issued to INA India were determined based on the actual hours incurred and consistent with the pricing policy of the service fee charges which for the year is 5%." From the above report, it is overwhelmingly manifest, which also emanates from the Agreement between the assessee and Schaeffler China under which such services were provided, that the service fee is actual cost incurred by Schaeffler China plus a mark-up of 5%. The authorities below have not disputed the correctness of the invoices raised by Schaeffler China. Though no separate ALP determination of the international transaction of payment of Management services fees is available for the year under consideration, but one thing which is clear is that the payment of Rs.5,65,53,971/- and odd to Schaeffler China is towards actual expenses incurred

plus 5% mark-up, which is in the nature of Cost plus method prescribed under rule 10B(1)(c) of the I.T. Rules. Even if, we proceed with the assumption that the mark up of 5% is not at ALP, which should be as low as 1% or even less than that, still the difference arising on account of such mark-up going even up to 0% in a comparable uncontrolled situation, would be within +/-5% range, not requiring any transfer pricing adjustment.

32. To sum up, it is held that the assessee entered into an agreement with Schaeffler Holding (China) Co., Ltd for receipt of "Management support Services", for which separate benchmarking was required to be done. Such services were actually rendered. These services are not in the nature of stewardship or shareholder activity. The payment to Schaeffler Holding (China) Co. Ltd. at the actual costs incurred in providing such services plus 5% mark-up is at ALP, which does not require any transfer pricing addition. We, therefore, set aside the impugned order by holding that the international transaction of payment of Fees for Management services at Rs.5,65,53,971/- is at ALP, which does not require any transfer pricing addition. The addition so sustained in part by the ld. CIT(A), is directed to be deleted in full."

30. We find the Pune Bench of the Tribunal in the case of East West Seeds India Pvt. Ltd. (supra) while deleting the addition on account of TP adjustment on account of adoption of any of the prescribed methods has observed as under:

"8. Heard both parties and perused the material available on record. We note that the TPO discussed the issue of Management Service Fees in its page 9 at para 10 and a show cause notice issued to the assessee as to why payment made towards management fees should not be treated as Nil. As pointed out by the ld. AR the assessee submitted that the details of services were furnished to the TPO vide Point No. 9 to 15 vide letter dated 29-10-2014 but however we note that the AO/TPO made upward adjustment regarding the segment management service fees of Rs.5,08,05,398/- mainly basing on the issue arose for A.Ys. 2009-10 and 2010-11. Further, we note that the above said adjustment was made without following any prescribed method contemplated under the provisions of section 92C of the Act. We note that at Point No. 7 vide its reply the assessee is stated that the appeals for A.Ys. 2009-10 and 2010- 11 were pending before the CIT(A). Therefore, it is clear that the TPO made the said adjustment without following the due procedure contemplated under law and the adjustment made thereon is liable to be deleted.

9. Coming to the decision of Hon'ble High Court of Bombay in the case of Johnson & Johnson Ltd. (supra) we find that the TPO had made transfer pricing adjustment on account of sales promotion and publicity expenses being payable by the assessee to its parent company M/s. Johnson & Johnson, USA. The TPO did not follow any method prescribed u/s. 92C(1) of the Act r.w.s. 10B made adjustment. The Hon'ble High Court of Bombay was pleased to hold that 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 and upheld the order of Tribunal in allowing assessee's appeal by deleting the addition made on account of sales promotion and publicity expenses.

10. Further, the Hon'ble High Court of Bombay in the case of Merck Ltd. (supra), the Hon'ble High Court of Bombay was pleased to hold the entire transfer pricing agreement becomes unsustainable in law in not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services payable by the assessee therein to its AE. The Hon'ble High Court of Bombay held the view taken by the Tribunal in deleting the adjustment made by the TPO without applying any of the method prescribed u/s. 92C to determine ALP is a possible view.

11. Further, this Tribunal in the case of INA Bearings India (P.) Ltd. (supra) by placing reliance in the case of Johnson & Johnson Ltd. (supra) discussed in length the provisions of section 92C(1) of the Act in its order at para 27 and held the term shall used in the provision gives it a status of mandatory character and it cannot be construed here as directory so as to empower the TPO to determine the ALP of an international transaction in an arbitrary manner. The TPO has to confine himself to one of the prescribed methods for determination of the ALP of international transaction, for which mechanism has been prescribed in Rule 10B of the Income-tax Rules, 1962. Further, it held the ALP of an international transaction can be determined only by applying one of the prescribed methods given under section 92C(1) of the Act and the ALP is determined by TPO by not applying any method at all or by choosing a method which is not prescribed u/s.92C(1) of the Act, then such a determination of ALP frustrates the transfer pricing addition and deleted the transfer pricing addition made thereon by holding the methods prescribed for determining the ALP are statutory prescription, it is absolutely essential for the TPO to compute the ALP by adhering strictly to one of such methods. Thus, adjustment made in Research and Development fees and Management fees without following prescribed method under law is deleted. Therefore, ground Nos. 1 to 2.5 raised by the assessee are allowed."

31. The various other decisions relied on by the Ld. Counsel for the assessee also supports his case to the proposition that in absence of any of the prescribed methods for the determination of the ALP, such TP adjustment is not sustainable in law. Since the TPO in the instant case has not adopted any of the prescribed methods for determination of the ALP, therefore, respectfully following the decisions cited (supra), we hold that the addition made by the Assessing

Officer/TPO/DRP is not in accordance with law for which the same has to be deleted. We accordingly set aside the order of the Assessing Officer and direct him to delete the adjustment of Rs.6,71,58,603/-. The grounds raised by the assessee are accordingly allowed.

32. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 4th March, 2025.

Sd/-

(VINAY BHAMORE)
JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 4th March, 2025

GCVSR

Sd/-

(R. K. PANDA)
VICE PRESIDENT

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. The concerned Pr.CIT, Pune
4. DR, ITAT, 'C' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	03.03.2025		Sr. PS/PS
2	Draft placed before author	04.03.2025		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			