

IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 7624/Mum/2012 (Assessment Year 2008-09)

PPG Coatings India Pvt. Ltd. (Now merged with PPG Asian Paints Pvt. Ltd.) 158, Vidyanagari Marg Dani Wootex Compound Kalina, Santacruz(East) Mumbai-400 098. PAN : AABCS4378K (Appellant)	Vs.	DCIT-9(2) Mumbai (Respondent)
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Assessee by	Shri Percy Pardiwala
Department by	Shri Rajesh Mishra
Date of Hearing	04.10.2021
Date of Pronouncement	03.01.2022

ORDER

Per Shamim Yahya (AM) :

This appeal by the assessee is against the order of the Assessing Officer dated 12.12.2011 pursuant to direction of Dispute Resolution Panel (DRP) dated 9.8.2012 pertaining to assessment year 2008-09.

2. Grounds of appeal read as under :

1. That on facts and circumstances of the case and in law the Ld AO erred in assessing the income of the Appellant under the normal provisions of the Act at Rs 6,72,57,997 against returned income of Rs 3,99,18,428 based on the directions received from Hon'ble Dispute Resolution Panel ("DRP") upholding the adjustment to the transfer price proposed by the learned Transfer Pricing Officer ("Ld TPO").
2. That on facts and circumstances of the case and in law the Ld AO/TPO erred in proposing and the Hon'ble DRP further erred in upholding an adjustment of Rs 2,73,39,569 in respect of the international transactions pertaining to (a) payment for SAP license, (b) cost sharing expenses, and (c) reimbursement of expenses (expenses incurred) alleging that the same to be not at arm's length in terms of the provisions of Sections 92C(1) and

92C(2) of the Act read with Rule 10D of the Income-tax Rules, 1962 ("the Rules").

3. That on the facts and circumstances of the case and in law the LdAO/ TPO/ DRP grossly erred in computing the arm's length price at NIL in relation to payment for SAP license, cost sharing expenses, and reimbursement of expenses (expenses incurred) disregarding the provisions of Section 92C read with Rule 10D of the Rules and ignoring the methods prescribed under the Act.

4. That on the facts and circumstances of the case and in law, the LdAO/ TPO/DRP has erred in making a transfer pricing adjustment in relation to the payment for SAP license and cost sharing expenses allegedly ignoring the OECD Transfer Pricing Guidelines, other international and domestic jurisprudence.

5. That on facts and circumstances of the case and in law the Ld AO/TPO/DRP has erred in not appreciating that even after considering payment of SAP license (depreciation), cost sharing expenses and the reimbursement of expenses (expenses incurred) the appellant's margin on a whole entity basis on the application of Transactional Net Margin Method ("TNMM") was higher than the margin earned by the comparable companies.

6. That on facts and circumstances of the case and in law Ld AO/TPO/ DRP has also erred in confirming the payment for SAP license as revenue in nature and disallowing the entire payment cost.

6.1 That on facts and circumstances of the case and in law Ld AO/ DRP had failed to appreciate the business and commercial need by appellant company for implementation of SAP software and erred in upholding the TPO's contention that the cost of SAP license was merely imposed by parent company on the appellant.

6.2 That on facts and circumstances of the case and in law Ld AO/TPO/ DRP had erred in brushing aside the additional evidences filed by the appellant company documenting the benefits derived by it from the implementation of SAP software.

6.3 That on facts and circumstances of the case and in law Ld AO/ TPO/ DRP erred in not considering the details of cost incurred by the Parent Company, the basis of cost allocation and the third party supporting evidences placed on record by the appellant company in connection with the purchase of SAP license.

7. That on facts and circumstances of the case and in law Ld AO/TPO/ DRP failed to appreciate the business and commercial need for the appellant for availing the cost sharing services.

7.1 That on facts and circumstances of the case and in law the Ld AO/TPO/DRP has failed to take cognizance and has merely brushed aside the additional documentary evidences which have been placed on record by the appellant for the cost sharing expenses clearly demonstrating that intra group services have been received by the appellant company and the consequent benefit from availing the services.

7.2 That on facts and circumstances of the case and in law the Ld AO/ DRP has failed to appreciate that the cost recharge was determined based on scientific allocation keys and as per the cost sharing agreements entered into between the appellant and its associated enterprises ("AEs").

7.3 That on facts and circumstances of the case and in law the Ld AO/ DRP had erred in ignoring the detailed cost allocation workings placed on record by the appellant company in connection with determination of the cost sharing expenses.

8. That on facts and circumstances of the case and in law the Ld DRP has not taken cognizance of the responses filed against the remand report placed on record even after a rectification being filed by the appellant under Rule 13 of the Income Tax (Dispute Resolution Panel) Rules, 2009.

9. That on the facts and in circumstances of the case the Ld AO has erred in initiating penalty proceedings against the appellant company.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.”

3. The assessee has further filed additional grounds as under :

1:0 Re.: SAP software and cost sharing expenses:

1:1 That on facts and circumstances of the case and in law Ld DRP had erred in brushing aside the additional evidences filed by the appellant company documenting the benefits derived by it from the implementation of SAP software, even while passing the rectified Dispute Resolutions Panel ('DRP') directions dated 30 October 2012 ('rectified DRP directions').

1:2 That on facts and circumstances of the case and in law Ld DRP had erred in not considering the details of cost incurred by the Parent company, the basis of cost allocation and the third party supporting evidences placed on record by the appellant company in connection with the purchase of SAP license, even while passing the rectified DRP directions.

1:3 That on facts and circumstances of the case and in law Ld DRP has failed to take cognizance and has merely brushed aside the additional documentary evidences which have been placed on record by the appellant for the cost sharing expenses clearly demonstrating the intra group services have been received by the appellant company and the consequent benefit from availing the services, even while passing the rectified DRP directions.”

4. Brief facts are as under :

SigmaKalon Marine & Protective Coatings BV, Hollands is holding company of the assessee. Sigma Coatings BV Hollands holds directly or indirectly, shares carrying not less than 26% of the voting power in SigmaKalon India Private Limited and other Sigma group entities. Thus these 21 companies became associated enterprise of the assessee company u/s. 92A(2) of the LT. Act.

International transactions:-

During the relevant previous year, the assessee has entered into the following international transactions.

Transaction	Amount of transaction Rs.	Method used for determining the ALP
Purchase of Finished Goods	5,46,98,678	TNMM
Sale of Finished Goods	82,66,617	TNMM
Commission Income	18,22,651	TNMM
Purchase of SAP License	12,80,079	CUP
Purchase of Furniture	23,733	CUP
Advance received from customers	5,68,05,006.57	CUP
Cost Sharing	2,56,94,820	Actual cost without mark up
Expenses Incurred	3,64,670	Actual expense

5. The TPO noted that the assessee has purchased SAP license and paid a sum of Rs. 12,80,079/- to Sigmakalon BV (parent company). The Assessing Officer disallowed the same primarily on the ground that same was not required and was not beneficial to the assessee. Further he also drew adverse inference that the details of purchase cost which was done by the parent company was not produced. The observation of the TPO in this regard are as under :-

“Before examining the share allocated to the assessee, let us examine the benefit of SAP license to the assessee. The assessee company is engaged in the business of trading in paints. For trading business there is no additional benefit by using software like SAP as the business activity of the assessee is simple which can be performed easily by simple accounting software. Using costly software like SAP can be requirement of the parent company of the assessee which is collecting and collating data received from AEs situated worldwide. The assessee has not demonstrated as to how, there is value addition to its business by using SAP license. In a third party situation, no company would pay for services which are not beneficial for its business. The use of SAP licence is imposed by parent company of the assessee for the benefit of parent company. Therefore, ALP of a service provided by AE which is beneficial to it but not beneficial to the assessee cannot be more than nil. Without prejudice to the above, for sake of argument, if we accept that the assessee has got some utility of the SAP software. In that case, the assessee is required to furnish following details/evidences-

- i. Evidence of incurring expenditure by the parent company- to support this the assessee has furnished only copy of agreement and no detail working of total cost incurred by the parent company has been furnished.
- ii. Evidence of allocation key among different AEs including the parent company for sharing of the cost. The assessee has not furnished detail of allocation key among different AEs on the basis of which it can be seen that the allocation among AEs was justifiable. Evidence of allocation of total cost among AEs and the parent company on the basis of allocation key.

In the absence of these evidences, it is not possible to examine whether the transaction was fairly allocated among AEs including parent company.

Accordingly, as discussed above the assessee has failed to demonstrate additional benefits from the SAP license, cost of which has been imposed by the parent company on it. Further, the assessee has also failed to demonstrate that the allocation of SAP license expense was fair between AEs and parent company. Hence, the ALP of transaction is proposed to be determined at Rs. NIL. Accordingly an adjustment of Rs. 12,80,079/- is made.”

6. Before DRP the assessee sought to submit additional evidence. Learned DRP proceeded to confirm the action of the learned TPO. Learned DRP held as under :-

“The assessee sought to present additional evidences before the Panel A letter was sent to TPO-II(8), Mumbai for his comments on the additional evidences. The TPO has replied that the statement of the assessee that the expenses

were benchmarked under TNMM is factually incorrect. As per revised report the assessee has benchmarked the purchase of SAP license under CUP method.

The Panel has considered the submissions of the assessee and the observations of the TPO, The total cost incurred by the parent company for getting SAP license has not been produced by the assessee. Also, the basis of cost being allocated to the assessee has not been produced by the assessee. No evidence has been produced by the assessee regarding the evidence of incurred expenditure by the parent company and also for allocation of sharing of the cost among the AEs including the parent company. In view of this the observation of the TPO that the cost of the SAP license has been imposed on the assessee by the parent company, is upheld.”

Apropos cost sharing expenses:-

On this issue TPO observed as under :-

“The assessee company has paid an amount of Rs. 2,56,94,820/- on account of cost sharing to Sigmakalon BV (Parent company). The assessee is stated that it is the group policy that the common costs incurred by the parent company have to be allocated among all the AE's and parent company. These costs are to be allocated irrespective of any benefit. The main natures of expenses for cost sharing are R&D expenses, Central support like - marketing and development, common administrative expenses, etc. The assessee has also furnished cost-sharing agreements. While making the comparative analysis with last year, the assessee has stated that there is increase in allocation of expenses by the parent company during the year in comparison to last year. It has been further stated by the assessee that detailed working of this is not available with the local entity.

On being asked, vide order sheet dated 11/8/2011, the AR stated that, the assessee is not in a position to provide working of share of assessee out of total cost of the group incurred by parent company. What revenues were earned by the assessee by incurring these costs was also not provided by the assessee. Therefore, the assessee was asked to show-cause why the ALP of this transaction should not be taken as nil. In response, the AR appeared on 29-8-2011. However, no reply was furnished on this issue.

In the absence of evidences which proves that actually some cost was incurred by the parent company and services were provided to the assessee and the costs so incurred have been fairly allocated among the group entities, neither it is possible to examine whether any such expense was incurred nor that the value of such expense was fairly allocated among AEs including parent company.

The assessee has failed to prove that actually some services were requested by the assessee to its AE. The assessee has also failed to establish that any service was received by the assessee from AE for these payments. The

assessee has also failed to even prove that any cost was incurred by the parent company. Further, the assessee failed to demonstrate any utilization of services in its business of trading from the cost sharing which has been imposed by the parent company on it. Further, the assessee has also failed to demonstrate that the allocation of so called costs was on some basis and that the basis of allocation was fair between AEs and parent company. Hence, the ALP of transaction is proposed to be determined at Rs. NIL, Accordingly an adjustment of Rs. 2,56,94,820 /- is made."

7. Against this order the assessee is in appeal before DRP. Learned DRP confirmed the same by observing as under :-

"5. The assessee had submitted that it has availed the following services from its AE: Central support services, R & D services for protective coatings and marine, Marketing and support services for protective coatings and marine and Centralized IT services. The cost allocated to the assessee was based on the application of scientific allocation keys and was governed by the cost sharing agreements.

5.1 The TPO has observed that no evidence has been produced by the assessee, which shows that actually some cost was incurred by the parent company and services were provided to the assessee. It has also been observed that the cost allocation cannot be fairly determined among the group entities, so neither it is possible to examine whether any such expense was incurred nor that the value of such expense was fairly allocated among AEs including parent company.

5.2 The assessee had stated before me DRP that the AE. has not made appropriate representations before the TPO. The TPO on reference to this point has made the observation that this ground is without any basis. In view of above discussion, that the cost allocation cannot be determined among the AEs, the objection on the ground that the TPO has erred in disallowing the cost expenses is rejected. Hence, the point no (c) of the objection is rejected."

8. Against this order the assessee is in appeal before the ITAT.

9. We have heard both the parties and perused the records.

10. Ld. Senior Counsel for the assessee has summarized his arguments in following written synopsis.

Synopsis of the arguments made by the Appellant during the course of the hearing:

Nature of business: PPG Coatings India Pvt. Ltd. ['PPG Coatings' / 'the Appellant'] is engaged in the business of trading in marine and protective paints (*refer para No. 3 at page No. 01 of the Assessment Order dated 25 October 2012*).

International transactions undertaken during the year under consideration:

During the year under consideration, the Appellant has entered into the following international transactions with its Associated Enterprises ['AEs'] - refer page No. 02 of the TPO's Order dated 27 October 2011

Nature of transaction	Value of International transaction (in Rs.)	Method adopted for the purposes of benchmarking
Purchase of Finished Goods	5,46,98,678	Transactional Net Margin Method [TIMMM]'J
Sale of Finished Goods	82,66,617	TNMM
Commission Income	18,22,651	TNMM
Purchase of SAP License	12,80,079	Comparable Uncontrolled Pricing Method [CUP]
Purchase of Furniture	23,733	CUP
Advance received from customers	5,68,05,006	CUP
Cost sharing	2,56,94,820	Actual cost without mark-up
Expenses Incurred	3,64,670	Actual expense
Total:	14,89,56,254	

Ground Nos. 01 to 08 - Adjustment of Rs. 2,73,39,569/- :in respect of payment for SAP license, cost sharing expenses and reimbursement of expenses made to AEs:

The aforementioned grounds of appeal challenge the adjustment of Rs. 2,73,39,569/- made by the Assessing Officer [AO' / Transfer Pricing Officer [TPO'J and confirmed by the Dispute Resolution Panel [DRP'] in respect of payment for SAP license, cost sharing expenses and reimbursement of expenses made to AEs.

Before the AO / TPO:

Re.: Purchase of SAP Licenses (Rs. 12,80,079/-):

- The SAP licenses were purchase by the AE viz. Sigmakalon BV from a third-party SAP Nederland BV in bulk quantities.
- A copy of the agreement entered into between Sigmakalon BV with the third-party viz. SAP Nederland BV alongwith a copy of the debit note raised by the AE viz. Sigmakalon BV was submitted by the Appellant to the TPO vide letter dated 25 July 2011 (refer page No. 76 to 92 of the paperbook).
- The rationale behind the purchase of SAP license by Sigmakalon BV was to avail volume discounts from such purchases, since if the assessee would have purchased this from the open market from a third party the cost incurred would have been higher.
- Out of the bulk purchase of SAP licenses made by Sigmakalon BV, the Appellant was allotted 11 SAP professional licenses and one employee user license.

- The said transaction was benchmarked under 'Comparable Uncontrolled Price' ['CUP'] method, since the cost of the 3rd party licenses have been allocated based on the number of users.

However, without considering the aforesaid details, the TPO determined the Arm's Length Price ['ALP'] of the transaction at Nil, on the ground that the Appellant had failed to demonstrate the additional benefits from the SAP license, cost of which has been imposed by the AE on it - refer page No. 3 and 4 of the TP Order - the relevant extracts of the TP Order are given hereunder:

Accordingly, as discussed above the assessee has failed to demonstrate additional benefits from the SAP license, cost of which has been imposed by the parent company on it. Further, the assessee has also failed to demonstrate that the allocation of SAP license expense was fair between AEs and parent company. Hence, the ALP of transaction is proposed to be determined at Rs. NIL. Accordingly an adjustment of Rs. 12,80,079/- is made.

- Further, the following details were also submitted before the Assessing Officer vide a letter dated 15 December 2011 (post receipt of the TP Order) in respect of the impugned transaction (refer page 101 / 103 of the paperbook):

- o Comparative details of allocation of SAP License cost charged to the Appellant with a comparison with the SAP price list.

- o that the aforesaid transaction alongwith the other transactions under dispute, were debited to the Profit and Loss Account. The Appellant had benchmarked other transactions viz. purchase of goods, sale of goods and commission income using TNMM method. The net margin of the Appellant is higher than . that of the comparables (after including all the aforesaid expenses), and accordingly it was submitted that the transaction is at ALP under TNMM as well.

Re.: Cost sharing expenses - Rs. 2,56,94,820/-:

- The Appellant had availed the following services from the AE under the cost sharing expenses:

- o Central Support Services

- o Research and Development Service for protective coating and marine

- o Marketing and support service for protective coating and marine

- o Centralised IT service.

The said services were availed by the Appellant to facilitate management and conduct of its business more efficiently. The cost allocated to the Appellant was based on the application of scientific allocation keys and was governed by the relevant agreements.

The transaction was benchmarked under CUP, as the expenses were reimbursed on a cost to cost basis.

Copies of the relevant cost sharing agreements were also submitted to the TPO (refer pages 93 and 104 to 123 of the paperbook).

However, without considering the aforesaid details, the TPO determined the ALP of the transaction at Nil, on the reason that the Appellant had failed to prove that any services were actually rendered by the AE, failed to prove whether any cost was actually incurred by the AE and as how the cost allocation was made - refer page 04 to 05 of the TP Order - the relevant extracts of the TP Order are given hereunder:

The assessee has failed to prove that actually some services were requested by the assessee to its AE. The assessee has also failed to establish that any service was received by the assessee from AE for these payments. The assessee has also failed to even prove that any cost was incurred by the parent company. Further, the assessee failed to demonstrate any utilization of services in its business of trading from the cost sharing which has been imposed by the parent company on it. Further, the assessee has also failed to demonstrate that the allocation of so called costs was on some basis and that the basis of allocation was

fair between AEs and parent company. Hence, the ALP of transaction is proposed to be determined at Rs. NIL. Accordingly an adjustment of Rs. 2,56,94,820/- is made.

Further, the following details were also submitted before the Assessing Officer vide a letter dated 15 December 2011 (post receipt of the TP Order) in respect of the impugned transaction (refer page 101 to 103 of the paperbook):

- o A report of factual findings issued by PricewaterhouseCoopers certifying the cost allocation methodology in connection with the cost sharing agreement - refer page 124 to 129 of the paperbook
- o Detailed working of cost sharing expenses - refer page 130 to 132 of the paper book.
 - That the aforesaid transaction along with the other transactions under dispute, were debited to the Profit and Loss Account. The Appellant had benchmarked other transactions viz. purchase of goods, sale of goods and commission income using TNMM method. The net margin of the Appellant is higher than that of the comparables (after including all the aforesaid expenses), and accordingly it was submitted that the transaction is at Arms Length Price under TNMM as well.

Re.: Reimbursement of expenses - Rs. 3,64,670/-:

- During the year under consideration, certain expenses were incurred by the AE's on the Appellant's behalf and were subsequently reimbursed by the Appellant.
- The said expenses were reimbursed on a cost to cost basis from the Appellant.
- The transaction was benchmarked under CUP, as the expenses were reimbursed on a cost to cost basis.
- However, the TPO has determined the ALP of the said transaction at Nil as under -refer page No. 5 of the TP Order:

The assessee has failed to produce evidences to prove that any services were availed by the assessee for these expenses and any such expense were incurred by the AE at all. Hence, it is not possible to examine whether any such Expenses were incurred at all.

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Aggrieved by the Order dated 27 October 2011 passed by the TPO, the Appellant filed its objections before the Dispute Resolution Panel ['DRP'],

Before the DRP:

- All the above details / evidences filed before the AO / TPO relating to the TP adjustments made by the TPO on all the aforesaid 3 issues were once again filed before the DRP.
- In addition to the above, additional evidences were filed before the DRP with respect to cost sharing expenses and SAP under cover letter dated 04 July 2012 (filed on 09 July 2012) - refer page Nos. 137 to 376 of the paperbook), to in order to enable the Hon'ble Panel appreciate the details of the transaction. The details of the additional evidences is as under:
 - o Transfer Pricing Report on the benchmarking of the cost sharing expenses -refer page No. 138 to 376, which inter-alia contains:
 - the documentation of the benefits received by the Appellant from the said expenses:
 - Central support services - refer page nos. 157 to 163 of the paperbook;
 - Research and development services - refer page nos. 164 to 171 of the paperbook;
 - Marketing and support services - refer page nos. 172 to 186 of the paperbook;
 - Centralised IT services - refer page Nos. 188 of the paperbook
 - Emails correspondences alongwith the relevant documents (refer page 208 to 376 of the paperbook)
 - Details of the marketing material provided.
 - Summary of the Benefits obtained (refer page 194 of the paperbook).

- Further, in support of the additional evidence(s), the Appellant also submitted an affidavit from the Finance Manager of the Appellant- refer page no. 133 to 136 of the paperbook. The DRP called for a remand report from the AO / TPO, which was submitted by the AO / TPO vide a communication dated 13 August 2012 - refer page nos. 402 to 406 of the paperbook.

In the said remand report the TPO had made various unsubstantiated allegations which were rebutted by the Appellant vide a letter dated 27 August 2012 (filed in the DRP's office on 10 September 2012) - refer page nos. 377 to 406 of the paperbook, *inter-alia* submitting: that allocation key of cost sharing expenses has already been submitted before the TPO vide letter dated 15 December 2011 - tabulated hereunder:

Particulars	Allocation Key
Central support	Sales ratio (based on sales of the entire PPG Group)
Marketing Support service for Protective Coating and Marine	Sales ratio (based on sales for Protective Coating and Marine)
Research & Development for Protective Coating and Marine	Sales ratio (based on sales for Protective Coating and Marine)
Centralised IT Services	Actual hours spent on the individual charge out rate.

brief summary of the email correspondences and the benefits derived by the Appellant - refer page Nos. 392 to 401 of the paperbook.

that the cost allocation expenses have been certified by a third party consultant Price Waterhouse Coopers (refer page Nos. 124 to 132 of the paperbook)

Despite submitting such voluminous data before the AO / TPO / DRP, and providing each and every detail, the DRP in its Directions dated 09 August 2012 (*to be read as 06 September 2012 as per the rectification Order passed by the DRP subsequently*), has upheld the Order of the TPO for stating that no evidences have been filed by the Appellant -relevant extracts of the Directions of the DRP are given hereunder;

4.3 The panel has considered the submissions of the assessee and the observations of the TP. The *tool* cost incurred by the patent company for getting SAP license has not been produced *by* the assessee. Also, the basis of cost being allocated to the assessee has not been produced by the assessee- No evidence has been produced by the assessee regarding the evidence of incurred expenditure by the parent company and also for allocation of sharing of cost among the AEs including the parent company. In view of this the observation of :=>e TPO that the cost of the SAP license has been imposed on the assessee by the parent company, is upheld. The points (a) and (b) of objection No. 1 are rejected.

5. The assessee had submitted that it has availed the following services from it? AE: Central support services, R & D services for protective coatings and marine, Marketing and support services for protective coatings and marine and Centralized IT services. The cost allocated to the assessee was based on the application of scientific allocation keys and was governed by the cost sharing agreements.

5.1 The TPO has observed that no evidence has been produced by the assessee, which shows that actually some cost was incurred by the parent company and services were provided to the assessee.

It has also been observed that the cost allocation cannot be fairly determined among the group entities, so neither it is possible to examine whether any such expense was incurred nor that the value of such expense was fairly allocated among AEs including parent company.

5.2 The assessee had stated before the DRP that the AR. has not made appropriate representations before the TPO. The TPO on reference to this point has made the observation that this ground is without any basis. In view of above discussion, that the cost allocation cannot be determined among the AEs, the objection on the ground that the TPO has erred in disallowing the cost expenses is rejected. Hence, the point no (c) of die objection is rejected.

5.3 The other two grounds of the objection stem out from the previous points. As the earlier 3 points have been rejected, the other two points, being consequential in nature of the

It will not be out of place to mention here that, against the Directions of the DRP, the Appellant filed a rectification application dated 11 October 2012, to consider the evidences filed by it, however, the DRP vide its ratification Order dated 30 October 2012 has once again failed to consider the evidences so filed - refer page nos. 407 to 410 of the paperbook for the said application.

Aggrieved by Order of the DRP, the Appellant has filed an appeal before the Hon'ble Income-tax Appellate Tribunal ['ITAT'].

1. As mentioned hereinabove, complete details vis-a-vis agreements, benefits derived, sample copy of email correspondences, allocation keys have been submitted before the AO / TPO and DRP.
2. However, the evidences have been out rightly rejected by the lower authorities without providing any cogent reasons thereto and the action of the TPO in determining the ALP as Nil has been upheld.
3. In this connection, it is submitted and the action of the AO / TPO / DRP of determining the ALP of a transaction as Nil, without considering the evidences and without applying any of the six methods prescribed under the TP regulations, is misconceived, erroneous and deserves to be deleted.
4. Reliance in this regard is placed on the following decisions wherein the adjustment has been deleted in cases where ALP has been determined as Nil without following the prescribed six methods for determining the ALP of an international transaction:
 - a. Decision of the jurisdictional Bombay High Court in the case of CIT v/s. Lever India Exports Ltd. reported in [2017] 78 taxmann.com 88 (refer page Nos. 09 to 12 of this compilation);
 - b. Decision of the jurisdictional Bombay High Court in the case of CIT v/s. Johnson & Johnson Ltd. reported in [2017] 80 taxman 337 (refer page Nos. 13 to 24 of this compilation);
 - c. Decision of the jurisdictional Bombay High Court in the case of CIT v/s. Merck Ltd. reported in [2016] 73 taxmann.com 23 (refer page Nos. 25 to 29 of this compilation);
 - d. Decision of the jurisdictional Bombay High Court in the case of CIT v/s. SI Group-India Ltd. [ITA No. 447 of 2017] (refer page Nos. 30 to 33 of this compilation);
 - e. Decision of the jurisdictional Bombay High Court in the case of CIT v/s. Kodak India Pvt. Ltd. reported in [2017] 79 taxmann.com 362 (refer page Nos. 34 to 36 of this compilation);
 - f. Decision of the Mumbai Bench of the Tribunal in the case of Megger India Pvt. Ltd. v/s. DCIT [IT(TP)A No. 791/Mum/2017] (refer page Nos. 37 to 42 of this compilation);
 - g. Decision of the Mumbai Bench of the Tribunal in the case of Millward Brown Market Research Services India Pvt. Ltd. v/s. DCIT [IT(TP)A No. 932/Mum/2016] (refer page Nos. 43 to 55 of this compilation);
 - h. Decision of the Mumbai Bench of the Tribunal in the case of Jabil Circuit India Pvt. Ltd. v/s. ACIT [ITA No. 2200/Mum2017 and 867/Mum/2018] (refer page Nos. 56 to 86 of this compilation).

A photocopy of the aforementioned decisions is attached herewith for your Honours ready reference - refer "Appendix - A"..

5. Reliance in this regard is also placed on the following decisions where it has been held that TPO cannot sit in the judgment of business module of assessee and its intention to avail or not to avail any services from its associated enterprises. The role of TPO is to determine the arm's length price of international transactions:

- Decision of the Pune Bench of the Tribunal in the case of Emerson Climate Technologies (India) (P.) Ltd. v. Dy. CIT reported in [2018] 100 taxmann.com 478 (Pune - Trib.) (para 32) (refer page Nos. 87 to 92 of this compilation);
- Decision of the Pune Bench of the Tribunal in the case of Eaton Fluid Power Ltd. v. Asstt. CIT reported in [2018] 92 taxmann.com 158 (Pune - Trib.) (refer page Nos. 93 to 110 of this compilation); A copy of the said decision(s) are also attached herewith for your Honour's ready reference - refer "Appendix - B".

Prayer: In view of the above it is submitted and it will be appreciated that the action of the AO / TPO / DRP in determining the ALP of an international transaction a.s Nil, without applying the 6 "methods prescribed under law, that too when complete details vis-a-vis agreements, sample copy of email correspondences, benefits derived by the Appellant, allocation key has been submitted is misconceived, erroneous and illegal and accordingly, the adjustment ought to be deleted.

Further, the AO / TPO / DRP have not found any defect in the evidences submitted by the Appellant, and therefore determining ALP of an international transaction at Nil is incorrect, erroneous, illegal and deserves to be deleted.

11. Per contra Ld.DR relied upon the orders of authorities below.

12. First of all, we note that the TPO has applied benefit test in dealing with the issue of ALP of payment for SAP license. The TPO has elaborated that assessee did not need this software like SAP. That it was unnecessarily using costly software. That assessee has not demonstrated as to how there is value addition to its business by using SAP license. We find that all the aforesaid discussions by the TPO are not at all sustainable in the context of determination of ALP in Transfer Pricing Adjustment. This has been held by Hon'ble jurisdictional High Court in several case laws as referred by the Ld. Counsel of the assessee in the submissions as above. Furthermore, determination of ALP as nil by applying the benefit test without resorting to the methodology of determining ALP as per the methodology set out in Chapter X of the Act and the relevant Rules has also been held to unsustainable. In these circumstances, the determination of ALP as nil has been held to be not sustainable in the case laws from Hon'ble Bombay High Court as above including CIT vs. Lever India Exports Ltd. [2017] 78 taxmann.com 88 and CIT vs Johnson & Johnson Ltd.[2017] 80 taxmann 337. In these case laws, it was expounded that TPO is mandated by law to

determine the ALP by following one of the methods prescribed u/s. 92C read with rule 10B. When No such exercises is carried out by the TPO, the determination at Nil of the ALP was held to be not sustainable. The above said case laws are fully applicable on the fact of the case. Thus we hold that authorities below have fatally erred in applying the benefit test as rightly contended by the Ld. Counsel of the assessee. Furthermore, it has been submitted that after applying the benefit test authorities below have brushed aside the details submitted by the assessee. In this regard elaborate submissions in paper book have been given. These submissions before the TPO/AO are summarized as under:

It was submitted that SAP license was purchased by the AE at Netherland in bulk quantities. A copy of the agreement entered into between the said AE and the third party along with the copy of the debit note raised by the AE was submitted. It was submitted that purchase of SAP license by the AE was to avail volume discounts. Out of the bulk purchase of SAP license made by the AE, the assessee was allotted 11 SAP professional licenses and one employee user license. It was submitted that the said transaction was benchmarked under Comparable Uncontrolled Price [CUP] method, since the cost of the third party licenses have been allocated based on the number of users. Comparative details of allocation of SAP license cost charged to the assessee with a comparison with the SAP price list was also submitted.

13. We have gone through the same and we find ourselves in agreements with the submissions of the Ld. Counsel of the assessee that requisite details were submitted and authorities below have failed to consider the same and have held that proper details were not submitted after having held that there was no benefit to the assessee from the said license. For all these reasons as

discussed above, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

14. As regards the issue of cost sharing, the observations of the authorities below that the details have not been submitted is similar to the one on the issue of documentation of SAP discussed as above. Our observation as above is applicable here also. We are in agreement the details were in fact submitted and authorities below have erred in ignoring the same. In this regard, the submissions before the AO/TPO summarized as under:-

It was submitted that assessee has availed following services from the AE under the cost sharing expenses:

Central Support Services, Research and Development Services for protective coating and marine, Marketing and support service for protective coating and marine, Centralized IT service. It was submitted that the said services were availed by the assessee to facilitate management and conduct of its business more efficiently. The cost allocated to the assessee was based upon the application of scientific allocation keys and was governed by the relevant agreements. The transaction was benchmarked under CUP, as the expenses were reimbursed on a cost to cost basis. Copies of relevant cost sharing agreements were also submitted to the TPO. A report of factual findings issued by the Price Water house coopers certifying the cost allocation methodology in connection with the cost sharing agreement was also submitted. Hence, adequate details of working of cost sharing expenses were submitted before the authorities below.

15. We have examined the submission and the records, We are in agreement that authorities below have erred in holding the ALP at nil on the ground that relevant documents have not been submitted. In our considered opinion, the assessee has discharged the onus cast upon it. The case laws

as referred above are duly applicable on this issue also. The determination of ALP at nil in this regard also is not sustainable on the touchstone of the aforesaid case laws from the Hon'ble jurisdictional High Court in the case of Lever India Exports Ltd. (supra) and Johnson and Johnson Ltd.(supra) as the determination of ALP at nil without following one of the methods prescribed u/s. 92C r.w.Rule 10B has been held to be non sustainable. Accordingly, we set aside the orders of the authorities below, and decide the issue in favour of the assessee.

16. In the result, this appeal by the assessee stands allowed

Pronounced in the open court on 03.01.2022

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 03.01.2022

Copy of the Order forwarded to :

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

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai