

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "J" Bench, Mumbai.

Before Smt. Kavitha Rajagopal (JM) & Shri Omkareshwar Chidara (AM)

ITA No. 1497/MUM/2018 (Assessment Year : 2005-06)

ACIT-14(2)(2) 461, 4 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Pfizer Limited The Capital, 802/1901 Plot No. C-70, G Block Bandra Kurla Complex Bandra East, Mumbai 400 0051.
		PAN : AAACP3334M
Appellant		Respondent

C.O. No. 40/Mum/2022(Assessment Year : 2005-06)

M/s. Pfizer Limited The Capital, 802/1901 Plot No. C-70, G Block Bandra Kurla Complex Bandra East, Mumbai 400 0051.	Vs.	ACIT-14(2)(2) 461, 4 th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.
PAN : AAACP3334M		
Appellant		Respondent

Assessee by	:	Shri Vishal Kalra
Revenue by	:	Shri Nihar Ranjan Samal
Date of Hearing	:	25/04/2025
Date of pronouncement	:	21/07/2025

O R D E R

Per Omkareshwar Chidara (AM) :-

In the above cited Departmental appeal, the following grounds of appeal are taken :

1. On the facts and circumstances of the case, Ld. CIT(A) erred in holding that the payments made by the assessee to the clinical labs to be treated as pass-through cost without appreciating that pass-through cost can be allowed only when the assessee is acting as an agent of the AE (Para 7.36 of OECD guidelines 2010), but as per clause 11 of the Agreement between the assessee and AE for clinical trial, it has been clearly stated that the assessee company is and will remain an independent contractor and shall not be an agent or employer of AE for any purpose.

2. On the facts and circumstances of the case, Ld. CIT(A) erred in not appreciating the facts that all agreements for clinical trial are entered into between the Assessee and the Principal Investigators (clinical labs] directly and that all rights or obligations arising out of clinical trial directly vests in the assessee and by virtue of this, the assessee cannot be merely treated as a mere intermediary.

3. On the facts and circumstances of the case, Ld. CIT(A) erred in not appreciating the fact that as per clause 3 of Agreement between assessee and Principal Investigator any amendment in protocol will be offered by assessee company only, and as per clause 17 the assessee company undertakes to indemnify and hold harmless the principal investigator from any and all liabilities, loss or damage they may suffer out of activities of clinical trial and therefore assumes the risk of recovery of cost to Principal Investigator and in the capacity of risk bearer assessee company cannot be treated as mere intermediary.

4. On the facts and circumstances of the case, Ld. CIT(A) failed to appreciate the functions performed by the assessee in organizing and arranging the conduct of clinical trials including feasibilities, start-up, execution, follow-up and close-up and also other functions of compilations, storing and analysis of the data generated in the course of clinical trials involving value addition and therefore the assessee cannot be treated as intermediary and the impugned cost cannot be treated as mere pass-through cost.

5. On the facts and circumstances of the case, Ld. CIT(A) failed to appreciate that other functions of compilations, storing and analysis of the data generated in the course of clinical trials are performed by the assessee involving value addition and therefore the impugned cost cannot be treated as mere pass-through cost.

6. On the facts and circumstances of the case, learned CIT(A) erred in rejecting the comparables adopted by TPO to benchmark the transaction of Provision of Clinical Study Management and Monitoring Services without appreciating the fact that as per TNMM comparables selected have to be functionally similar and not exactly the same.

7. On the facts and circumstances of the case, learned CIT(A) erred in directing the AO to adopt the comparables selected by the assessee without giving any cogent, reason as to how each and every comparable chosen by assessee are similar to the assessee and further these comparables do not entrust part of clinical triad functions to third parties which is the feature of business model of assessee.

8. On the facts and circumstances of the case, learned CIT(A) erred in directing to take the same set of comparables to benchmark the transaction of provision of clinical study Management and Monitoring Services as well as for Provision of Marketing support services without

appreciating that it will defeat the very purpose of benchmarking the separate set of transactions separately.

2. From the above, it can be seen that Ground No. 1 to 5 relate to whether payments made to clinical laboratories which are third parties for performing clinical trials should be treated as a pass through cost and accordingly, reduced from the cost base for calculating the operating margin of the appellant in respect of provision of Clinical Study Management and Monitoring (CSMM) support services. In brief, in this case, the TPO rejected the comparables selected by the Respondent for benchmarking the provision of CSMM support services and applied contract Research & Development ("R&D") companies for benchmarking the said international transaction. Accordingly, computed an arm's length margin of 23.76%. Further, the TPO considered the Assessee's operating margin earned from the provision of CSMM support services as 10.08% (including pass through cost) as against the comparables operating margin of 23.76%.

Accordingly, an adjustment of INR 2,66,54,778 was made in respect of the international transaction of provision of CSMM activity of the respondent. The Ld. CIT(A) relying on the order passed by his predecessor in Respondent's own case in following the principles laid down by the Delhi Tribunal in the case of DCIT vs Cheil Communications India Pvt. Ltd.: ITA No. 712/Del/2010, held that there is a merit in the Assessee's contentions that in order to compute the operating margin, the pass through cost needs to be removed from the cost base and the margin of 13.71% is to be considered for computation of margin of the Assessee in respect of CSMM services.

3. The main argument of the appellant company that these payments which represent third party costs incurred by the Respondent while acting an intermediary, are, therefore in the nature of pass-through cost and hence there cannot be any mark-up on such payments.

4. The Ld. DR relied on the assessment order and Grounds of appeal.

5. The Ld. Counsel of the appellant company has argued, after briefly explaining the facts of the case, that the issue of mark-up is not applicable in case of “pass through costs”. This subject issue was already decided in favour of Respondent company by Hon'ble Mumbai Bench in respondent's own case for A.Ys. 2002-03, 2003-04 and 2004-05 by holding that “pass through cost” needs to be removed from the cost base for computing the Respondent company's own operating margin. Accordingly, the Respondent's margin (after excluding pass through cost) was considered as 13.71% as against 10.34%. It was also submitted that, as far as A.Y. 2004-05, the Hon'ble High Court of Bombay has dismissed the Departmental appeal in ITA No. 1731 of 2016. Thus, the grounds of appeal No. 1 to 5 raised by the Revenue are dismissed and the issue is decided in favour of the Respondent company.

6. Grounds No. 6 and 7 raised by the Revenue deals with the issue of rejection/deletion of comparables used for benchmarking the international transaction of provision of CSMM support services.

7. The brief facts as far as these grounds of appeal 6&7 are concerned, the Respondent company in its TP study, had characterized its activity as a provision of support services and identified 6 comparable companies which are engaged in the business of providing various business support/consultancy services and the Respondent company has computed the arm's length margin of 0.82%. The TPO during the course of assessment proceedings stated that the Respondent company is engaged in carrying out the activity of clinical trials provided the Respondent with a list of 5 contract R&D companies where he selected 4 companies and computed arm's length margin of 23.76% and computed the adjustment of Rs. 2,66,54,778/-. The main contention of Respondent company is that it is merely carrying out the support service activity and its role is limited to that of a facilitator between AEs and institution undertaking clinical trials in India. Hence, Respondent's

argument is that international transaction of provision of CSMM support services should not be compared to the companies engaged in carrying out research and development activity but rather to the comparable engaged in the business of 'business support services'.

8. Ld. AR of the Respondent company has submitted that the issue of Arms Length margin adjustment was already covered in its favour in its own case by the order of Hon'ble Tribunal of Mumbai in A.Ys. 2003-04 where the Tribunal has held that the Respondent company acts as a mere facilitator as it does not carry out the clinical trial activity by itself rather the Respondent is getting the clinical trial done from third party. To sum up, the Tribunal held that the action of TPO comparing the margin of the Respondent with comparable set of companies performing contract R&D services is incorrect. Finally, the Ld. AR of the Respondent company has submitted that the Revenue's appeal against the order of Tribunal passed for A.Y. 2003-04 on the same issue was dismissed by the Hon'ble High Court of Bombay in ITA No. 1731 of 2016.

9. In view of the above arguments of Respondent company and the order of Tribunal, the grounds of appeal 6&7 are dismissed.

