आयकर अपीलीय अधिकरण, मुंबई " के" खंडपीठ

Income-tax Appellate Tribunal -"K"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member

आयकर अपील सं./I.T.A./2280/Mum/2016, निर्धारण वर्ष /Assessment Year: 2010-11

Dimension Data India Private Limited (Formerly known as Dimension Data India Limited) One BKC, B&C Wing, Level-17, G-Block, Plot No.C-65, Bandra –(East), Bandra Kurla Complex,Mumbai-400 051. **PAN:AAACD 2145 G**	Vs.	DCIT –Range- 6(2)(2) Room No.504, 5th Floor, Aayakar Bhavan, M.K. Road Church Gate, Mumbai-400 020.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Jayant Kumar- DR

Assessee by: Shri Vijay Mehta

सुनवाई की तारीख **/ Date of Hearing: 14.08.2017**

घोषणा की तारीख **/ Date of Pronouncement: 16.08.2017**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 25/2/2016 of the AO passed u/s. 143(3) r.w.s.144C (13) of the Act, passed in pursuance of the directions of Dispute Resolution Panel-I (DRP.-I) ,Mumbai, dated 31/ 12/2015,the assessee has filed the present appeal. Assessee-company ,engaged in the business of designing,developing,marketing and servicing of Tele-Communication, filed its return of income on 30/11/2011,declaring total income at Rs.14.70 crores.

2.First Ground of appeal is about Transfer Pricing(TP)adjustment of Rs.8.27crores.During the assessment proceedings,the AO found that the assessee had entered into International Transact - ions(IT.s) with its Associated Enterprises, (AE.s), that the value of IT.s was more than Rs.50 crores. He made a reference to Transfer Pricing Officer(TPO) to determine the Arm's Length Price (ALP)of the IT.s.During the TP proceedings,the TPO found that the assessee had entered into following IT.s

S.No.	Nature of International Transactions	A.Y. 2011-12 Amount (Rs.)	Segment
1.	Purchase of Goods for Resale	996,329/-	
2.	Sale of Goods	45,982,164/-	
3.	Global Account Management Service (Amt. Receivable)	643,318/-	
4.	Global Account Management Service (Amt. Payable)	12,288,416/-	
5.	Maintenance & Technical Services	49,831,419/-	

	Availed		**Distribution and Support Service Segment**
6.	Maintenance Services provided	83,215,751/-	
7.	Rendering of Advisory services in connection with marketing of products (Commission)	21,704,295/-	
8.	Allocation of Management	229,122,265/-	
9.	Allocation of Training Fees	15,349,345/-	
10.	Reimbursement of Expense Receivable	162,586,415/-	
11.	Reimbursement of Expense Payable	25,480,883/-	
12.	Technical Support Services Provided	65,685,460/-	**ITES**

He found that the assessee had used TNMM for Bench marking the items mentioned at Sl.No.11 of the above table,that the margin of the assessee was 9.87% as against comparables'- margin of 4.35%, that it was contended that margin was better than the margins of comparables and that transactions should be taken at arm's length.He further found that assessee had paid management fee of Rs.22.91 crores,that the issue of payment of management fee came up in the AY.2010-11,that the TPO ,in that AY.,had rejected the TNMM method in respect of management fee and had applied CUP method for the purpose of benchmarking, that the then TPO had held that payments made by the assessee under the head Finance and Specific Support services,Information technology services and Strategy execution and business development services were at arm,s length, that the then TPO had suggested adjustment with regard to three heads,namely,Corporate communication & brand management services,(ii)Human resources services and(iii)Sales and marketing services.He directed the assessee to show cause as to why similar additions should not be made for the year under consideration.After considering the detailed submissions,the TPO suggested total adjustment of Rs.8,39,98,906/- for the IT.s entered into by the assessee with its AE.The AO issued a draft assessment order to the assessee on 27/ 3/2015 as per the provisions of section 144C (1) r.w.s. 143(3).

3.Aggrieved by the aforesaid draft order the assessee filed its objections before the DRP-I.Before it,the assessee filed additional evidence with respect to proposed TP additions.The DRP remanded the evidences to the TPO for verification and comments.The TPO filed his remand report on 15/12/ 2015. On 22/12/2015 the assessee filed detailed reply against the remand report.

Before the DRP the assessee argued that the TPO had not apportioned the total management fee into different categories correctly, that it had received different types of services from the AE for which management fee had been paid,that number of the employees falling under three heads

constituted 78% of the total manpower employed by the AE,that the TPO should have accepted 78% of the total management fee of Rs.22.91 crores,that he should have restricted the adjustment only with respect to balance amount of 22% of Rs.22.91 crores i.e. Rs.5.04 crores,that the TPO had failed to appreciate the fact that the management fee was for bundle of services and the value of benefits assessee received was much higher than the payments made as management fees, that against the total management fees of Rs. 12.91 crores the benefit accrued to the assessee was to be Rs.64.22 crores on account of guarantee support and support in global procurement, that the order of the DRP for the AY. 2010 -11 was not efficacious for the year under consideration, that the TPO had erred in applying the CUP method, that he had wrongly treated some of the services provided by the AE to the assessee says shareholder's activities.

3.1. The DRP observed that the assessee had not filed any break up of fee charged by the AE against the different type of services claimed to have been rendered by AE,that during the TP proceedings the TPO had specifically raised the issue of breakup of price charged ,that the assessee had furnished the break up vide its letter dated 14/1/2015,that same was not giving complete picture, that the assessee was a distributor of Cisco products,that the AE was obtaining the same on bulk basis from Cisco,that when goods were procured on a global basis the benefit to the assessee and the benefit to other AE's were on account of joint purchase of bulk quantities, that it was traceable to the membership of the assessee in the multinational group,that the gains in the purchase price, if any,was not on account of any concerted action of the AE but was on account of the membership of the assessee in the multinational group,that the benefits were arising out of group synergies,that at the most the AE could recover the salary cost plus overheads and arm's length markup,that the so-called gains of Rs. 56.08 crores could not be ground to charge Rs. 22 crores as fees of employees who were involved in negotiation on behalf of the assessee, that the assessee had claimed that the AE had negotiated on its behalf to Cisco, that the compensation to the AE should have to be seen in respect of the negotiation carried out by it, that the reduction in price offered by the seller could by no stretch of imagination be treated as a concession for the negotiating function performed by the AE, that the corporate guarantee support provided by the AE was on account of the membership of the assessee in the multinational group, that there was no evidence of the AE extending guarantee in favour of the assessee separately, that it had not produced any evidence of any guarantee commission charges paid by the AE. With regard to the argument of the assessee of providing a bundle of services,

the DRP stated that there was no warrant to arrive at the contention that price paid by it had to be evaluated on a global basis and not on an individual basis. It further observed that the assessee was confusing the whole issue by stating that it could obtain favourable purchases term or favourable credit terms to the extent of Rs. 64 crores, that profits arising out of centralised purchasing function had to be passed onto the concerned entity, that the person performing the purchase function was at best entitled to cost plus markup remuneration,that the assessee was directed to provide the particulars of time devoted by the employees of the AE to provide the service to it along with their cost,that it had failed to produce the requisite information, that it was persisting on justifying the fees paid on the basis of the said function, that the assessee has failed to prove that facts of the year under consideration were different from the facts for the earlier year, that the order of the DRP for the last assessment year was very much relevant to decide the issue on hand,that the assessee had neither justified the markup of 10% charged by the AE over and above its cost nor had it shown that the cost incurred by the AE were in fact in respect of services actually rendered,that the transaction of Rs.21 crores, in the overall profitability in respect of turnover of Rs.400 crores,was too small to arrive at any conclusion, that it attempted to aggregate the meagre AE transaction with the substantial non-AE transaction and to apply the TNM method was not in accordance with the law,that the TPO had rightly rejected the method, that intra group services had to be benchmarked separately, that the TPO had rightly applied the CUP method, that the evidences produced by the assessee indicated that some incidental benefit might have been accrued to it,that an Indian company could not charge the AE for some incidental benefit that the AE might derive out of the activities performed,that the TPO had been quite liberal in quantifying the number of hours and determining the ALP, that he had allocated a sum of Rs. 9.16 crores under the head total management fee. Finally,the DRP held that a further allowance of Rs. 12.75 lakhs was to be allowed to the assessee,that the AO should restrict the addition of Rs. 8.27 crores as against Rs.8.39 crores,as suggested by the TPO.

4.Before us,the Authorised Representative(AR)argued that the assessee had entered into an agreement with its AE to avail certain services,services were not of water tight compartment nature, that some of them were over-lapping,that the agreement with the AE was not doubted by the departmental authorities, that it provided a bundle of services, that the TPO and DRP artificially divided into two segments,that in the earlier years payments made by it to its AE were allowed by the AO without making any TP adjustments, that the payments were made for

various services and not for specific services, that payments made in pursuance of an agreement for availing services had to be allowed, that no TP adjustment was required to be made. He referred to the chart giving details of management fee paid to the AE and the TP adjustment made.Referring to the agreement for provision of management general support and administra - tive services,he stated that assessee was to be rendered services as per the schedule 1 (page 8 of the paper book),that the TPO had allowed the expenditure incurred for three services out of total six services. He relied upon the cases of Merck Ltd.(389 ITR 70) and Nielsen (India) Private Ltd. (ITA/8799/Mum/2012, dated 27/05/2016).The Departmental Representative (DR) contended that the assessee had availed only three services, that the assessee had not provided details called for by the TPO,that the agreement itself divided the services into six segments, that the assessee had not explained as to how the services were charged. He relied upon the cases of Knorr-Bremse India (P.) Ltd. (63 taxmann.com 186) and Cranes Software International Ltd. (52 taxmann.com 19).

5.We have heard the rival submissions and perused the material before us.We find that the assessee is part of the dimension Data Group and is a subsidiary of Dimension Data Asia Pacific Pte.Ltd., that the Group is a dealer for CISCO Networking Products, that as per the agreement entered into between the assessee and its AE the assessee was to be rendered services by its AE under ten different heads, that the assessee had availed certain services from its AE as per the agreement and had made payment accordingly, that the AE had similar type of agreements with other entities of the group,that the allocation key used for charging management fee to various entities of the group by the AE was turnover of an entity vis-a-vis turnover of the entire Asia-Pacific group for the year under consideration.We are of the opinion that the basic issue to be decided in the matter before us is as to whether the payment made by the assessee under the head management service should be allowed or not. It is a fact, assessee had, during the year under consideration,not availed services under the heads (i)Corporate communication & brand management services,(ii)Human resources services and(iii)Sales and marketing services. It is also a fact that as per the agreement the assessee was entitled to avail all the services. We find that similar issue has been deliberated upon and decided by the Hon'ble Bombay High Court in the case of Merck Ltd.(supra).In that matter the assessee had entered into an agreement with its AE.s to provide technical know-how or consultancy in 12 fields,as indicated therein,for a consideration of Rs.1.57 crores. During the previous year relevant to the AY.2003-04, the

assessee availed of services of its AE.s only in three out of twelve fields listed in the agreement.The TPO proceeded to hold that the entire consideration of Rs.1.57 crores was attributable to the three technical services which the assessee availed of and held that no consideration was payable in respect of nine services provided for in the agreement.Thus the entire payment of Rs. 1.57 crores was attributable only to the three services availed out of the twelve listed in the agreement.He further held that only Rs. 40 lakhs could be considered as arm's length price attributable to three services and made adjustment of Rs. 1.17 crores resulting in its addition to the taxable income. The FAA confirmed the order of the AO.The Tribunal held that the AE was obliged to provide technical assistance in the 12 areas listed in the agreement and it was for the availability of the assistance in all twelve areas that the consideration was paid and thus, no adjustment was required. Dismissing the appeal filed by the department the Hon'ble High Court held as under:

> *"...(c)The grievance of the Revenue before us is that services only in three areas had been availed of by the respondent-assessee from its associated enterprises out of the twelve areas listed in the agreement. Therefore, the consideration paid to the associated enterprises is only attributable to the services received/availed.*
> *(d) The finding of the Tribunal that the Transfer Pricing Officer has not applied any of the method prescribed under section 92C of the Act to determine the arm's length price in respect of fees for technical know-how/ consultancy fee paid by the respondent-assessee to its associated enter prises is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where the respondent-assessee had availed the services, no exercise to bench mark the same with similar transactions entered into between independent parties was carried out before holding that the arm's length price in the three areas availed of is Rs. 40 lakhs, is not disputed. The finding of the Tribunal that the agreement for technical know-how/consultancy was in respect of all the twelve services and the respondent-assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose. We find the agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the respondent-assessee in the present facts was not justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the arm's length price in respect of fees for technical services payable by the respondent-assessee to its associated enterprise, makes the entire transfer pricing agreement unsustainable in law.*
> *(e) In view of the above, the finding of fact arrived at by the Tribunal that Rs. 1.57 crores paid by it to its associated enterprises is in respect of its right to avail and the obligation of the associated enterprises to provide technical assistance in any of the twelve services listed out in the technical know-how agreement entered into between the respondent-assessee with its associated enterprises is not shown to be perverse. The view taken by the Tribunal in the present facts is a possible view."*

Here,we would also like to refer to the matter of AC Nielsen (India) Private Ltd.(supra).Relevant portion of the order reads as under:

*"**2.2.**The TPO found that during the year the assessee had paid Rs. 11.14 crores to its AE,that the said payment was made in view of business support services received from the AE. It was claimed that above-mentioned payment was in the nature of intra-group services payment. He found that the first was signed on 02/06/203 and its specified a Mark up of 5% in accordance with Article 4, whereas the second agreement was signed on 28/11/2007 and was stated to be effective from 01/01/2007.He found that the assessee had paid Euro 113315+ 339945+USD103385 under the head Regional GSA(Business Support Services) for Client Services.He further found that under the heads Finance(Euro 19,000+ 5700+ US dollar 45, 713) and IT (Euro 48, 851+ Euro 146552 plus US dollar 18,759)the assessee had made payments to its AE.*

The TPO directed the assessee to justify the ALP in respect of the GSA charges paid to its AE and to submit the gross allocation base, computation of allocation base, key of allocation and the basis of the key of allocation.The TPO examined the regional expenses allocation of Rs.9.01 crores.After considering the submissions of the assessee dated 25/09/2010, 11/10/ 2010, 12/ 10/ 2010 and 19/ 10/2010,the TPO held that the IT was based upon components of costs,that the assessee had not disclosed the basis for the allocation,that no details of special marketing support was brought on record to show that specialist marketing and complication support service have been provided by the AE to the taxpayer, that the cost allocation included expenses on regional information technology team consisting of hundreds of employees located in New Zealand Australia and India and 140 people in other countries, that the assessee had not brought any evidence on record regarding employees located in India, that no customised research was conducted for the year for the assessee by the regional centre, that it had paid certain amounts towards business support services to its AE's, that the total allocation could not be accepted to be India specific,that the submission of intra-group invoices could not be construed as sufficient complia -nce to show that payments made for GSA services were at arm's length, that actual working for general costs incurred and its components were not produced for verification, that it was not proved that the assessee had really benefited out of the services of the regional team, that no one would pay any amount without knowing the actual basis and also the actual allocation figures in a third-party situation,that the assessee had its own client/server system,that total allocation could not be accepted to be India specific. He held that adjustment had to be made in the TP order.Accordingly,he made an adjustment of Rs. 4.50 crores (50% of Rs. 9.01 crores)."

***2.8.**It is not denied by the TPO/DRP that expenses incurred by ACNielsen Corporation were not allocated to all the group entities on the basis of revenue.The assessee had made a claim that ACNielsen Asia Pacific has prepared a master file to determine an arm's length mark-up to be charged for the intra-group services.Both the authorities has not commented upon the said evidence and alleged errors,if any,of the method approved by the Group.In short,the assessee had proved with documentary evidences that charges paid by the assessee were at arm's length and that other arm's length entity was prepared to pay for such services in comparable circumstances.*

***2.9.**We are not agreeable to the proposition,advanced by the TPO/DRP,that when expenditure is incurred for the benefit of the group as a whole no charge of such expenditure is required. Services rendered by AE help not only the group as a whole,but also helps others.Therefore, there is nothing wrong in charging cost for such services.As the cost incurred by the AE had been allocated to all the group companies on the basis of the revenue and detailed workings was shared with the TPO and DRP,so,it cannot be held that requisite information was not made available.It is other thing that both of them did not take notice of the details filed,as discussed earlier.We are unable to understand the logic behind the argument of both the authorities that if the assessee had its own client service team then why costs of client service teams was included. According to us,it is gross violation of the 'Laman-Rekha' drawn by the basic and fundamental taxation jurisprudence.No authority is required to hold that the jurisdiction of the AO u/s.37 of the Act and that of the TPO u/s.92CA are distinct.The authority of the TPO is to conduct a TP analysis to determine the ALP and not to determine whether or not there is a service from which*

the assessee benefits. So,when the TPO holds that the assessee did not benefit from these services it amounts to disallowing expenditure.Such a decision is outside the authority of the TPO.The decision as to whether the expenditure was "laid out or expended wholly and exclusively for the purposes of the business" is a fact determination or verification and that exercise is to be undertaken by the AO.That determination is not and cannot be made by the TPO.The Hon'ble Delhi High Court in the case of Ekl Appliances Ltd.(345 ITR 241) has held as under:

> "It is not open to the Transfer Pricing Officer to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. It is entirely the choice of the assessee as to from whom it contemplates to source its technology or technical know-how and as to what steps should be taken to meet the competition prevalent in the market and to stave off the competitors. This is the domain of the busi nessman and the Transfer Pricing Officer has no say in the matter. As held by the Supreme Court in S. A. Builders Ltd. v. CIT (Appeals) [2007] 289 ITR 26 (SC) the Revenue cannot justifiably claim to place itself in the arm chair of businessman or in the position of the board of directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case.
>
> 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.....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 Transfer Pricing Officer 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 Transfer Pricing Officer is not contemplated or authorised."

In the case under consideration actually the TPO had DRP have completely taken over the role of the AO.Instead of deciding the ALP of the IT.s reported by the assessee,they have decided the issue of allowability of expenditure incurred by it.Therefore,in our opinion,their order are not in accordance with the provisions of the Act…."

From the above,it is clear that while deciding the ALP of umbrella of services what has to considered is the right of assessee that it is entitled to avail.If it avails only a few services out of the boquet of services the TPO should not reject the TP study of the assessee on the ground that it did not avail all the services or the majority of services as mentioned in the agreement.Availing selected services from a composite agreement is sufficient for claiming the deduction.For rejecting the TP study of the assessee the TPO should prove that price shown by the assessee from the services availed was not at arm's length.Non-availing of services cannot be the basis for rejecting the claim.These are two different things and are fundamentally separate.In the case under consideration the TPO or the DRP has not stated that payment made by the assessee to its

AE were not at Arm's length.Therefore,respectfully following the above mentioned cases,we decide the first ground of appeal in favour of the assessee.

As far as cases relied upon by the DR are concerned,we would like to state that both of them do not deal with the issue.Dispute before us,as stated earlier,is as to whether any TP adjustment can be made if an assessee avails only certain services out of the bunch of services mentioned in an agreement specially when the TPO does not doubt the arm's length price of availed services. Both the cases are not helpful to decide the issue before us.

6.Second ground of appeal deals with addition of Rs.31.50 lakhs on account of non reconciliation of TDS statement and the computation of income.Before us,the AR stated that due to mistakes committed by some of the deductors of tax mismatch of income had occurred,that proper verification was not done by the AO in that regard.The DR stated that the issue could be decided on merits.In our opinion,in the interest of justice matter should be remanded back to the file of the AO for fresh adjudication.He is directed to afford a reasonable opportunity of hearing to the assessee.The assessee would submit all the necessary documents to reconcile the TDS statement with computation of income.Second ground of appeal is decided in favour of the assessee,in part.

As a result appeal filed by the assessee is partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतःमंजूर की जाती है.

Order pronounced in the open court on 16th,August, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 16 अगस्त, 2017 को की गई।

Sd/-	Sd/-
(**राम लाल नेगी / Ram Lal Negi**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 16.08 .2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**