IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.88/PUN/2021
निर्धारण वर्ष / Assessment Year: 2013-14

DCIT, Circle-8, Pune.	Vs.	India Kawasaki Motors Private Limited, Building B, Multi Modal Logistics and Industrial Area, P-5, Phase-II, Chakan Industrial Area, Tal. Khed, Pune-411035. PAN : AACCI3725K
Appellant		Respondent

Revenue by : Shri Piyushkumar Singh Yadav
Assessee by : Shri Ajit Jain &
Shri Siddhesh Ghaugule

Date of hearing : 06.04.2022
Date of pronouncement : 19.05.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the order of ld. Commissioner of Income Tax (Appeals)-13, Pune ['the CIT(A)'] dated 22.07.2020 for the assessment year 2013-14.

2. Briefly, the facts of the case are that the respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of trading and distribution of Completely Knocked Down (CKD) Parts of Motorbikes. The return

of income for the assessment year 2013-14 was filed on 29.11.2013 declaring loss of Rs.1,85,01,611/-. The respondent-assessee company reported the following international transactions with its Associated Enterprises (AEs) within the meaning of section 92B of the Income Tax Act, 1961 ('the Act') :-

S. No.	*Name of the AEs*	*Description*	*Amount (In INR*	*Method used*
1	*Kawasaki Heavy Industries Ltd., Japan*	*Purchase of Traded Goods*	*9,41,28,561*	*CPM*
2	*Kawasaki Heavy Industries Ltd., Japan*	*Purchase of Capital Asset*	*2,94,11,424*	*Other Method*
3	*Kawasaki Heavy Industries Ltd., Japan*	*Write Off Capital Asset*	*55,477*	*Other Method*
4	*Kawasaki Heavy Industries Ltd., Japan*	*Fees for Technical Services Availed*	*61,79,780*	*TNMM*
5	*Kawasaki Heavy Industries Ltd., Japan*	*Issue of Equity Shares*	*18,49,99,940*	*Other Method*
6	*Kawasaki Heavy Industries Ltd., Japan*	*Reimbursement of Expenses*	*3,23,432*	*Other Method*
	Total		*31,50,98,614*	

3. The respondent-assessee company also submitted Transfer Pricing (TP) study report, wherein, respondent-assessee sought to benchmark the above international transactions by using Cost Plus Method (CPM) as the most appropriate method with Gross Profit Margin i.e. gross profit to cost as Profit Level Indicator (PLI). The respondent-assessee company also selected AEs as tested party identifying 11 comparables on the basis of FAR analysis. In the TP study report, the respondent-assessee company adopted 3 years

weighted average arithmetic mean of the margins whereas, the tested party's PLI was 0.30%.

4. Noticing the above international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) u/s 92CA(1) for the purpose of benchmarking the above international transactions reported by the respondent-assessee company in Form No.3CEB.

5. The TPO vide order dated 27.10.2016 passed u/s 92CA(3) suggested the TP adjustments on account of trading services of Rs.1,07,52,140/- and technical services fees of Rs.61,79,780/-. While doing so, the TPO rejected the TP study report submitted by the respondent-assessee company. Further, considering the 13 comparables as selected by the respondent-assessee company, the TPO, for non-availability of the data, rejected 7 comparables. The TPO also rejected one another comparable 'Cuprum Bagrodia Ltd.' on account of exceptionally high Gross Profit Margin. Thus, the TPO selected following 5 new comparables whose arithmetic mean of Gross Profit Margin was at 12.81% against the appellant Net Profit Margin 0.30% :-

S. No.	*Name of the Company*	*GPM %*
1	*India Motor Parts & Accessories Ltd.*	*12.45%*
2	*Jullunder Motor Agency (Delhi) Ltd.*	*10.68%*
3	*P AE Ltd.*	*11.73%*

4	*Stanes Motor Parts Ltd.*	*13.30%*
5	*Stanes Motors (South India Ltd.)*	*15.89%*
	Mean	*12.81%*

Accordingly, the TPO proposed upward TP adjustments of Rs.1,07,52,140/- on account of trading services and Rs.61,79,780/- on account of technical services fees totalling to Rs.1,69,31,920/-.

6. On receipt of the TPO's order, a draft assessment order was passed on 30.11.2016 u/s 143(3) r.w.s. 144C(1) of the Act.

7. On receipt of the draft assessment order, the respondent-assessee company filed a letter dated 04.01.2016 requesting to pass a final assessment order so as to enable the respondent-assessee to prefer an appeal before the ld. CIT(A). Accordingly, the Assessing Officer passed the final assessment order dated 27.02.2017 u/s 143(3) r.w.s. 144C(3) after making the above upward TP adjustments of Rs.1,69,31,920/-.

8. Being aggrieved by the above final assessment order, the respondent-assessee company filed an appeal before the ld. CIT(A), who vide impugned order directed the Assessing Officer/TPO to make the suitable adjustments in respect of customs duty adjustments considering the fact that the comparables have not incurred any customs duty on import of goods, whereas, the

respondent-assessee company incurred significant expense of customs duty of Rs.2,36,72,575/- on import of goods out of which it had recovered of Rs.1,27,29,215/- from its customers, in respect of balance of Rs.1,09,43,360/-, the respondent-assessee company sought suitable adjustments which the ld. CIT(A) had granted placing reliance on the decision of the Co-ordinate Bench of the Pune Tribunal in the case of Skoda Auto India Pvt. Ltd. vs. ACIT (ITA No.202/PN/2007). The ld. CIT(A) also directed the Assessing Officer/TPO to grant the working capital adjustments.

9. Being aggrieved by the above decision of the ld. CIT(A), the Revenue is in appeal before us.

10. It is submitted that the respondent-assessee company cannot be granted economic adjustments on account of customs duty paid in view of the decision of the Pune Tribunal in the case of Fresenius Kabi India Private Limited vs. ACIT in ITA No.2572/PUN/2016 for A.Y. 2011-12.

Without prejudice to the above, it is submitted that in case any difference between the comparables and the respondent-assessee company in computation of PLI, it should be ironed out by making a suitable adjustments for operating margin of the comparables, not that of the respondent-assessee company. Reliance also placed on

the decision of the Co-ordinate Bench of the Delhi Tribunal in the case of JCB India Ltd. vs. ACIT, 59 taxmann.com 211 (Delhi-Trib.).

In respect of the TP adjustments on account of technical services fees of Rs.61,79,780/-, it is submitted that the respondent-assessee company had not carried out any manufacturing activity and it engaged only in trading activity, therefore, for what purpose of technical services fees have been availed during the year under consideration is not understood. Therefore, there was no necessity of these services and the respondent-assessee company had failed to demonstrate the benefits of technical services. Thus, it was contended that the order of the ld. CIT(A) should be reversed.

11. On the other hand, ld. AR for the assessee placing reliance on the decision of the Co-ordinate Bench of Pune Tribunal in the case of Skoda Auto India Pvt. Ltd. (supra) submits that the suitable adjustments while computing the profit margin of the respondent-assessee company in respect of import goods should be granted.

With regard to the payment of technical services fees, placing reliance on the decision of the Hon'ble Bombay High Court in the case of CIT vs. M/s. Johnson & Johnson Ltd. in Income Tax Appeal No.1030 of 2014, order dated 07.03.2017 that no ALP adjustments

can be made in respect of fees availed for technical services by not adopting one of the mandatory prescribed method to determine the ALP. Placing reliance on the decision of the Co-ordinate Bench of Delhi Tribunal in the case of ACIT vs. Swatch Group (India) Pvt. Ltd. in ITA No.2264/DEL/2009 for A.Y. 2004-05, order dated 30.01.2020, ld. AR submitted that there is no bar under law to adjust the profit margin of respondent-assessee company.

12. We heard the rival submissions and perused the material on record. Ground of appeal no.1 and 2 challenges the decision of the ld. CIT(A) allowing the customs duty adjustments to the margin of the respondent-assessee company. The submissions of the respondent-assessee company is that the respondent-assessee had 100% imported the traded goods, which resulted in higher incidence of customs duty on traded goods, accordingly, increased the cost of the traded goods directly affected the gross profit margin, when compared to the comparables. Accordingly, respondent-assessee claimed the adjustments on higher customs duty paid in respect of import of traded goods. The provisions of section 10B(1)(b)(iv) of the Act provides that the adjustments can be made to element difference that are likely to materially affect the price or cost or profit between the controlled and uncontrolled transactions.

Therefore, there is merit in the contention of the respondent-assessee that the suitable adjustments should be made to iron out the differences of profit between the profit of tested company and the comparables. On this score, we do not find any illegality in the order of the ld. CIT(A), but the question is in whose hands such adjustments should be made. The Co-ordinate Bench of this Tribunal in the case of ACIT vs. Nord Drive Systems Pvt. Ltd. in ITA No.825/PUN/2016 of A.Y. 2011-12, order dated 28.11.2019 held that the adjustments is required to be made only in the profit margin of the comparables by holding as under :-

> *"10. In sofaras the legal position on this issue is concerned, subclause (i) of rule 10B(1)(e) eloquently provides for computing the net profit margin as realized by the enterprise from the international transaction. Sub-clause (ii) deals with the computation of net operating profit margin from a comparable uncontrolled transaction, may be internal or external. Sub-clause (iii) provides that the net profit margin realized by a comparable company, determined as per sub-clause (ii) above, 'is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, ... which could materially affect the amount of net profit margin in the open market.' It is this adjusted net profit margin of the unrelated transactions or of the comparable companies, as determined under sub-clause (iii), which is used for the purposes of making comparison with the net profit margin realized by the assessee from its international transaction as per sub-clause (i). Thus the law explicitly provides for adjusting the profit margin of comparables on account of the material differences between the international transaction of the assessee and comparable uncontrolled transactions. It is not the other way around to adjust the profit margin of the assessee. In other words, the net operating profit margin realized by the assessee from its international transaction is to be computed as such, without adjusting it on account of differences with the comparable uncontrolled transactions. The adjustment, if any, is required to be made only in the profit margins of the comparables."*

13. This decision is being the latest decision on the issue, we do not prefer other decisions referred by the ld. AR. Accordingly, we direct the Assessing Officer/TPO to make adjustments to the margins earned by comparables instead of the margins of the respondent-assessee company. To this extent, the order of the ld. CIT(A) is reversed, hence, ground of appeal no.1 and 2 stands partly allowed.

14. Ground of appeal no.3 challenges the decision of ld. CIT(A) in deleting the TP adjustments of Rs.61,79,780/- on account of technical services fees by stating that no additional evidence was filed by the respondent-assessee.

15. It is contended that there is no necessity of technical services fees as the respondent-assessee had not started manufacturing activities. It is further contended that even accepting that the technical personnel had visited the respondent-assessee company/office, there is no proof of rendition of services by the technical personnel.

16. On the other hand, ld. AR submitted that it had furnished all the necessary evidence to establish that actual conditions of services and arm's length price of the management fees cannot be

determined at Nil without following the prescribed method placing reliance on the following decisions :-

(i) M/s. Johnson & Johnson Ltd. (Income Tax Appeal No.1030 of 2014) (Bom-HC).

(ii) M/s. Kodak India Pvt. Ltd. (Income Tax Appeal No.15 of 2014) (Bom-HC).

(iii) M/s. Merck Ltd. (Income Tax Appeal No.272 of 2014) (Bom-HC).

17. We heard the rival submissions and perused the material on record. We have carefully gone through the orders of the lower authorities and find that the Assessing Officer had determined the ALP for technical know-how fees at Rs.Nil as the respondent-assessee failed to demonstrate the actual conditions of services by technical personnel. On appeal before the ld. CIT(A), ld. CIT(A) considering the additional evidence filed before him in support of expenditure incurred on airfare, daily allowances of visiting engineers including boarding passes, attendance reports and the mail correspondence between them, had concluded that the respondent-assessee had availed the technical services from its AEs. The ld. CIT(A) also found fault with the TPO for not benchmarking the transactions by adopting one of the prescribed methods. Thus, the finding of the ld. CIT(A) that the appellant had availed the technical services from its AEs is not in dispute. But, on the

question of necessity of technical services, it is settled position that the Assessing Officer cannot question the necessity of incurring of the expenditure on technical services, as it is within the exclusive domain of the respondent-assessee. Further, the Hon'ble Jurisdictional High Court in the case of CIT vs. M/s. Merck Ltd. in Income Tax Appeal No.272 of 2014, order dated 08.08.2016 held that not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services, makes the entire Transfer Pricing Study is unsustainable in law. The relevant paragraphs of this said decision of the Hon'ble Bombay High Court (supra) is reproduced hereunder :-

> *"3. .....*
>
> *(d) The finding of the Tribunal that the TPO has not applied any of the method prescribed under Section 92C of the Act to determine the ALP in respect of fees for technical knowhow/consultancy fee paid by the Respondent-Assessee to its AE is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where 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 ALP in the three areas availed is Rs. 40 lakhs, is not disputed. The finding of the Tribunal that the agreement for technical knowhow/consultancy was in respect of all the twelve services and 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 ALP in respect of fees of technical services payable by the Respondent-Assessee to its AE, makes the entire Transfer Pricing Agreement unsustainable in law."*

18. In view of the above decision of Hon'ble Jurisdictional High Court (supra), we do not find any illegality in the order of the ld. CIT(A). Therefore, we do not find any merit in the ground of appeal no.3 filed by the Revenue. Thus, this ground of appeal no.3 stands dismissed.

19. In the result, the appeal filed by the Revenue stands partly allowed.

Order pronounced on this 19th day of May, 2022.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 19th May, 2022.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-13, Pune.
4. The Pr.CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.