10. The last concise grounds of appeal No. 8 of Revenue deals with respect to considering same set of comparables to benchmark the transaction of provision of CSMM as well as far as provision of marketing support services. Here the Ld. TPO held that since Assessee has calculated same set of comparables for benchmarking this activity as it is done for CSMM service, therefore, going by the same logic, the comparables as selected for the provision of CSMM service would be considered for the transaction of marketing support services as well. Accordingly, considered the arm's length margin of 23.76% as against the Assessee's own margin of 15.37% and thus, computed the adjustment amounting to INR 5,41,708 in respect of provision of Marketing Support Services. The Ld. CIT(A) held that comparables

activities are completely different from the activity of the assessee. Accordingly, the approach of the TPO is liable to be rejected and the comparables selected by the Appellant are ordered to be restored. The Respondent company has submitted its argument on this issue as follows :-

- At the outset, it is respectfully submitted that the plea raised by the department that the CIT(A) has erred in upholding the benchmarking of two separate set of transactions of CSMM and MSS with same set of comparables is incorrect and contrary to its own stand in view of the fact that TPO vide his order dated October 31, 2008 himself applied the same set of 4 comparable companies used for benchmarking CSMM which were engaged in contract R&D services.(refer page 470 of the paper book).
- In this regard, it is further submitted that the Respondent's role is limited to that of a facilitator as regards CSMM as well as marketing support services transactions as it is engaged in only rendering support services (refer pages 355, 356 and 370 to 377 of the paper book)
- The TPO, however, by applying the same set of 4 comparable companies in contract R&D services as were applied for benchmarking provision of CSMMSS services, has erred in considering the marketing support services as contract research and development services which is absolutely erroneous.
- Thus, it is respectfully submitted that the impugned marketing support services should not be compared with the institutions and companies engaged in high end contract research and development services and that the comparables selected by the Respondent in its TP study should be restored as upheld by Ld. CIT(A).

11. After perusing the TPO order, Ld. CIT(A) order and hearing both sides in ITAT, the Bench is of the opinion that there is considerable force in the impugned case, in the argument of Ld. AR of the Respondent company that the impugned marketing support services should not be compared with the institutions and companies engaged in high end contract research and development services and that of the comparables selected by the Respondent company. Thus, the order of Ld. CIT(A) is upheld and the addition made by the Ld. AO in this regard is deleted. The ground of appeal No. 8 is dismissed.

12. Thus, the appeal of the Revenue is Dismissed.

C.O. No. 40/Mum/2022

13. Following legal ground is taken by the appellant company in its Cross objection challenging the assumption of jurisdiction by Ld. AO while passing the assessment order. This cross objection was filed by the appellant company on 22.4.2022, whereas the assessment order in this case was passed on 31.12.2008.

14. The main crux in the legal grounds of cross objection in all the grounds No. 1, 2 & 3 is that the Additional CIT who passed the assessment order did not have jurisdiction to pass the assessment order in the absence of order issued to him under section 120(4)(b) of the IT Act conferring him with valid jurisdiction. As there is no order under section 127 of the I.T. Act, transferring the case to Additional Ld. CIT(A), the assessment order passed by him is invalid, bad in law and hence liable to be quashed, contended by Ld. AR of the appellant company in this cross objection. Further the appellant company has relied on the decisions of Mumbai Tribunal in the cases of DCIT Vs. Tata Communications Ltd., Mega Corporation Ltd. Vs. ACIT 155 ITD 1019, Tata Power Company Ltd. Vs. ACIT and Tata Sons Ltd. Vs. ACIT for the proposition that the subject legal issue is squarely covered in appellant favour and hence the assessment order passed by the Ld. AO lacks jurisdiction and liable to be quashed.

15. Per contra, Ld. DR filed a written submission dated 18.2.2025, in which it was stated that the copy of order under section 120(4)(b) and order under section 127 of the I.T. Act were not traceable because of lapse of time and after several cadre restructuring within Department allocating files, transferring the jurisdiction based on monetary limits to various field officers, the concerned records are not available/traceable. The Ld. AO relied on the order passed by Mumbai Tribunal "B" Bench in the case of M/s. Novartis India Ltd., ITA No. 6832/Mum/2010 (A.Y. 2002-03) where Hon'ble Tribunal rejected the contention of appellant as the same was raised after several years. Moreover, the appellant company participated in all

proceedings before Ld. AO, TPO and Ld. CIT(A) and never raised the ground relating to assumption of jurisdiction by the Additional Ld. CIT(A) who passed this order, argued by Ld. DR. The relevant portion of the decision of ITAT is stated as follows :-

7. Considered the rival submissions on the issue of additional ground raised above, challenging the jurisdiction and validity of the assessment order passed under section 143(3) by the Addl. Commissioner of Income Tax on the ground that there was no order under section 120(4)(b) or 127 of the Act, authorizing the Addl. Commissioner of Income Tax to act as an Assessing Officer and jurisdiction to pass the assessment order.

