

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'A'**

**BEFORE DR. O.K NARAYANAN, VICE PRESIDENT AND
SMT. P MADHAVI DEVI, JUDICIAL MEMBER**

ITA No.352/Bang/2009
(Asst. Year – 2003-04)

M/s Gemplus India Pvt. Ltd.,
#27, 80 Feet Road,
H.A.L III Stage, Indiranagar,
Bangalore-560 075.

. Appellant

Vs,

The Asst. Commissioner of Income-tax,
Circle-11(4),
Bangalore.

. Respondent

Appellant by : Shri K.R Girish, Chartered Accountant

Respondent by : Smt. Preethi Garg, Commissioner of Income-tax

ORDER

PER DR. O.K NARAYANAN, VICE PRESIDENT

This appeal is filed by the assessee. The relevant assessment year is 2003-04. The appeal is directed against the order of the Commissioner of Income-tax (Appeals)-IV at Bangalore dated 30.01.2009. The appeal arises out of the assessment completed u/s 143(3) of the Income-tax Act, 1961.

2. The assessment has been passed adopting the order of the Transfer Pricing Officer (TPO) passed u/s 92CA of the Income-tax Act 1961.

3. The assessee is an Indian company and wholly owned subsidiary of Gemplus SA, France. Gemplus is a multi national engaged in providing smart card solution for telecommunication industry, financial services and other e-business segments. The assessee company in India is functioning under the regional headquarters of the mother firm at Singapore, mentioned as Gemplus Singapore.

4. The assessee company has filed its return of income for the impugned assessment year for Rs.81,95,150/-. The return was initially processed u/s 143(1). Subsequently, the case was selected for scrutiny and notice was issued u/s 143(2). As the assessee company had entered into international transactions as provided in sec. 92B, the question of ALP was referred by the Assessing Officer to the Transfer Pricing Officer (TPO). The reference was made to examine the ALP on international transactions as provided u/s 92CA.

5. The assessee company in India had entered into an agreement called Management Services Agreement (MSA) with its Singapore associate. Gemplus Singapore for providing services in respect of marketing and sales support, customer service support, finance, accounting & administration support and legal support. According to the assessee, the charges for services rendered by Gemplus Singapore was booked on the basis of time spent for the services rendered to the assessee company in India. Even though the services were charged on time basis, there was an overall capping of the service cost at US \$ 3 lakhs p.a which approximately works out to Rs.1.44 crores.

6. While examining the transactions of the assessee company for the assessment year under reference, the TPO observed that the assessee company has made the following payments to Gemplus Singapore.

- | | | |
|-------------------------------|---|-------------------|
| 1. Import of SIM Card | - | Rs.21,67,98,272/- |
| 2. Payment of management fees | - | Rs.1,44,98,000/- |
| 3. Reimbursement of expenses | - | Rs.6,76,906/- |

7. In respect of import of simcards and reimbursement of expenses, the TPO found that the transactions were at Arms Length and no adjustment was called for. Those factors were accepted as such.

8. But in respect of payments made towards management services amounting to Rs.1,44,98,000/-, the TPO found that the payment was not justified. She found that the total management services paid by the assessee company works out to Rs.1,44,98,000/-. It is less than 5% of either the cost or sales. She observed that that comparables identified by the assessee company have not paid any management service fees. The Transactional Net Margin Method (TNMM) analysis made by the assessee company cannot be accepted for the purpose of ALP. Therefore, the claim for the payment of service charges has been rejected by the TPO u/s 92C(3).

9. In the hearing taken before the TPO, the assessee has elaborately explained why the payment of fee for management services was justified in the present case. As per the agreement, the assessee pointed out, that Gemplus Singapore would provide need based services to the assessee company in different fields, such as,

marketing and sales, customer service, finance & accounting, administration and legal support. In respect of marketing and sales support in which the cost was Rs.60,89,428/-, it was explained by the assessee that six persons from India were imparted training. The TPO found that the expenditure per person works out to Rs.10 lakhs which is more than the course fee charged by any Primary Management Institution in the country. She has also found that the only evidence filed by the tax payer was training certificate issued in the name of two persons. She further noticed that one of the trainees is a pre university metric and the course was for two days and in such circumstances, the payment of Rs.60,89,428/- was without any basis and not commensurate to the benefits accrued to the assessee company. The assessee has explained that Rs.15,94,824/- was paid towards customer service support. The TPO has observed that the explanation offered by the assessee was a vague one. In respect of services regarding finance and accounting, the assessee had paid Rs.42,04,536/-. It was the explanation of the assessee company that monthly balance sheet/profit and loss account and other reports were reviewed as per local India GAAP and other regulatory norms. The TPO has observed that there is no evidence to prove that such services were rendered by the Singapore associate. The TPO had the same

view on the contention raised by the assessee to justify the payment of Rs.26,09,784/- against legal support.

10. Summing up the observations, the TPO concluded that the assessee company has not derived any specific benefit from the management services stated to be advanced by Gemplus Singapore and this is more so because the assessee company in India has already incurred separate head-wise expenses for professional and consultancy services. The TPO held that if at all any benefit is accrued as a result of the services said to be rendered by the Gemplus Singapore, the benefit was accrued to the Gemplus Singapore group as a whole and exclusively to the individual company Gemplus India.

11. On the basis of the above observations, the TPO held that the payment of Rs.1,44,98,000/- was not justified and held that the said amount is adjustable u/s 92CA.

12. This was the only adjustment suggested by the TPO and addition made by the Assessing Officer. The first appeal has been dismissed. Therefore, the second appeal before us.

13. The assessee company has raised series of grounds in its appeal memorandum concerning the legality of the assessment in determining the ALP, Transfer Pricing Analysis, shifting of profit outside India, 5% variation of \pm of arithmetic mean and levy of interest u/s 234B.

14. In spite of the long speaking grounds raised in the appeal, the learned counsel appearing for the assessee fairly agreed that the only short question to be decided is whether the addition of Rs.1,44,98,000/- by way of ALP adjustment determined by the TPO is justified or not.

15. Shri K.R Girish, the learned Chartered Accountant of BSR and Company appeared for the assessee company and argued the case at length. He argued that the assessee company has achieved a commendable amount of sales turnover for the previous year relevant to the assessment year under appeal, which would not have been possible but for the various service rendered by Gemplus Singapore on the basis of the services agreement. He explained that the assessee had employed only a handful of persons in India and all the technical expertise were provided by Gemplus Singapore from time to time and

as and when required by the assessee company. He has drawn our attention to various materials placed before us in the form of paper book, which contained the details of services rendered by the Gemplus Singapore in terms of the agreement entered into by the assessee company. In the light of the materials available on record, he submitted that the payment for services were made exclusively for the purposes of business carried on by it in India and, therefore, there is no reason or rhyme in treating the said amount outside the normal parameters of ALP.

16. The learned CA explained that the PLI opted by the assessee company is justified in the nature of business carried on by it and the TPO has gone wrong in holding that the payment of service charges to Gemplus Singapore has impaired the acceptability of the PLI. The learned CA explained that the OECD Guide Lines have contemplated similar circumstances in the international transactions and have highlighted the relevance of such services rendered by the units situated in foreign countries and the way in which those receipts and payments are to be treated in the accounts. He explained that there is no material on record to show that no services were rendered to the

assessee and that the payments made for services were excessive when compared to analogous transactions.

17. Smt. Preeti Garg, the learned Commissioner of Income-tax on the other hand explained that the assessee has not proved anything in black and white to establish that the so called services were rendered by Gemplus Singapore to the assessee company in India. She further submitted that the assessee company has not even established the necessity for availing such services from Gemplus Singapore.

18. The learned commissioner further explained that the assessee company has already qualified personnel in its service in India and the assessee company has already incurred expenditure for similar services. In such circumstances, there is no justification for making out a case for further services to be rendered by a foreign associate. She explained that there is no comparison between the volume and quality and services and the amounts paid by the assessee company. She further explained that cost has been apportioned by Gemplus Singapore for different country centers on a mutual agreed basis and not on the basis of actual services rendered.

19. She also pointed out that the service agreement was entered into by the assessee company with its Singapore Associate even before the beginning of the relevant previous year and, therefore, it was not possible, at the time of entering into an agreement, to contemplate the nature and volume of services to be rendered and to workout the modalities of compensating the same. She, therefore, submitted that the appeal filed by the assessee devoid of merits.

20. We heard both sides in detail and also perused the records of the case including the paper book filed by the assessee company running in to 390 pages. The necessary facts of the case have already been discussed in paragraphs above. On examination of the facts and circumstances of the case and the terms of the agreement entered into by the assessee and its Singapore associate, the TPO has come to certain pertinent observations in her order. She has observed that the terms prescribed in the agreement in respect of the payments to be made by the assessee company are independent of the nature and volume of services, if any rendered by the Singapore Associate. This is a vital observation made by the TPO which goes to the root of the issue. The function of the TPO is to compare the payments made by the assessee company for services received if any and to see whether

those payments are comparable. In a given scenario, the TPO has to examine whether the payments were ALP conducive. Therefore it is very imperative on the part of the assessee to establish before the TPO that the payments were made commensurate to the volume and quality of services and such costs are comparable. The payment terms as pointed out by the TPO are independent of the nature or volume of services. The assessee has defeated in this primary examination itself. The TPO is also justified in making a pertinent observation that the expenses are apportioned by Singapore affiliate among different country centers on the basis of their own agreements and not on the basis of the actual services rendered to the individual units. It is in addition to the above fundamental flaw, that the TPO has made a clear findings that there are no details available on record in respect of the nature of services rendered by Singapore affiliate to the assessee company. Therefore, we are of the considered view that the TPO is justified in holding that the assessee has not proved any commensurate benefits against the payments of service charges to the Singapore affiliate. Therefore, the TPO is justified in making the adjustment of ALP under sec. 92CA of the Income-tax Act 1961.

21. In view of the above finding, we hold that the addition made by the Assessing Officer is justified and the CIT(A) is right in law in confirming the addition in this regard.

22. In result, the appeal filed by the assessee is dismissed.

Order pronounced on **Thursday** the **21st** day of **October 2010**,
at Bangalore.

Sd/-
(P MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(DR. O.K NARAYANAN)
VICE PRESIDENT

Vms.

Copy to :

1. The Assessee
2. The Revenue
3. The CIT concerned.
4. The CIT(A) concerned.
5. DR
6. GF

By order

Asst. Registrar, ITAT, Bangalore.