

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES : I-1 : NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT  
AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA Nos.3419 & 6571/Del/2016 & 1112/Del/2014  
Assessment Years : 2008-09, 2009-10 & 2012-13

Atotech India Pvt. Ltd.,  
66 KM Stone, NH-18,  
Delhi Jaipur Highway,  
Vill. Sidhrawali,  
Gurgaon.

Vs. ACIT,  
Circle-II,  
Gurgaon.

PAN: AACCM0338G

(Appellant)

(Respondent)

Assessee By : Shri Percy Perdiwala, Sr. Advocate &  
Shri Divyanshu Agrawal, Advocate  
Department By : Shri Kumar Pranav, Sr. DR

Date of Hearing : 09.05.2018

Date of Pronouncement : 11.05.2018

ORDER

PER R.S. SYAL, VP:

These three appeals filed by the assessee relate to assessment years  
2008-09, 2009-10 & 2012-13. Since some of the issues raised in these

appeals are common, we are, therefore, disposing them by this consolidated order for the sake of convenience.

Assessment Year 2008-09

2. The only issue raised in this appeal is against the confirmation of addition of Rs.4,55,25,620/- by the ld. CIT(A) on account of transfer pricing adjustment in the international transaction of 'Management group cost.'

3. Briefly stated, the facts of the case are that the assessee is a wholly owned Indian subsidiary of Atotech B.V., a company incorporated in the Netherlands. The assessee is engaged in the business of manufacturing and marketing of specialty chemicals and compounds used for general metal finishing and production of printed circuit boards. The assessee reported six international transactions in Form No.3CEB. The Assessing Officer (AO) made reference to the Transfer Pricing Officer (TPO) for determining the arm's length price (ALP) of the international transactions. The assessee disclosed, *inter alia*, an international transaction of 'Cost sharing expenses paid' with two sub-transactions, viz., 'Management group cost' at

Rs.4,55,25,620/- and 'R&D assistance cost' at Rs.5,53,55,453/-. The Transactional Net Margin Method (TNMM) was used by the assessee as the most appropriate method on entity level with Profit level indicator (PLI) of Operating Profit to Sales for demonstrating that all its international transactions were at ALP. The TPO did not dispute the ALP of any of the international transactions except 'Cost sharing expenses.' Here also, he concurred with the assessee's determination of the ALP of 'R&D assistance cost.' He did not accept the 'Management group cost' declared at Rs.4,55,25,620/- as at ALP. On being called upon to justify the ALP of 'Management group cost', the assessee contended that it participated in Costs Contribution Agreement (CCA) and furnished necessary details in support of its determination. The TPO held that the international transaction of 'Management group cost' with the transacted value of Rs.4.55 crore was required to be separately benchmarked by segregating it from the entity level ALP determination done by the assessee. He invoked the Comparable Uncontrolled Price (CUP) Method for determining the ALP of the transaction. He noticed that the assessee's bifurcation of total costs of this international transaction into four sub-heads, namely, 'Product

management’, ‘Network administration’, ‘Management cost’ and ‘Regional costs sharing’ , was not properly substantiated. He proceeded to carry out the cost benefit analysis and, ultimately, came to hold that the nature of services claimed to have been received by the assessee under this international transaction were either not received or were duplicate in nature. In view of the no cost benefit analysis carried out by the assessee with regard to the purported receipt of services, the TPO held that no independent party would have made any payment in uncontrolled circumstances. Applying the CUP method, he determined Nil ALP of the international transaction as against the transacted value of Rs.4.55 crore declared by the assessee. This resulted into an addition for the equal sum by the Assessing Officer. The Id. CIT(A) echoed the assessment order in making the above addition by holding that it was not a case of CCA, but, payment for receipt of intra-group services; CUP method was applicable; and no benefit was demonstrated to have been received as a result of such services. The assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and perused the relevant material on record. The authorities below have determined Nil ALP of the

international transaction of 'Management group cost' on the ground that either no services were obtained or it was a case of duplication of services. Further, the authorities went on to apply the 'benefit test' for determining the ALP of such services at nil.

5. The Hon'ble jurisdictional Punjab & Haryana High Court in *Knorr-Bremse India P. Ltd. vs. ACIT (2016) 380 ITR 307 (P&H)* has held that the question whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. A view to the contrary would then raise a question as to the extent of profitability necessary for an assessee to establish that the transaction was at an arm's length price. A further question that may arise is whether the arm's length price is to be determined in proportion to the extent of profit. Thus, while profit may reflect upon the genuineness of an assessee's claim, it is not determinative of the same. It went on to hold that business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do, result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into

*bona fide* or not or whether it was sham and only for the purpose of diverting the profits.

6. Reverting to the facts of the extant case, it is found that the assessee has placed on record a list of services received under the international transaction of 'Management cost services', a copy of which is available on pages 18 to 21 of the paper book. Certain other details of technical materials received from the AEs during some of the workshops attended by the employees of the assessee, has also been placed on pages 94 to 650 of the paper book. Under these circumstances, it is difficult to approve the stand taken by the authorities that the assessee did not avail any services. We, therefore, hold that the assessee did receive some services and the applicability of 'benefit test' cannot be countenanced in view of the judgment of the Hon'ble jurisdictional High Court in the case of *Knorr-Bremse India P. Ltd.* (supra).

7. There is a further dispute as to whether the assessee made payment of Rs.4.55 crore under CCA or for intra-group services. Whereas, the assessee claimed it to be CCA, the Id. CIT(A) has held it to be intra-group

services. In this regard, it is observed that the assessee entered into the agreement, pursuant to which such payment was made, in an earlier year and started making payment, *inter alia*, for 'Management group cost.' The TPO proposed transfer pricing adjustment in respect of such an international transaction in preceding and succeeding years as well. On the question as to whether the payment of 'Management group cost' was under CCA or for intra-group services, the Tribunal, vide its order (in ITA No.6680/Del/2015) dated 12.08.2016 for the assessment year 2011-12, has restored the matter to the file of TPO for determining if it was a case of CCA or intra group services. Relevant discussion has been made in para 11 of the order, whereby it has been observed that: 'The ld. TPO is also required to examine the nature of services whether there is cost sharing arrangement or intra group services with respect to various agreement.' There is no adjudication on this issue by the Tribunal in its order for the A.Y. 2007-08. Since the matter has already been restored by the Tribunal for determining if it is a case of CCA or for intra-group services and the relevant Agreement continues to remain the same for the instant year as well, we are of the opinion that it would be just and fair if the impugned

order holding payment of 'Management group cost' as intra-group services instead of CCA, is set aside and the matter is restored to the file of Assessing Officer/TPO for deciding it in conformity with the decision taken pursuant to the directions given by the Tribunal in the other year.

8. Coming to the most appropriate method, it is found that the assessee aggregated all the international transactions and applied the TNMM on entity level. On the other hand, the TPO came to hold that the CUP was required to be applied for determining the ALP of the international transaction of 'Management Group cost', which view was accorded imprimatur by the Id. CIT(A).

9. The Hon'ble jurisdictional High Court in *Knorr Bremse India (P) Ltd.* (*supra*) considered the question of aggregation of international transactions. Their Lordships held that several transactions between two or more AEs can form a single composite transaction if they are closely linked transactions and the onus is always on the assessee to establish that such transactions are part of an international transaction pursuant to an understanding between various members of a group. The Hon'ble High



Court observed that in case of a package deal where each item is not separately valued but all are given a composite price, these are one international transaction. It went on to hold that where a number of transactions are priced differently but on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e. either take all or leave all), then it is also an international transaction. But it will be on the assessee to prove that although each is priced separately, but they are provided under one composite agreement. It still further held that each component may be priced differently also, but it will have to be shown that they are inextricably linked that one cannot survive without other. Merely because purchase of goods and acceptance of services lead to manufacture of final product, it does not follow that they are dependent transactions.

10. Adverting to the facts of the instant case, we find that the international transactions combined by the assessee for showing them at ALP cannot be aggregated as they do not satisfy the above criteria laid down by the Hon'ble jurisdictional High Court in *Knorr Bremse India (P) Ltd. (supra)*. Firstly, there is no package deal and the international transaction in question is separately valued. Secondly, despite the fact that the

international transactions are priced differently, there is nothing to show an understanding that the pricing was dependent upon the assessee accepting all of them together. Besides, the assessee has not shown any inextricable link between these transactions as one not surviving without the other. We, therefore, uphold the view point of the TPO in rejecting the aggregation approach adopted by the assessee.

11. Having held that the international transactions of 'Management Group cost' should be separately benchmarked, the next crucial question is the determination of the most appropriate method. It is seen that the assessee applied the TNMM as the most appropriate method on an aggregate basis, which has been rejected by the TPO. Obviously, the TNMM applied by the assessee simply establishes the aggregate price paid for independent international transactions to be at ALP. Since the international transaction of 'Management Group cost' has been held above to be separate, the determination of its ALP also needs to be done distinctly.

12. Insofar as the Tribunal orders in the case of the assessee on the applicability of the most appropriate method are concerned, we find that as

against the assessee applying the TNMM, the TPO applied the CUP method for determining the ALP of the international transaction in the immediately preceding year. The Tribunal approved the CUP as the most appropriate method, but on the basis of a concession given by the assessee as has been recorded therein. The Id. AR did not give any concession for the applicability of the CUP as the most appropriate method for the year under consideration. We further find from the order of the Tribunal for the assessment year 2011-12 that there is no adjudication on the applicability of a particular method as most appropriate for determining the ALP of the international transaction.

13. By now, it is fairly settled through a catena of decisions that the CUP is the most appropriate method to determine the ALP of an international transaction because it seeks to compare the price charged or paid for property transferred or services rendered, provided proper comparables are available. It is under this method alone that the price charged or paid is directly compared with the price charged or paid in an uncontrolled comparable transaction. The remaining four specific methods seek to make comparison of the price charged or paid indirectly through the medium of

normal profit arising in a comparable uncontrolled transaction. Further, the CUP method is a transaction specific method which strives to determine the ALP of an international transaction on a micro level, thereby lending more credibility to the ALP of a transaction.

14. Considering the decision in *Knorr-Bremse (supra)* and the view taken by the Tribunal in assessee's own case as discussed above, we set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction of 'Management Group cost', primarily, under the CUP method. While applying the CUP method, it is always obligatory to bring on record some comparable uncontrolled instance as per the mandate of rule 10B(1)(a)(i). Not even a single comparable instance has been brought on record by the TPO in his order to facilitate comparison between the price paid by the assessee *vis-à-vis* that paid by other comparables in similar uncontrolled circumstances. It was on account of his having canvassed a view that either the services were not received by the assessee or were duplicate in nature. Such a view has been overturned by us in earlier paras. Under these circumstances, we are left with no option but to set aside the impugned

order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction, primarily, under the CUP method. In case, the TPO finds that the CUP method cannot be applied either due to non-availability of the relevant data or for some other genuine reasons, he is free to apply any other appropriate method for a fresh determination of the ALP of the international transaction of 'Management Group cost'. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings.

15. In the result, the appeal is allowed for statistical purposes.

Assessment year 2009-10

16. This appeal by the assessee is directed against the final assessment order dated 07.01.2014 passed by the Assessing Officer u/s 143(3) read with section 144C of the Act. The only dispute in this appeal is against the addition of Rs.5,34,99,556/- made by the Assessing Officer in the international transaction of 'Management group cost.'

17. Both the sides are in agreement that the facts and circumstances of this appeal are *mutatis mutandis* similar to those of assessment year 2008-

09. Following the view taken hereinabove, we set aside the impugned order and remit the matter to the file of Assessing Officer/TPO for a fresh determination of the ALP of the international transaction of 'Management group cost' in accordance with the observations made in our order for assessment year 2008-09 above.

18. In the result, the appeal is allowed for statistical purposes.

Assessment year 2012-13

19. This appeal by the assessee is directed against the final assessment order passed by the Assessing Officer u/s 143(3) read with section 144C of the Act. The assessee is aggrieved against the transfer pricing addition of Rs.21,27,64,079/- made in the in the international transaction of 'R&D and Management cost sharing.'

20. Here, again, both the sides agree that the facts and circumstances of this appeal are similar to those of preceding years dealt with above except that in this year the TPO, apart from determining Nil ALP of the international transaction of payment of 'Management group cost', also recommended transfer pricing adjustment in respect of 'R&D assistance

cost.’ The Tribunal has passed an order for the immediately preceding year restoring the fresh determination of the ALP of ‘R&D assistance cost’ and ‘Management group cost’ to the file of the AO/TPO. Following the view taken in such an order of the immediately preceding year and the two earlier years dealt with hereinabove, we set aside the impugned order and remit the matter to the file of Assessing Officer/TPO for a fresh determination of the ALP of the international transaction of ‘Management group cost’ and ‘R&D assistance cost’ in accordance with the observations made in our detailed order for the assessment year 2008-09 above.

21. In the result, the appeal is allowed for statistical purposes.

The order pronounced in the open court on 11.05.2018.

Sd/-

[LALIET KUMAR]  
JUDICIAL MEMBER

Sd/-

[R.S. SYAL]  
VICE PRESIDENT

Dated, 11<sup>th</sup> May, 2018.

dk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.