

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

Before Shri George George K, JM and Ms.Padmavathy S, AM

IT(TP)A No.837/Bang/2016 : Asst.Year 2011-2012
IT(TP)A No.626/Bang/2017 : Asst.Year 2012-2013
IT(TP)A No.2031/Bang/2017 : Asst.Year 2013-2014

M/s.Bostik India Private Limited No.124/4 & 124/4A, Kachanayakanahalli, Off: Hosur Road, Bommasandra Post, Anekal Taluk Bangalore – 560 099. PAN : AABCB4627N.	v.	The Deputy Commissioner of Income-tax, Circle 1(1)(2) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.C.J.Brito, CA
Respondent by : Sri.Pradeep Kumar, CIT-DR

Date of Hearing : 04.05.2022	Date of Pronouncement : 10.05.2022
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ORDER

Per George George K, JM :

These appeals at the instance of the assessee are directed against three final assessment orders passed u/s 143(3) r.w.s. 144C of the I.T.Act. The relevant assessment years are 2011-2012, 2012-2013 and 2013-2014. Common issues are involved in these appeals, hence, these appeals were heard together and are being disposed of by this consolidated order.

2. The brief facts of the case are as follows:

The assessee company is a wholly owned subsidiary of Bostik Australia Pvt. Ltd. which in turn is part of the 'Bostik International Group'. The assessee is engaged in the manufacture of industrial adhesives, more particularly,

applications used in the footwear industry, hotmelts, non-woven products consisting of hygiene product like diapers. The assessee also manufactures adhesives used in construction sector like water proofing. It is stated that the assessee has only one Indian employee director and the company has directly employed about 150 persons engaged mainly in production and marketing functions. It is stated that additional management support, assistance in decision making, strategic planning, etc. are received from the Bostik International Group. The assessee procures the material as required, carries out the manufacturing function, markets and sells the same to that parties situated mainly within India.

3. For the assessment year 2011-2012 to 2013-2014, the assessments were selected for scrutiny and as there were international transactions with Associated Enterprises (AEs), the Assessing Officer referred the matter under provisions of section 92CA(1) of the I.T.Act to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price (ALP) in respect of such transactions. The assessee submitted before the TPO that these transactions need to be aggregated and benchmarked using Transactional Net Margin Method (TNMM) as the most appropriate method, using a PLI consisting of Net Operating Margin on Operating Cost. The arithmetic mean of comparable companies that are engaged in manufacture of Adhesives and that the assessee is set out below for each of the relevant years.

Assessment year	Sales	Profit before tax	Operating cost (OC)	Operating profit margin (OP)	OP/OC (PLI)	Comparable companies PLI
2011-12	143.02	8.84	130.07	12.23	8.56%	7.94%
2012-13	181.37	6.26	168.96	12.08	7.15%	6.24%
2013-14	210.06	7.93	196.56	13.51	6.87%	5.71%

4. In view of the above, the ALP of international transaction undertaken by the assessee with its AEs was sought to be justified. The details of the international transactions entered by the assessee with its AEs for each of the three relevant assessment years are tabulated below:

Sl. No.	Transactions	Year-3 AY 2013-14	Year-2 AY 2012-13	Year-1 AY 2011-12
1.	Import of raw material	20,08,87,773	11,58,23,149	13,22,30,130
2.	Import of traded goods	2,32,871	2,98,937	2,40,942
3.	Export of finished goods	3,01,49,581	2,14,91,373	3,98,62,031
4.	Goods return	Nil	Nil	47,60,767
5.	SAP implementation charges	38,34,644	Nil	Nil
6.	Import of capital goods	Nil	4,62,485	Nil
7.	Research-Product customization expenses	81,07,973	40,49,304	10,78,000
8.	Commercial services (IT support services)	26,18,154	25,60,345	19,97,000
9.	Technology License renewal fee	52,58,825	54,21,169	56,40,000
10.	Management fees	4,22,69,056	3,01,67,905	2,67,01,782
	Total	29,33,58,877	18,02,74,667	21,25,10,652

5. The TPO accepted the TNMM as computed by the assessee with respect of select transactions as set out below and held these international transactions to be at ALP.

Sl. No.	Transactions	Year-3 AY 2013-14	Year-2 AY 2012-13	Year-1 AY 2011-12
1.	Import of raw material	20,08,87,773	11,58,23,149	13,22,30,130
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4.	Goods return	Nil	Nil	47,60,767
5.	SAP implementation charges	38,34,644	Nil	Nil
6.	Import of capital goods	Nil	4,62,485	Nil
7.	Research-Product customization expenses	81,07,973	40,49,304	10,78,000
	Total	24,32,12,842	14,21,25,248	17,81,71,870

6. However, the TPO rejected the TNMM to determine the ALP in respect of payments for intra group services, namely, Technology License renewal fees, commercial services (IT support services) and management fee. The TPO instead proposed to adopt CUP for these transactions as the most appropriate methods. In the opinion of the TPO, these transactions were in a separate class of their own. It was observed by the TPO that the ALP of these transactions should not be determined using TNMM and issued a show cause notice based on this conclusion. The assessee in turn submitted a detailed response to the show cause notice. The content of same is reproduced in the order of the TPO passed u/s 92CA of the I.T.Act. The TPO, however, rejected the submissions of the assessee which inter alia pleaded that the Technology License Fee and the Management Fee paid by the assessee are so interdependent and interlinked with the main activity of manufacture and sale of adhesive products that these transactions should not be benchmarked separately. Further, the TPO proceeded to pass an order u/s 92CA of the I.T.Act considering the CUP at `Nil' and recommended the TP addition for all the three years as follows:-

Sl. No.	Transactions	AY 2013-14	AY 2012-13	AY 2011-12
1.	Commercial services (IT) support services	26,18,154	25,60,345	19,97,000

2.	Technology License Renewal fee	52,58,825	54,21,169	56,40,000
3.	Management Fees	4,22,69,056	3,01,67,905	2,67,01,782
	Total	5,01,46,035	3,81,49,419	3,43,38,782

7. The gist of the reasons given by the TPO for rejecting TNMM and adopting CUP at `Nil' as per his order are summarized as follows (Refer the AO for A.Y.2013-14):-

- (i) In para 9.2 of his order, the TPO alleged that the services are a continuing service and have been availed by the taxpayer in earlier years also, but no payments were made for such services although there has been no changes in FAR profile of the taxpayer from the earlier year. Therefore, the taxpayer has not justified these payments for the relevant assessment year.
- (ii) In para 10.1, of the TPO order, it is stated that the taxpayer has failed to show that, the alleged services received from AE have led to any substantial and commercial benefit to the taxpayer.
- (iii) In para 10.2, it is stated that the taxpayer has not been able to provide any documentary proof of tangible benefit received on account of these alleged services.
- (iv) In para 10.3, the TPO observed that although under CUP an uncontrolled comparable transactions from public data ought to be identified but that if it is not possible to identify similar transactions from real business world, one may construct a hypothetical CUP based on the study of

third party scenario. Accordingly, the TPO observed that in a hypothetical CUP no third party would make payment for services for which no credible evidence could be submitted.

- (v) In para 10.4, it is stated that no cost benefit analysis has been furnished by the taxpayer to show that the tax payer has benefitted out of the alleged services and the payment is commensurate to the benefit received.
- (vi) Based on the above, the TPO came to the conclusion in para 10.5 that the taxpayer has failed to prove that arm's length nature of the payment of technical and management costs paid by the taxpayer to its AE. Hence, the arm's length price of costs of such management fees and other payments on account of intra-group services identified by the TPO is treated as Rs.Nil.

8. Consequent to the TPO's order, the AO served a draft assessment order with TP additions made by the TPO. Other than the TP adjustment, there were no other additions or modifications in the draft order for all the three relevant assessment years.

9. Aggrieved by the draft assessment orders for assessment years 2011-2012 to 2013-2014, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP passed orders giving directions to the TPO / AO. The DRP deleted the TP addition made towards `Commercial Services (IT Support

Services) for two AYs out of three assessment years (no relief given for A.Y.2011-2012) :-

10. The observations/conclusions arrived by the DRP are summarized below: (Referring to DRP order for A Y 2013-14).

(i) On page 3 & 4 the DRP's directions it was stated that *"TNMM is not an appropriate method and a separate transaction approach was warranted in the case of the assessee relying on the Hon'ble Punjab & Haryana high court in IT Appeal No 182 & 172 of 2013(O&M) in the case of Knorr Bremse on whether composite transaction approach to be adopted or separate transaction approach to be adopted for evaluation of the international transactions, in paragraph 41 observed that "the question, therefore in each case must first be whether the sale of goods or the provision of services was a separate independent transaction agreement or whether they formed part of an international transaction, i.e, a composite transaction". If the rationale of the observation of the Hon'ble Punjab & Haryana High Court is applied to the present case, it is an undisputed fact that the assessee has entered into independent agreement for payment of different types of fees and therefore such transactions cannot be aggregated with the evaluation of manufacturing under TNMM"*.

(ii) On page 4 the DRP stated that the TPO has held that *"The alleged services are in the nature of a continuing service and have been availed of by the*

taxpayer in earlier years, but similar payments were not made. Since such expenses were not incurred prior to AY 2011-12 even though the company is in the same business from 2001 the objection raised by the appellant was not acceptable."

(iii) On page 6 The DRP said "*With regard to Technology License Renewal Fees Rs. 54,21,169/- it is noticed by us that similar to the other agreements, this agreement was also entered on 01.01.2010 with Bostik SA France, it is also noticed by us that the application for Trademark and Brands were made long back in the year 1986, and these were registered much before the date of the alleged agreement. Further, there is no justification in regard to the aspect as to why such payments were not made prior to the assessment year 2011-2012 and also there are no evidence to justify that actual benefit was derived from such agreement. Further we are of the view that the transactions with other AE cannot be considered as an internal CUP for evaluation of such transaction"*.

(iv) On page 7 the DRP has held that "*However, with regard to the fees for other services amounting to Rs. 422,69,056 the assessee except for providing copies of the agreements and invoices failed to substantiate that the services were actually rendered by the AEs, the allocation has been made based on the turnover or the budget which makes it clear that such fees has to be paid even if no such services are actually provided or any actual expenditure has been incurred by the AE."*

(v) On page 7, the DRP has held that *"Further for claiming of deduction of any expenditure in respect of the international transactions the assessee has to prove that the expenses have been incurred wholly and exclusively for the purpose of the business as per section 37(1) of the IT Act. The special provisions of chapter X of the IT Act overrides the general Provisions of the act which means that even if it is proved that the expenditure has been incurred, the assessee has to prove that such payment has been incurred for the purpose of the business. The appellant has to prove that such payment of expenses was in accordance with Arms length price."*

(iv) On page 8 of the DRP direction, it was held that *"for claiming any deduction under section 37(1) of the Act, the onus is on the assessee to produce the evidences to prove the receipt of actual services"*.

11. Based on the aforementioned observations, the DRP confirmed the TP adjustment proposed by the TPO, except for providing relief by excluding payment for commercial services (IT support services) for two of the three years amounting to Rs.26,18,154 for A.Y.2013-14 and Rs.25,60,345 for the A.Y. 2012-13 (This relief was not given for the AY 2011-12). Consequent to the DRP's directions, final assessment orders were passed u/s 143(3) r.w.s. 144C of the I.T.Act for assessment years 2011-2012 to 2013-2014.

12. Aggrieved by the final assessment order, the assessee

has filed these appeals before the ITAT. The assessee has filed multiple paper book. However, during the course of hearing, the learned AR has referred to only seven sets of paper books inter alia enclosing therein sample copies of invoices raised for payments made for each of the services rendered by the AEs, financials of each of the assessment years, detailed submissions along with annexure submitted before the Income Tax Authorities, copies of the agreements under which payments were made for intra group services, etc. The assessee has also filed detailed submission.

13. As regards the payment made to AEs for technology license renewal fees, it is submitted that the TPO erred in rejecting the TNMM and considered the CUP at 'Nil' rate. As regards the decision relied on by the AO / TPO and the DRP, it was contended that the Hon'ble High Court vide judgment dated 06.11.2015 remanded the matter back to the ITAT. Subsequent to the remand, the ITAT ruled in favour of the assessee by upholding the TNMM for benchmarking license fees and management fees. The learned AR also placed reliance on the ITAT orders for the subsequent years 2008-2009 to 2010-2011 in the case of Knorr Bremse India Private Limited v. ACIT [IT(TP)A No.5886/Del/2012 – order dated 23.08.2016 for A.Y.2008-2009], [ITA Nos.4023 & 4024/Del/2015 – order dated 28.06.2018 for A.Y.2009-2010 and 2010-2011]. As regards the payment for technology license agreement, the learned AR stressed the need for making such payments to the assessee's AE, namely, Bostik SA France. Further, it was submitted that the payments were

made towards fees for technology license and management fees were closely linked and integral part of the principal business of the assessee, namely, manufacture and sale of industrial adhesive and these transactions with the group must be considered in its entirety. It was further contended that in absence of comparable rates available in the public domain under the CUP method for similar license fees and management fee, the TNMM must be considered as Most Appropriate Method (MAM) to be benchmarked with other similar companies. It was stated that the TPO and the DRP have erred in determining ALP of the transaction at 'Nil' without following the due procedure in applying the CUP method as prescribed under Rule 10B(1)(a) of the Income-tax Rules, 1962. Further, it was submitted that there is no provision under the Rules and Act to construct a hypothetical CUP that too at 'Nil' value. It was stated that the particular areas where the assessee had received services rendered by the AE are detailed in exhibits submitted before the lower authorities. It was submitted that the TPO has ignored the evidences submitted by the assessee to prove its case that the services rendered by the AE is required. It was contended that the AO has wrongly come to a conclusion that no commercial benefit was received by the assessee and no cost benefit analysis was furnished. It was submitted that it is settled position of law that reasonableness of the expenditure has to be seen from the point of businessman and not that of the Revenue. In this context, the learned AR has relied on various judicial pronouncements.

14. As regards the payment of commercial services is concerned (IT services of Rs.19,97,000) (only for assessment year 2011-2012), it was stated that Bostik SA France had rendered IT support services to the assessee for which Bostik India had paid a sum of Rs.19,97,000 towards IT shared services. It was stated that the total expenses are shared based on number of IT users, i.e., head count. It was submitted that the IT services are centralized for the total group and distributed among all the divisions, subsidiaries and the associates, who use this facility. The various services are detailed in the written submission submitted. The copies of the invoices of the IT fees for Bostik SA France along with the working of cost of allocation is placed at page 241 to 243 of the paper book-1. It was finally contended that for identical facts for assessment years 2012-2013 and 2013-2014, the DRP has granted relief to the assessee and the Revenue has not filed an appeal before the Tribunal. In the light of the above submission, the assessee made the following prayer:-

(i) Commercial Services (IT Services) of Rs. 19,97,000 paid to the AE in AY 2011-2012 may please be allowed similar to the relief given by the Hon'ble DRP in the assessee's own case for the AY 2012-13 and AY 2013-14;

ii) Deleting the entire addition made by the TPO/AO/DRP by determining the a length price at NIL.

iii) Transactions relating to Technology License Fees, Management fees paid by the assessee to the AE's in each of the 3 years are so inter related and connected to the main business of the appellant consisting of manufacture, sale and export of adhesive products, that these transactions need to be aggregated and benchmarked using TNMM at entity level which is the most appropriate method in this instant case instead CUP. Furthermore since the TPO has already accepted the TNMM working of the appellant for transactions relating to

import and export of raw materials and finished goods and considering all submissions above, the Hon'ble Tribunal may be pleased to allow the appeal filed by the appellant.

15. The learned Departmental Representative has filed a brief written submission essentially reiterating the observations of the TPO and the DRP.

16. We have heard rival submissions and perused the material on record. The issue raised before the ITAT are as follows:-

Sl. No.	Transactions	AY 2013-14	AY 2012-13	AY 2011-12
1.	Commercial services (IT Support services)	Nil	Nil	19,97,000
2.	Technology License Renewal fee	52,58,825	54,21,169	56,40,000
3.	Management Fees	4,22,69,056	3,01,67,905	2,67,01,782
	Total	4,75,27,881	3,55,89,074	3,43,38,782

16.1 We shall first adjudicate the payments made for Technology License renewal fees and management fees. With respect to the above two payments to AE, the choice of method of benchmarking, the assessee has considered TNMM as MAM and the TPO has considered 'hypothetical CUP' by rejecting TNMM. The basis of rejection of the method of benchmarking was by placing reliance on the ruling of ITAT Delhi Bench in the case of Knorr Bremse. (Refer TPO's order at para 6.4 for A.Y.2011-12). The decision relied on by the AO / TPO was, however, carried in appeal to the Hon'ble High Court and the Hon'ble High Court vide judgment dated 06.11.2015 remanded the matter to ITAT for reconsideration, whether the transaction ought to be benchmarked separately

or whether TNMM could be adopted. The Delhi Bench of the ITAT in ITA No.5097/Del/ 2011 (order dated 31.05.2018) (Refer page 556 to 575 of the paper book-3 of A.Y. 2013-2014) ruled in favour of the assessee upholding TNMM for benchmarking license fee and Management Fee. Further, the ITAT Delhi Bench for subsequent years, i.e., A.Y. 2008-09, 2009-2010 and for A.Y. 2010-2011 (page 622 to 658 of the paper book-3) in the case of the same assessee, concluded that in the absence of proper benchmarking being available in the public domain for the CUP method, TNMM would be the most appropriate method for benchmarking of license fee and management fee.

16.2 The subject payments (Management fee and Technology License Renewal Fee) are incurred with respect to the manufacture of industrial adhesives. It is undisputed that the assessee is engaged only in the manufacture, and marketing and therefore dependent on its group companies for intellectual property, skills, expertise, know-how, specialization and technology which are developed in-house by the group in all core areas of its business, benefits also the assessee in the form of consistency in business practice, the economics of scale with regard to global sourcing. The process improvements are also passed on by the group companies to the assessee and same is evident from facts on record. The subject payments are duly supported by agreements which details the nature of services performed by the associated enterprises to the assessee company. Given the above factual background, we find that the management

fee and technology license fee are interlinked and interconnected with the business of manufacture.

16.3 The TPO /DRP in their order has expressed an inability to compute the ALP using CUP due to a lack of information in the public domain. Given the difficulty / impossibility in computing ALP using CUP and considering the close nexus between the manufacturing activity and payment of management / license fees, the method to be adopted for benchmarking the above international transactions by the assessee ought to be TNMM. The TPO is accordingly directed to consider TNMM as MAM for determination of ALP for payment of license and management fees.

16.4 The learned DR submitted that the order of the TPO as upheld by DRP has to be followed as the payments are made for continued services and the same has been availed by the assessee in the preceding years for which payments have not been made. He also highlighted that there is no change in the FAR profile of the assessee. It was also stated that the assessee has failed the service rendition test. Similarly, submissions were made with respect to payment of 'Technology license renewal fee' that the trademark was registered in 1986 and no payment was made towards it till A.Y.2011-2012. In this regard, we will follow the ruling of the coordinate bench in the case of Dresser Rand India Pvt. Ltd. in ITA No.8753/Mum/2010 wherein it had been held that *"the fact that the assessee has availed services in the preceding years without any consideration or not is irrelevant.*

'The AE may have given the same service on gratuitous basis in the earlier period, but that does not mean that ALP of these services are Nil'. The contention of the TPO that the assessee has not submitted the documentary evidence for the benefit received on account of services rendered is factually incorrect in view of voluminous evidences filed as a paper book. The assessee has also submitted a detailed note explaining the benefits received on account of payment of license and management fees. The TPO and the DRP have failed to consider the same in an objective manner. The Delhi High Court in CIT v EKL Appliances Ltd [2012] 24 taxmann.com 199 held that so long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purpose of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. The TPO and the DRP in the present case have summarily rejected the evidences and submissions of the assessee on the 'benefit test' without bringing on record any contrary material. The TPOs reasoning of constructing a hypothetical CUP based on the study of third party scenario is not envisaged as per the benchmarking exercise laid out in rule 10B. The TPO has also not explained the basis or reasoning in support of his impugned conclusion that no third party would make payment for services in a hypothetical CUP. The orders passed by the lower authorities therefore cannot be sustained.

16.5 As regards payments made for commercial service (IT support services), the issue pertains to only A.Y. 2011-2012 (see ground 8). The assessee has submitted that the

cost allocation is on the basis of a number of IT users, i.e., head count. Since centralized IT services of the TOTAL group are distributed among all divisions, subsidiaries and associates who use this facility, the basis of cost allocation is reasonable and cannot be faulted. In addition to listing the services availed, the assessee has also furnished copies of invoices evidencing payments to the AE. The AR for the assessee invited our attention to the DRP directions for the A.Y. 2012-2013 and 2013-2014, wherein relief has been allowed considering the above basis to be the scientific basis of cost allocation. We direct the TPO to consider the above evidence, and if the facts remain the same as in the case of subsequent years, allow appropriate relief to the assessee. It is ordered accordingly.

17. In the result, the appeals filed by the assessee are allowed for statistical purposes.

Order pronounced on this 10th day of May, 2022.

Sd/-
(S.Padmavathy)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 10th May, 2022.
Devadas G*

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