आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, VICE PRESIDENT
&
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA No.	निर्धारण वर्ष / A.Y.	अपीलार्थी / Appellant	प्रत्यर्थी / Respondent
863/Hyd/2016	2010-11	Menzies Bobba Ground Handling Services Private Limited, Hyderabad [PAN No. AAFCM0724P]	The Deputy Commissioner of Income Tax, Circle-16(2), Hyderabad
864/Hyd/2016	2011-12		

निर्धारिती द्वारा/Assessee by: Shri Darpan Kirpalani, AR
राजस्व द्वारा/Revenue by: Shri Kumar Aditya, DR

सुनवाई की तारीख/Date of hearing: 06/07/2023
घोषणा की तारीख/Pronouncement on: 18/07/2023

आदेश / **ORDER**

PER K. NARASIMHA CHARY, JM:

Aggrieved by the order(s) passed by the learned Commissioner of Income Tax (Appeals)-4, Hyderabad ("Ld. CIT(A)"), in the case of M/s. Menzies Bobba Ground Handling Services Pvt. Ltd., ("the assessee") for the assessment years 2010-11 & 2011-12, assessee preferred these appeals.

2. Brief facts are that the assessee is in the business of providing ground handling services in the nature of ticketing, checking, load control, messaging and standard communication, aircraft loading and unloading, cabin cleaning, aircraft ground support equipment, cargo transfers, baggage services etc. It entered into a Technical Service Agreement on 06/02/2008 with its Associated Enterprise (AE) Menzies Aviation PLC, UK to get technical advice and support in relation to its ground-handling business. For the years under consideration, the assessee paid a technical service fee of Rs. 4,01,28,000/- for assessment year 2010-11 and Rs. 3,37,53,136/- for assessment year 2011-12 to the AE.

3. Assessee, in its Transfer Pricing (TP) documentation, benchmarked the international transaction using Transactional Net Margin Method (TNMM). Learned Transfer Pricing Officer (learned TPO) rejected TNMM as the most appropriate method (MAM) on the ground that payment of technical service fee is in the nature of intangibles and has to be analyzed under Comparable Uncontrolled Price (CUP). He compared the amount of technical service fee paid with the royalty percentage of 8% as allowed to be repatriated by the Reserve Bank of India (RBI) prescribed under the automatic route of remittance, resulting in TP adjustments for both years. Learned Assessing Officer accordingly passed the final assessment orders for both the years.

4. Aggrieved by such an action of the learned Assessing Officer/learned TPO, assessee filed appeals before the learned CIT(Appeals). Learned CIT(A), however, rejected the appeals by placing reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of Kirby Building Systems India Limited vs. DCIT in ITA No. 1759/H/2012, for the assessment year 2008-2009, dated 19/11/2014, and enhanced the TP adjustment by considering 7.5% as the acceptable percentage of payment of technical service fee paid by another company as ALP for assessee's international transaction.

5. Assessee, therefore, filed these appeals. It is the argument of the learned AR that re-characterization of the transaction relating to payment for technical services as payment for royalty is not in accordance with law and the authorities below mistakenly followed the Press Note-2 (2003 series), but such a Press Note was superseded by the Press Note-8 (2009 series) dated 16/12/2009 wherein the cap on the payment of royalty / payments towards technical services was removed and allowing them under automatic route without any approval of Government of India. He, therefore, submits that there is no upper limit for such payment subsequent to the Press Note dated 16/12/2009. His further submission is that in assessee's own case for the assessment year 2009-10 and also for the assessment year 2012-13, the same amount of technical service fee pursuant to the technical services agreement was accepted by the Department, and no adjustment was proposed, but for the assessment years in between, the Department wants to take a different view, which is not permissible under law. His further submission is that when the comparable product or services were not to be found and brought on record by the learned TPO, it is not fair to hold the CUP as the most appropriate method. His further contention is that the payment in question in these appeals has direct impact on the profits and by comparing the profitability, the ALP could be determined and, therefore, TNMM is the most appropriate method. According to the learned AR, under Rule 10B(1)(e) of the Income Tax Rules, 1962 ("Rules") there is no stipulation prohibiting the use of TNMM in cases where the international transaction comprises payment of technical service fee.

6. Per contra, the Revenue contends that the services provided by the AE are not such in nature as to be provided by any specialized organization. Apart from this, according to the learned DR it is imperative for the assessee to produce necessary documents to establish the actual rendering of services and even in respect of that expenditure, which is

allowed under the other provisions of Act, if the transactions are not at arm's length according to learned TPO, then required adjustment has to be made. It is further contended by the learned DR that as rightly pointed out by the learned Assessing Officer, TNMM is not the most appropriate method and in respect of payment for technical services, CUP is the appropriate method. Learned DR submitted that under CUP, the price of the product or value of service can be evaluated whereas it is not possible under TNMM and more particularly in case of intangibles, the emphasis on the value of the transaction rather than the profitability of the entity.

7. In reply, learned AR submitted that neither the learned TPO nor the learned CIT(A) doubted the rendition of the services or their nature, but what all observed by the learned TPO or the learned CIT(A) is in respect of the most appropriate method and the comparables. He, therefore, submits that it is not open for the learned DR to blow off the scope of litigation at second appellate stage. He further submitted that international transactions are expected to be undertaken on an arm's length basis and learned TPO cannot probe into the necessity or benefits of such transactions. Both the counsel placed reliance on several decisions in support of their contentions.

8. We have gone through the record in the light of the submissions made on either side. Insofar as the rendition of services or their benefit is concerned, as rightly pointed out by the learned AR, neither the learned Assessing Officer nor the learned TPO nor the learned CIT(A) doubted either the actual rendition of services rendered by the AE or the utility of such services to the assessee. To this fact situation, the decision of the Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd., (2012) 345 ITR 241 (Del), is applicable on all fours and for the sake of ready reference, we deem it just an appropriate to extract the relevant portion here under,-

"20. In the case of Sassoon J. David & Co. Pvt. Ltd. v. CIT, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale

disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised."

9. Though several decisions are cited by the learned AR on this aspect, in view of the decision of the Hon'ble High Court, which stands undisturbed so far, it is not necessary to refer to all such decisions on the very same principle. Natural consequence is that in the absence of any doubt expressed by the learned Assessing Officer/learned TPO or learned CIT(A), it is not open for the learned DR to raise any new point as to actual rendition of services at this stage and all the decisions relied upon by him, namely, Akzonobel India (P.) Ltd. vs. Addl.CIT [2022] 145 taxmann.com 468 (Delhi), Yanfeng India Automotive Interior Systems (P.) Ltd. vs. JCIT [2023] 148 taxmann.com 332 (Ahmedabad – Trib), Akzo Nobel India Ltd. vs. Addl. CIT [2022] 137 taxmann.com 369 (Delhi – Trib), Gemplus India (P.) Ltd. vs. ACIT [2010] 3 taxmann.com 755 (Bangalore – Trib), Deloitte Consulting India (P.) Ltd., vs. DCIT [2012] 22 taxmann.com 107 (Mumbai) and Cranes Software International Ltd. vs. DCIT [2014] 52 taxmann.com 19 (Bangalore – Trib) have no application to the facts of the case.

10. Now coming to the issue of application of CUP as most appropriate method, observation of the learned TPO is that in the cases of intangibles, finding of comparables is difficult and, therefore, reliance has to be placed on the permissions by other Government agencies. Then the learned TPO referred to the Press Notes of RBI on Exchange Control Regulation to adopt 8% of the sales. On this aspect, the view taken by the Tribunal in the case of DCIT vs. M/s. Knorr Bremse India Pvt. Ltd., in ITA No. 3219/Del/2018 is relevant. In this case, the Co-ordinate Bench placed reliance on the decision of the Tribunal which was upheld by the Hon'ble Punjab & Haryana High Court vide order dated 10/12/2019 passed in ITA 8535/2018 (O&M), ITA 105/2019 (O&M) & ITA 104/2019 (O&M), to hold that when the learned TPO did not bring on record any instance where comparable services were provided to an independent enterprise in the recipient

market, the CUP method was not the most appropriate method, but on the contrary, TNMM method would be most appropriate method, because it was difficult to apply the CUP method or the cost plus method in such situation. The Tribunal, accordingly, held that the TNMM was the most appropriate method in the absence of a CUP which is applicable where the nature of the activities involved, assets used, and risk assumed are comparable to those undertaken by an independent enterprise.

11. No decision contrary to the view taken by the Tribunal in the case M/s. Knorr Bremse India Pvt. Ltd., (supra), is brought to our notice. Hence, respectfully following the said decision of the Co-ordinate Bench of the Tribunal, we hold the issue in favour of the assessee.

12. Apart from that, it is the submission of the learned AR that for F.Y. 2008-09 (A.Y. 2009-10), i.e., immediately preceding year, paid technical service fees of Rs. 4,01,28,000/- in line with the technical service agreement, which is the same as amounts paid for years under appeal viz, assessment year 2010-11 and assessment year 2011-12, and such transaction of payment of technical service fees in assessment year 2009-10 was accepted by the department, and no transfer pricing adjustments was made. So also in the succeeding year, i.e., assessment year 2012-13, no adjustment has been proposed with respect to the payment of technical service fees. Page No. 58A and 58D of the paper book are the assessment orders for the assessment years 2009-10 and 2012-13, which show that no adjustment is made on account of the international transaction and these orders substantiate the plea of the assessee that adoption of TNMM for this two years as the most appropriate method, was accepted This submission of the learned AR goes undisputed except stating that each assessment year is an independent one and the rule of resjudicata has no application to the proceedings.

13. It is true that resjudicata is not applicable to tax proceedings, but the Hon'ble Supreme Court held in many cases including Radhasoami Satsang vs. CIT [1991] 100 CTR 267 (SC) that it is not open for the Revenue to take various stands for various years and Rule of Consistency demands that in case of a particular assessee under identical circumstances, different views cannot be taken. This factor also goes against the Revenue. Therefore, based on the Rule of Consistency, rejection of the same for the years under appeal is unjustified.

14. Lastly, having gone through the Press Note No. 8 (2009 series, dated 16/12/2009) to be found at page No. 1 of the paper book, we are satisfied that the Government of India reviewed the extant policy and decided to permit payments for royalty, lumpsum fee for transfer of technology and payments for use of trade mark/brand name on the automatic route i.e., without any approval of the Government of India and there is no cap for such payment as was there in the earlier press note. The authorities below are, therefore, not correct in referring to the press notes to determine the arm's length price either at 8% or 7.5% of the sales.

15. Viewing from any angle, we find force in submissions advanced on behalf of the assessee and, therefore, find it difficult to sustain the orders of the authorities below. Consequently, we allow the grounds of appeal relating to transfer pricing matters for both the years.

16. Coming to the corporate tax issues, grounds No. 10 and 11 relevant for the assessment year 2010-11 relate to not allowing of set-off the brought forward business loss and double disallowance of the service tax. Learned CIT(A) directed the learned Assessing Officer to verify those issues and to adjust the set-off of brought forward business losses against the income of that assessment year and also to allow the service tax receivable. No grievance could be made out by the assessee on these aspects and hence they are dismissed.

17. Coming to Ground No. 12 for the assessment year 2010-11 and Ground No. 10 relevant for the assessment year 2011-12, issue relates to the TDS credit and the impugned order reads that such a ground was not pressed. Assessee cannot have a grievance in this respect also. Hence, such grounds are also dismissed.

18. In the result, both the appeals are partly allowed.

Order pronounced in the open court on this the 18th day of July, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Hyderabad,
Dated: 18/07/2023

TNMM

Copy forwarded to:

1. M/s. Menzies Bobba Ground Handling Services Private Limited, Passenger Terminal Building Level E, Rajiv Gandhi International Airport, Shamshabad, Hyderabad.
2. Deputy Commissioner of Income Tax, Circle-16(2), Hyderabad.
3. Pr.CIT-4, Hyderabad.
4. DR, ITAT, Hyderabad.
5. GUARD FILE.

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