8. In this case, the assessment order was passed on 22.03.2005. Before this Tribunal the appeal proceedings started way back on 30.05.2012 and thereafter almost more than 40 hearings had taken place. On 10.03.2021 almost after lapse of 16 years from the date of the passing of the order, additional ground has been raised, challenging the jurisdiction of the Addl. Commissioner of Income Tax to pass the assessment order on the ground that there is no notification or order under section 120(4)(b) or 127 of the Act.

9. After filing of the additional ground, this Tribunal has called for the records from the department to verify, whether there was any such order under section 120(4)(b) or 127 of the Act passed by the concerned authority assigning the case to the Addl. Commissioner of Income Tax from DCIT. However, department could not produce the record on the ground that same is not traceable, because of lapse of time and after so many restructurings in the jurisdiction and field officers the concerned records are not available/traceable.

10. Before us, the Ld. Senior counsel had submitted that, if once the department could not be able to produce the records, then it is to be presumed there is no such order, because onus is upon the department to show that there is an order by the concerned authority authorizing the Addl. Commissioner of Income Tax for passing the order.

11. It was also pointed out that the originally the return of income was filed with Asst. CIT - 7(1), Mumbai, who was then jurisdictional Assessing Officer and thereafter Dy. CIT- 7(1), Mumbai had issued notices under section 143(2) of the Act and he also referred it to Transfer Pricing Officer for determination of Arm's Length Price for the international transactions in the case of the assessee vide letter dated 14.10.2003. It ITA NO.6832 & 6772/MUM/2010 (A.Y. 2002-03) CO NO.190/MUM/2011 M/s. Novartis India Limited was only on 22.11.2004 Addl. Commissioner of Income Tax has again issued notice under section 143(2) of the Act. If there is no such order available authorizing, the Addl. Commissioner of Income Tax then he could not have acted as an Assessing Officer. In support, of his contentions he relied upon series of judgments by this Tribunal on similar issue, wherein the Tribunal has quashed assessment holding that once

there is no such order authorizing the Addl. Commissioner of Income Tax to act as an Assessing Officer by the concerned authority, then that assessment order is invalid and assessments have been quashed on this count.

12. Before us, Ld. DR had objected to the very admission of additional ground on the ground of delay in filing the additional ground and submitted that since the Addl. Commissioner of Income Tax had issued notice under section 143(2) of the Act on 28.09.2004 and even after passing the assessment order on 22.03.2005, this issue was never raised either before the Assessing Officer or before the Ld. CIT(A) or even for 10 years before the Tribunal. Now admitting of additional ground after delay of 16 years, and without any satisfactory explanation for the reason for such a delay right from the stage of initiation of assessment proceedings till the date of filing of additional ground same cannot be admitted. If once assessee has not objected and participated in the proceedings and never raised this issue that is Addl. Commissioner of Income Tax did not have valid jurisdiction, now after a lapse of 16 years such a ground cannot be entertained. Thus, he objected to the very admission of the additional ground.

13. We have heard both the parties on admission of the additional ground. Though, it is a well settled law that point of jurisdiction or legality of any order can be raised at any stage and there is no time limit prescribed for raising such issue as long as "lis" is pending. However, in order to appreciate the admission as well as the legality of the issue challenged, it is imperative that such a plea or ground should be available from the records, so as to give a categorical finding of fact that there is no such order was passed under section 120(4)(b) or 127 of the Act by the CIT or DCIT or Pr.CIT, etc., and therefore assessment order should be declared invalid.

14. Now, whether the benefit can be given to the assessee because the department could not trace the records after a lapse of 16 years for the reason that due to restructuring and change in several jurisdictions the records are not traceable. If such a plea or legal issue would have been raised after a reasonable time, perhaps the records would have been verified by the First Appellate Authority itself and given some kind of finding, so as to decide the issue.

15. We are of the opinion that, such an inordinate delay and in absence of records being available, the "Principle of Estoppel of Latches" can be applied in such a situation, which lays down an equitable doctrine, where the court could deny the relief to claimant who has unreasonably delayed the claim or has been negligent in ascertaining the claim. Can the claim of claimant be condoned to raise the issue after lapse of 16 years. In our opinion it cannot be.

16. Further, doctrine of "Estoppel of Acquiescence" which is a estoppel for the party's failure to respond to claim within a reasonable time after receiving the notice of claim and thereby gave rise to presumption of

exceptions. If for 16 years assessee as acquiesce to the order passed by the Addl. Commissioner of Income Tax and did not challenge the validity of the order or to exercise the jurisdiction as an Assessing Officer for 16 years, then it would not be proper to by-pass the estoppel by acquiescence.

17. We are aware that in some matter, merely by acquiesce, assessee cannot be precluded from making a claim which is otherwise legally allowable to him. However, one has to consider the conduct of the assessee and the reason for delay while adjudicating the issue raised, even it might be a legal and jurisdictional issue, but there has to be a reasonable and plausible explanation as to why this matter was not raised for 16 years and whether the benefit of doubt can be given to the assessee simply because department could not produce the records and we are also not able to verify as a matter of fact that there is no such order on record.

18. Though additional ground can be raised if it is a pure question of law, but for adjudication such question of law, ascertainment of facts are necessary, then without those facts coming on record it is difficult to decide the question of law itself. Though we are aware that in some of the decisions by the Coordinate Bench have been admitted such an additional ground after inadvertent delay and decided the issue. However, in the present case, in absence of the records being available before us, we are not able to adjudicate this issue. Had the records being made available then perhaps such delay would have been condoned, being the point of jurisdiction. However, without actual records coming on record because of bonafide reasons given by the department that after lapse of so many years and that to be when this issue was not raised at any point of time, we cannot quash the assessment simply on the presumption that no such order would have been passed.

19. As we have already observed above there is a difference between order not available on record for transferring the jurisdiction from DCIT to Addl. CIT and not available on record due to lapse of time and latches on part of the assessee. Thus, we agree with the contention of the Ld.DR that additional ground cannot be admitted due to inadvertent delay and accordingly, the petition for admission of additional ground is rejected.

3. In view of the above decision of the Hon'ble ITAT, it is gathered that the facts of the above case and the facts of the case under consideration is identical. Further, the assessment order passed in the case of the assessee on 31.12.2008 and the assessee has challenged the jurisdiction of passing order u/s 143(3) in the year 2022 i.e after 14 years of passing assessment order. Thus, there is inadvertent delay of raising this ground on the part of the assessee. Hence, in view of the decision of Hon'ble ITAT in the case of Novartis India Ltd, the ground raised by the assessee vide C.O NO. 40/Mum/2022 needs not to be entertained.”

16. Heard both sides and perused the written submission filed by the Ld.AR of the appellant company and Ld. DR. The Bench finds considerable

force in the argument of Ld. DR where reliance was placed on the decision of M/s. Novartis India Ltd., passed by the ITAT Mumbai which is a co-ordinate Bench. The Bench is of the opinion that the question relating to assumption of jurisdiction by the officer who passed an order 14 year back, especially where the appellant has never questioned the same before the Ld. AO/Ld. TPO & Ld. CIT(A) and in fact participated actively in all the proceedings, submitted relevant documents and gave reply to all the queries of various Departmental authorities, cannot raise that question after lapse of considerable time. The doctrine of "Estoppel of Acquiescence" comes into play if 14 years, the appellant acquiesce to the order passed by the Additional Ld. CIT(A) and did not challenge the validity of the order or to exercise the jurisdiction as an AO for 14 years, then it would not be proper to by-pass the estoppel by acquiescence. The appellant's argument that legal argument can be raised at any time was also answered by Hon'ble ITAT in this decision at paras 17 to 19 of the order of Novartis India Ltd. (supra). As far as the argument that his case was covered by the decision in cases of Tata Group of companies, the ITAT Mumbai in the case of Novartis India Ltd. has taken into consideration the same at para 18 of the order.

17. In view of the above, the additional ground relating to assumption of jurisdiction by the Assessing Officer, raised by the appellant company by filing cross objection after 14 years of passing the assessment order, especially when appellant participated in the assessment and appeal proceedings, is rejected.

18. The cross objection of appellant company is Dismissed.

Order pronounced in the open Court on 21/07/2025.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OMKARESHWAR CHIDARA)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

PS

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai