

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.2196/Bang/2017 : Asst.Year 2013-2014

M/s.Disa India Limited 5 th Floor, Kushal Garden Arcade 1A, Peenya Industrial Area Peenya 2 nd Phase Bangalore – 560 058. PAN : AAACG5030F.	v.	The Income Tax Officer Ward 2(1)(3) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.K.R.Vasudevan, Advocate
Respondent by : Sri.Sunil Kumar Singh, CIT-DR

Date of Hearing : 12.01.2021	Date of Pronouncement : 12.01.2021
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against the final assessment order dated 21.09.2017 passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act. The relevant assessment year is 2013-2014.

2. The assessee has raised seven grounds. All the grounds relate to the solitary issue regarding Arms Length Price (ALP) adjustment amounting to Rs.1,33,76,590 made to group service fees paid by the assessee to its Associate Enterprises (AEs).

3. The brief facts of the case are as follow:

The assessee is a company. It is engaged in the business of manufacturing and services. For the assessment year

2013-14, the return of income was filed on 30.11.2011 declaring total income of Rs.27,19,08,550. The assessment was taken up for scrutiny by issuance of notice u/s 143(2) of the I.T.Act. During the course of scrutiny assessment, the matter was referred to the Transfer Pricing Officer (TPO) for determining the ALP of the international transactions entered by the assessee with its AEs.

4. The TPO vide order dated 25.10.2016 passed u/s 92CA of the I.T.Act, proposed TP adjustment amounting to Rs.1,33,76,590 to the group service fees paid by the assessee to its AEs. The TPO was of the view that the assessee was not able to justify the need for making payment of Rs.1,33,76,590 to its AEs on account of group service fees. The TPO held that the assessee has not received any benefit / service from its AEs for making such payment. Accordingly, the TPO treated the ALP as `Nil' and proposed the transfer pricing adjustment of Rs.1,33,76,590.

5. The AO passed a draft assessment order u/s 143(3) r.w.s. 144C(1) of the I.T.Act dated 22.11.2016 incorporating the arms length adjustment proposed by the TPO. The assessee preferred objections to the DRP against the draft assessment order. The DRP vide its directions dated 16.08.2017 upheld the arms length adjustment proposed by the TPO. Pursuant to the DRP's direction, the A.O. passed final assessment order dated 21.09.2017.

6. Aggrieved by the final assessment order passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act, the assessee has preferred this appeal before the Tribunal. The learned AR submitted that an identical issue was considered by the Tribunal in assessee's own case for assessment year 2012-2013 in IT(TP)A No.290/Bang/2017 (order dated 25.11.2020). The learned AR submitted that the Tribunal in assessee's own case for assessment year 2012-2013 (supra), had restored the matter to the AO/TPO directing to determine the ALP afresh for the group service fees paid by determining the most appropriate method and comparability analysis.

7. The learned Departmental Representative also agreed that the issue in question is squarely covered by the order of the Tribunal in assessee's own case for assessment year 2012-2013 (supra), and accordingly submitted that similar view may be taken for this assessment year also.

8. We have heard rival submissions and perused the material on record. The Tribunal in assessee's own case for assessment year 2012-2013 (supra) had directed to do afresh transfer pricing analysis and determine the ALP of international transactions with regard to group service fees paid by the assessee to its AEs. The relevant finding of the Tribunal reads as follow:-

"17. Grounds from 1-10 relate to payment made to AE in view of intragroup services received by assessee.

18. It is observed that Ld.TPO determined ALP 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.

19. The Income Tax Act provides computation of arms length price of any international transaction as under:

Computation of income from international transaction having regard to arm's length price.

92. (1) Any income arising from an international transaction shall be computed having regard to the arm's length price. Explanation.— For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction [or specified domestic transaction], two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

20. According to above provisions following principles emerge:-

- An international Transaction is entered in to between two or more associated enterprises for jointly acquiring or developing some property or for obtaining services.
- The parties to transaction enter in to mutual agreement or arrangement to share cost or expenses incurred or to be incurred in respect of joint property.
- The cost or expenses incurred should be in connection with a benefit or services of facility provided or to be provided to any one or more of such enterprise. The expectation of mutual benefit is important consideration for the acceptance of arrangement for pooling of resources by the enterprises.

- *The enterprises would require that each participant's proportionate share of the contribution is consistent with the proportionate share of overall benefits expected to be received from the arrangement.*

- *Transfer price of cost or expenses allocated or apportioned to such enterprise or contributed by such enterprise shall be determined having regard to Arm's length price of such benefit, service or facility received by the enterprise. In order to satisfy arm's length price participant's contributions must be consistent with what an independent enterprise would have agreed to contribute under comparable circumstances considering the benefits it expects to derive from the agreement.*

21. *We direct Ld.TPO to judge the requirement of services from viewpoint of assessee as a businessman. Therefore in this regard we are of view that assessee has to substantiate that these services are required by it. We note that assessee has entered into Intra Group Service agreement with AE, which is placed at page 467 of paper book Volume II. This goes to prove that services were required by assessee.*

22. *Hon'ble Delhi High Court in case of Cushman Wakefield Limited reported in 46 taxmann.com 317 has held that:*

"34. The Court first notes that the authority of the TPO is to conduct a transfer pricing analysis to determine the ALP and not to determine whether there is a service or not from which the assessee benefits. That aspect of the exercise is left to the AO. This distinction was made clear by the ITAT in DresserRand India (P.) Ltd. v. Addl. CIT [2011] 47 SOT 423/13 taxmann.com 82 (Mum.):

"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an Assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an Assessee and what is not. An Assessee may have any number of qualified accountants and management experts on his

rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question Assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of Assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an Assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. Similarly, whether the AE gave the same services to the assessee in the preceding years without any consideration or not is also irrelevant. The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that arm's length price of these services is 'nil'. The authorities below have been swayed by the considerations which are not at all relevant in the context of determining the arm's length price of the costs incurred by the assessee in cost contribution arrangement. We have also noted that the stand of the revenue authorities in this case is that no services were rendered by the AE at all, and that since there is No. evidence of services having been rendered at all, the arm's length price of these services is 'nil'."

23. Another aspect that was made clear by coordinate bench of this Tribunal in *Delloite Consulting India (P.) Ltd. v. Dy. CIT/ITO* reported in [2012] 137 ITD 21/22 taxmann.com 107 (Mum) is that:

“37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in *Gemplus India (P.) Ltd. v. Asstt. CIT [IT Appeal No. 352 (Bang.) of 2009, dated 20- 10- 2010]* held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When commensurate benefit against the payment of services is not derived,

then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price.”

24. Placing reliance upon aforesaid decisions, we are of considered opinion that for these services, assessee has to demonstrate and satisfy Evidence Test or rendition test and benefit test, as envisaged u/s 92(2) of the Act, and that, services provided by AE are neither duplicative nor shareholder's activity. Ld.AO/TPO is then directed to determine Arm's length price of these services based on documents submitted by assessee by determining "most appropriate method" and Comparability analysis.

Accordingly this issue stands allowed for statistical purposes.”

9. In view of the Tribunal order in assessee's own case for assessment year 2012-2013 (supra), which is identical to the facts of the instant case, we restore the matter to the AO / TPO. The AO / TPO shall follow the same directions that are given by the ITAT in assessee's own case for assessment year 2012-2013 for determining the ALP of impugned international transaction the assessee had with its AE's.. It is ordered accordingly.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 12th day of January, 2021.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 12th January, 2021.

Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-1, Bangalore.
4. The Pr.CIT-2 Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore