IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM & SHRI VIKAS AWASTHY, JM

ITA No. 6201/Mum/2018
(Assessment Year: 2014-15)

Hathway Cable and Datacom Ltd., Rahejas, 4th Floor, Corner of main Avenue & V.P. Road, Santacruz (West), Mumbai.	Vs.	DCIT-12(2)(2), 1st Floor, Aayakar Bhavan, Mumbai.
PAN/GIR No.AAACC 6814 B		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Vijay Mehta (AR)
Revenue by	Shri Anand Mohan (CIT-DR) & Ms. Nillu Jaggi (Jt.CIT)
Date of Hearing	**10/12/2019**
Date of Pronouncement	**10/01/2020**

आदेश / O R D E R

PER: R.C. SHARMA, A.M.

This is the appeal filed by the assessee against the direction of the Dispute Resolution Panel-1(WZ) (DRP), Mumbai dated 27/08/2018 U/s 144C (5) of the Income Tax Act, 1961 (in short, the Act) for the A.Y. 2014-15, which was given effect by the A.O. passing order U/s 144C(13) of the Act dated 22/09/2018. In this appeal, the assessee has raised following grounds:

"1. Payment of placement charges:

1.1. On the facts and in the circumstances of the case and in law, Hon'ble Dispute Resolution Panel / Transfer Pricing Officer/ Assessing Officer erred in retaining the adjustment to the extent of Rs. 6,96,01,120;

1.2. On the facts and in the circumstances of the case and in law, Hon'ble Dispute Resolution Panel erred in rejecting the supplemental benchmarking without providing any cogent reasons;

1.3. On the facts and circumstances of the case and in law, Hon'ble Dispute Resolution Panel erred in holding that the Assessee has rendered marketing services, incurred additional cost, and performed additional functions in negotiating placement charges on behalf of its related parties;

1.4. On the facts and in the circumstances of the case and in law, Hon'ble Dispute Resolution Panel erred in determining the arm's length price at 10% of the gross amount distributed to Associated Enterprise without following any of the prescribed methods/process;

1.5. Without Prejudice to the above ground, the Hon'ble Dispute Resolution Panel failed to note that the Appellant has retained arm's length consideration as determined in ground no. 1.4 and no further adjustment is warranted;

1.6. On the facts and in the circumstances of the case and in law, having held that the allocation of channel placement is fair and proper, the Hon'ble Dispute Resolution Panel erred in holding that the Appellant has rendered services of marketing of the channel placement rights and should have charged 10% of the amount distributed as arm's length consideration and thereby travelling beyond the scope of Section 92BA(i) r.w.s. 40A(2)(b).

2. Applicability of provisions of Specified Domestic transaction:

2.1. On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel-I, Mumbai erred in not appreciating the fact that the provisions of Section 92BA(i) are omitted and not repealed by the Finance Act 2017.

3. Reference to the Transfer Pricing Officer (`TPO') under section 92CA of the Act.

3.1. On the facts and in the circumstances of the case and in law, the Id. AO erred in making a reference to the Id. Transfer

Pricing Officer by mechanically following the directions of the Id. Principle Commissioner of Income tax u/s 263 of the Act, which is not mandate of Section 92CA of the Act, thereby making the reference and the transfer pricing order bad in law.

3.2. Without prejudice to the above grounds and on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel erred in confirming the action of the learned AO in not stating reasons to show that any of the conditions mentioned in clauses (a) to (d) of Section 92C(3) of the Act were satisfied before making an adjustment to the total income of the Appellant;

3.3. Without prejudice to the above grounds and on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel erred in confirming the action of the learned AO in not demonstrating the motive of the Appellant, to carry out transactions to reduce the taxable profits by manipulating the prices of its Specified Domestic transactions, either at the stage of invoking or initiating the assessment or at the stage of framing the assessment.

Each of the above Grounds of Appeal are without prejudice to each other.

The Appellant craves leave to add, amend, delete, rectify, substitute, modify, or otherwise, all or any of the aforesaid grounds or add a new ground(s) at any time before or during the hearing of the above appeal."

2. Rival contentions have been heard and record perused. Even though, 11 grounds have been taken by the assessee but the crux of the issue revolves around the decision of DRP for upholding 10% of the ad hoc addition made on account of income distributed for the services rendered for marketing of channel placement rights. Facts in brief are that the assessee company operates as "multi system operator" (MSO) in distribution of television channels through analog and digital cable

distribution network and internet services through cable. The assessee company operates as last mile cable operator for certain territories of the country. Over the years, it also acquired stake in other entities by subscribing to majority shares therein. These entities fall within the meaning of related parties as defined in Section 40A(2)(b) of the Act. These entities are hereinafter referred to as "Related Parties" (RPs). These RPs of the company operate as last mile cable operator in their respective territories which are not within the operating area of the assessee company. As such the assessee company and RPs together, as a group, operate over a large part of the country. The assessee company has adopted a 'Pooled Model' under which it negotiates and settles with the broadcasters for their channels or bouquets of channels. It acts as a principal negotiator (pooling entity) in the discussions and negotiations with the broadcaster/distributor and in settlement of the terms for the group as a whole. One of the revenue streams earned by the assessee is placement charges which are the amount paid by the broadcasters for placing their channels at preferred positions. Such revenue is shared by the assessee with the RPs on the basis of their subscriber base. In negotiating such placement charges also, the assessee company acts on the pooled model and negotiates the terms based on the total number of subscribers of the assessee company as well as the RPs. By projecting higher number of subscribing households of the group as a whole, the

assessee company is in a position to bargain for a significantly higher amount of placement charges in comparison to what the company and each related party would have got, had they negotiated separately on the basis of their own subscriber base. The placement fees as determined between the company and the broadcaster on the basis of the total number of subscribers is received by the assessee company and the amount relatable to RPs is then paid by the company to the respective RPs. During the year under consideration, the assessee got aggregate placement charges from all the broadcasters amounting to Rs. 314 crores and after retaining the amount attributable to the direct subscriber base of the company, distributed the balance amount of Rs. 69.60 crores among the RPs according to their respective entitlements as worked out on the basis of their subscribers. During the course of assessment, the TPO did not accept the system of proportional allocation of the total placement revenue for the reason that the benchmarking is ad hoc in nature and does not justify the allocation of total revenue proportionately. As per the TPO when 78% of the customers base was of the company itself whereas customer base of individual RPs is only 5% to 7% of the total base, then the RPs cannot be treated at par with the assessee company in the matter of sharing the placement revenue. As per the TPO, the assessee who can negotiate effectively on its large subscriber base, the risk

involved is also that of assessee and the contract with the broadcaster is executed with the assessee only. On these observations, he held that the entire revenue shared with RPs on basis of the subscriber base and the benchmarking does not result in arms length pricing. The TPO, therefore, determined the ALP of placement charges at 50% of the amount and held that the balance 50% has to be retained by the assessee for its own services rendered, risks undertaken and capital deployment. Accordingly, he directed an adjustment of Rs. 34,80,05,601/- to be made in respect thereof in determining the total income.

3. By the impugned order, the DRP has restricted ad hoc addition to the extent of 10% after observing as under:

> *"4.7 However, the Panel notes that the assessee has indeed performed more, functions with respect to the transaction of placement charges. This includes making efforts to consolidate the RPs, presenting their position and negotiating for RPs from broadcasters. The Panel is also of the view that each RP is also taking its own risks and deploying its own capital and is entitled to its share. The Panel is not in agreement with the TPO that just because each RP individually represents mere 5% to 7%, of the subscriber base and hence is not in a position to negotiate with the broadcaster individually, it should be allowed just 50% of the amount attributable to its subscriber base.*
>
> *4.8 In our view, the transaction can be viewed as a transaction of marketing of placement position available with the group by the*

assessee. The assessee was given an authority by its AEs to negotiate such channel placement. Clubbing such rights with one person ensured better charges for the entire group. Hence, the assessee itself benefited from such pooling of broadcast area. Other than giving a right to such negotiations, there was no other risk transferred to the assessee nor the assessee contributed to the deploying of capital on behalf of the RPs. Hence, the Panel is of the view that there was no significant assumption of risk by the assessee on behalf of the RPs. If the assessee was entitled to any compensation, it was towards rendering the services of marketing of the channel placement rights with the broadcasters. In the Panel's view, it would be sufficient if the assessee is compensated at 10% or the gross amount of Rs. 69,60,11,202/- with respect to its functions performed in the course or negotiation and subsequent allocation or placement charges to the RPs.

In the light of the above discussion, the TPO is directed to retain the adjustment to the extent or 10% or the allocated amount. The ground is decided accordingly."

4. Against the direction of the DRP which has been given effect by the TPO, the assessee is in further appeal before the ITAT.

5. We have considered the rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the ld AR and the ld DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that the addition has been made by the TPO

not in respect of any expenditure having been incurred but with respect to income derived by the assessee, part of which was distributed among the RPs according to their respective entitlements as worked out on the basis of their subscribers. The TPO has not accepted the distribution of revenue on the basis of actual entitlement of subscribers. The TPO was of the view that the assessee can negotiate effectively on its large subscriber base, therefore, the assessee is entitled for more part of the revenue. Thus, on ad hoc basis, the TPO added 50% of placement charges distributed to its RPs as assessee's income. By the impugned order, the DRP upheld ad hoc addition to the extent of 10%. We found that while upholding 10% of addition in respect of the amount distributed, the DRP at para 4.6 have clearly obsered that the TPO was not justified in making addition to the extent of 50%. The DRP held that consumer numbers represent a key parameter for deciding the amount or placement charges and in the facts and circumstances of the case held that allocation made by the assessee with respect to the total placement charges received is fair and proper. In our considered view, after this finding being recorded by the DRP, there is no justification even for upholding 10% of the addition, in so far as the assessee has distributed income on the basis of actual subscribers being commanded by the RPs.

6. We further observe that at para 4.7 of the direction, that DRP has categorically observed that the assessee has performed more functions that include making efforts to consolidate the RPs presenting their position and negotiating with the broadcasters for RPs. The DRP has further categorically rejected the findings of the TPO that just because each RP individually represents mere 5% to 7% of the subscriber base which is not in a position to negotiate individually with the broadcasters. Consequently, the finding of the TPO for the RPs should be allowed just 50% of the amount attributable to its subscriber base has been rejected by the DRP.

7. We further observe that the DRP at para 4.8 has held that by way of this transaction, the assessee was given an authority by the RPs to negotiate with the broadcasters for the placement charges for the entire group. The DRP acknowledges the fact that clubbing of such rights with one person ensured better charges for the entire group. And that the assessee itself has been benefitted from such pooling. Furthermore, the DRP has not categorically held that other than giving such rights of negotiation to the assessee, no other risks are transferred to the assessee nor there is any deployment of capital on behalf of the RPs. Moreover, the DRP at para 4.8 has held that it is a transaction of rendering of services of marketing of the channel placement rights with the broadcasters and arms length consideration is to be received by the

assessee with respect of functions performed in rendering these services,. After giving all these findings by the DRP, there is no justification for upholding any ad hoc addition of 10%. From the record we further found that the adjustment of 10% so upheld by the DRP was without following any of the prescribed methods U/s 92C(1) of the Act nor has any benchmarking been adopted in determination of the ALP. The Hon'ble Jurisdictional High Court in the case of CIT Vs Lever India Exports Limited in ITA No. 1306/1307/1349 of 2014 have held that the ad hoc determination of ALP de-hors Section 92C of the Act cannot be sustained, rendering the entire transfer pricing adjustment unsustainable in law.

8. In view of the above discussion, we do not find any merit in the action of the DRP for upholding ad hoc addition of 10% under transfer pricing adjustment.

9. Other grounds raised by the assessee were not pressed by the ld AR, so the same are dismissed as not pressed.

10. In the result, appeal of the assessee is partly allowed, in terms indicated hereinabove.

Order pronounced in the open court on 10th January, 2020.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 10/01/2020
*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai