THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 1429/Ahd/2019 **Assessment Year 2015-16**

Yanfeng India Automotive Interior Systems Pvt. Ltd., Plot No. AV 21, Sanand GIDC-II, Village Bol, Sanand, Ahmedabad PAN: AAACY5078P (Appellant)	Vs	Joint CIT (OSD), Circle-4(1)(1), Ahmedabad (Respondent)

Assessee by: **Shri Ajit Kumar Jain, A.R. &**
Ms. Sonal Pandey, A.R.
Revenue by: **Shri Ritesh Parmar, CIT-D.R.**

Date of hearing : 19-10-2022
Date of pronouncement : 17-01-2023

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Joint Commissioner of Income Tax (OSD), Circle 4(1)(1), Ahmedabad, in proceeding u/s. 143(3) r.w.s. 144C(13) vide order dated 11/07/2019 passed for the assessment year 2015-16.

2. The assessee has taken the following grounds of appeal:-

"Aggrieved by the order u/s. 143(3) r.w.s. 144C(13) passed by the Assessing Officer ('AO'), the Appellant wishes to raise the following Ground of Appeal for the kind adjudication of the Hon'ble Income-tax Appellate Tribunal:

1. On the facts and in the circumstances of the case and in law, the Learned AO / Transfer Pricing Officer ('TPO') has erred in and learned Dispute Resolution Panel ('DRP') has further erred in confirming Transfer Pricing adjustment amounting to 1NR 3,07,64,361 on account of disallowance of reimbursement of expenses made by the Appellant to its Associated Enterprise ('AE') Yanfeng Global Automotive Interior Systems Co. Limited ('Yanfeng China').'

2. Without prejudice to the above Ground No. 1, the Learned AO / TPO has erred in and the learned DRP has further erred in in disregarding the fact that the said expense was not claimed by the Appellant as deductible while computing taxable income during the year under consideration, and thereby, proposing the adjustment to the total income during AY 2015-16 resulting in disallowance of the amount not claimed in the computation of income.

3. On the facts and in the circumstances of the case and in law, the Learned AO has erred in initiating penalty proceedings under section 271(l)(c) of the Act in respect of the addition made on account of reimbursement of expenses by stating that the Appellant has furnished inaccurate particulars of income.

The Appellant craves leave to add to, or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."

3. The brief facts of the case are that the assessee (Yanfeng India Automotive Interior Systems Pvt. Ltd.) a subsidiary of Yanfeng Global Automotive Interior Systems Company Ltd., a company incorporated in China. The assessee was engaged in the business of manufacturing and selling automotive trim components such as door trims, instrumental panels, floor consoles, pillars etc. During the year under consideration, the assessee was awarded contract by Ford India Pvt. Ltd. for launching D-562 Line vehicles, a new product for its Indian operation. For the purpose of executing the project, the assessee took the assistance of Yanfeng China and the employees of Yanfeng China visited Germany, Brazil, China etc. and

then subsequently visited the assessee in India to share their experience and assist them in initial phases. The majority of activities carried out by employee Yanfeng China was for the purpose of development of tools for the new product and included understating product design, technical specifications, proto testing and provide assistance to the assessee during the new product launch in India. During the proceedings before the transfer pricing officer, the assessee submitted that employees of Yanfeng China incurred certain expenditure such as ticket cost, lodging cost, air fare, meal expense, viza application cost etc. These expenses had been reimbursed by the assessee to the AE on cost to cost basis without any mark up and was therefore considered to be at arms length under the India Transfer Pricing Regulation. Further, this expenditure was with respect to the tools being developed for further re-sale to customer and accordingly the said expenditure was reflected under inventory along with the value of tools as on 31st March, 2015. It was explained to the TPO that the transactions represented actual cost to cost reimbursement of actual amount incurred by AE towards third party expenses on behalf of the assessee and therefore does not require separate bench marking, in absence of any mark up charged by the A.E i.e. Yanfeng China to the assessee. Since the reimbursement of expenses has been made at actuals, the transaction is considered to be bench marked under Rule 10AB (Any Other Method).

3.1 Regarding the business rationale, the assessee submitted that this was the first project of the assessee company with Ford India and the contract was expected to generate significant revenues, which is evident from the turnover of Rs. 1,842 million achieved during the next financial year, which

included more than 80% sales revenue from Ford India. For the purpose of making this project successful Yanfeng China had deployed more than 60 employees for this project at different points of time which itself was more than double the strength of the employees of the assessee during the impugned assessment year. Before the TPO, the assessee submitted following documents in support of the above expenses.

(i) Agreement between Ford India and assessee for B-562 project.

(ii) Designation and department of employees who travelled to various countries for this project.

(iii) Various invitation letters sent to employees of Yangfeng China for viza processing in connection with Ford Project.

3.2 Further, Yanfeng Group did not have any sales to Indian customer and therefore expenditure incurred in India by employees of Yanfeng China for travel, hotel, viza etc. was for the purpose of benefit of the assessee being a new set up.

3.3 However, the TPO passed the transfer pricing order by determining the arms length price of the international transaction pertaining to reimbursement of expenses by the assessee to Yanfeng China as “nil” and thereby made a downward adjustment amounting to Rs. 3,07,69,361/- to the transaction value of reimbursement of expenses to the AE. While passing the order, the TPO noted that the assessee has not submitted any supporting

documents in support of its contention. The TPO held that assessee merely submitted copy of agreement between the assessee and Ford India, designation and department of employees, copies of email communications of the employees of Yanfeng China who travelled to other countries. In appeal, the DRP rejected assessee's appeal with the following observations:-

> *"7.7 We, have, however, perused the additional evidence filed by the assessee. It is found that most of these are in the form of e-mails containing correspondence between the employees of the AE in China and Ford Term at Germany and other destinations. Although, some of these emails have reference to the Indian entity (assessee), but these do not have any categorical discussions on actual or tangibly identified work relating to the Indian entity. This at best, could be taken as having some reference of the Indian operations but in no manner demonstrates or provides any insight whatsoever on the level and scale of involvement of the employees of the China and AE in India operations so as to justify the benefit and the cost determined for the same. In fact, we find that these emails do not even provide any clarity as to what was the exact nature of work for which the employees of the AE were involved and discussions in respect of which specific work of the assessee was made with the parties in Germany and other jurisdictions. In this regard, it would be most relevant to refer to the decision of Hon'ble Bangalore ITAT in case of M/s. Fosroe Chemical (ITAT No. 148/Bang/2014] wherein it was held that:*
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> > *"The evidence filed by the Assessee in this regard is in the form of emails between parties, reports etc. As to how the evidence filed by the assessee was actually useful in its business has also to be highlighted as the assessee will be the best person to know these facts which are within its knowledge. It is only if such a stand is taken by the Assessee can be TPO take the issue forward to arrive at a proper conclusion. In our onion filing of voluminous correspondence, reports etc. would not be proper way of discharge of Assessee's burden to establish the ALP of expenditure in question."*
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> > *(emphasis supplied)*
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> *7.8 We find that the jurisdiction given for the tours of the employees of Yangfeng China is couched in generalities rather that specifics. Instances of these are that the visits were for "understanding the nature of the product", "effectively supervise the project", the Indian team lacking "requisite experience", "experience sharing", coordinating with customers and supplies"- are devoid of any specific details and, therefore, remain facile narrations. In this light, it is rather difficult to accept the sweeping but unsubstantiated assertion of the*

assessee that these visits undertaken by the employees of Yangfen China was the prime mover for the sharp hike in turnover in this year as compared to the immediately preceding year. Even otherwise, by the assessee's own submission, the turnover for the financial year 2014-15 primarily included sales to General Motors India, whereas, the sales in the appeal year was attributable to Ford India to the extent of 80 percent –being the first project of the assessee with it. Hence, the comparison is not on an 'apple to appeal' basis, besides being sketchy. We do not therefore find the increase in turnover as straight away supporting the case sought to be made by the appellant.

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7.16 Hence, as per the material on record, in the present case the assessee company has failed to qualify the "Benefit Test' and the 'Willingness to Pay Test'.

7.17 In view of the detailed factual and legal discussions as above, the Panel is of the view that the A.O./TPO has rightly determined the ALP of the intra-group charges claimed as reimbursement of expenses at 'Nil'. Hence, no direction needs to be issued to the AO/TPO on these grounds. The Grounds of Objections is, accordingly, rejected."

4. Before us, counsel for the assessee primarily argued in respect of ground no. 1. At the outset, the counsel for the assessee drew our attention to page 112-114 of the appeal said and submitted that the transfer pricing documentation has elaborated in detail the nature of expenses in respect of which reimbursement has been made by the assessee to Yanfeng China and the T.P. documentation has also given the business rationale for incurring such expenses. He further drew our attention to page 119 of the transfer pricing documentation of the appeal set and submitted that the present case being that of reimbursement of expense, "any other method" was employed for bench marking the international transactions entered into by the assessee company during the year under consideration. The counsel for the assessee submitted that the AE of the assessee Yanfeng China is not rendering any services and has only incurred cost in relation to assessee's project with Ford

India, which has been reimbursed on actual basis. The counsel for the assessee then drew our attention to page 208 of the appeal set containing list of employees who were working for the assessee and whose costs were reimbursed by the assessee to its AE. He then drew our attention to page 210 onwards of the appeal set and submitted that all documentary evidences regarding incurring of expenses have been placed on record before the Revenue authorities. The counsel for the assessee submitted that there is substantial evidence to prove that expenses were incurred by the AE for the assessee, which was reimbursed by the assessee on cost to cost basis. He however admitted that in the instant facts, there was no agreement between the assessee and its AE for incurring of such cost by the AE on behalf of the assessee. However, the counsel for the assessee submitted that on appreciation of facts there is substantial justification for incurring of such expenses in the instant set of facts therefore even in absence of formal agreement to incur such expenses, the arms length price could not have been determined at "nil".

5. In response, the ld. Departmental Representative relied upon the observations made by the DRP and TPO in their respective orders.

6. We have heard the rival contentions and perused the material on record. The issue for consideration before us is whether in the instant set of facts, the TPO is justified in determination of arms length price act "nil" when the assessee is not able to demonstrate that the expenses so incurred have a live nexus with India. In the instant set of facts, admittedly there is no agreement between the assessee and its AE to incur the aforesaid

expenses, who have been invoiced to India on cost to cost basis. In its order, the TPO has categorically noted that the assessee has not given any supporting evidence to support its contention. In fact, the TPO has noted that instead of furnishing the supporting evidences, the assessee has relied upon judicial precedent to support its case. The TPO has noted that the assessee has not proved with proper documentation and evidence that services are actually rendered. The reimbursement of expenses is guided by the profitability of the AE and is not based on services rendered by the AE to the assessee. Accordingly, the Assessing Officer concluded that though ALP/services by AE cannot be determined at "nil" for questioning the necessity, or benefits of the expenditure so incurred, however, such expenditure can be allowed only after assessee proving conclusively that there was actual rendition of services by AE. The onus lies on the assessee to prove that the services are actually rendered by the AE. In appeal, the DRP observed that the only documentary evidence which could be produced were simply email correspondences. However, from such emails, there is no evidence on record to prove that such services were actually received by the assessee company. The DRP observed "at para 7.7" that while some of these emails have reference to the assessee but these do not have any categorical discussion on actual or tangibly identified work relating to the Indian entity. Though this could be taken as having some reference to Indian project but in no manner demonstrates or provides any insight whatsoever on the level and scale of involvement of the employees of the China AE in Indian project so as to justify the benefit and cost determined for the same. The DRP observed that these emails do not even provide any clarity as to what was the exact nature of work for which the employees of

the AE were involved and discussions in respect of which specific work of the assessee was made with parties in Germany and other jurisdictions. Now, in the light of the above observations, the issue for consideration before us is whether in absence of any agreement or any supporting evidences which could convincingly prove that the expenses in the form of reimbursement to its AE by the assessee had any nexus with India, or without any proof of actual rendering of services, whether ALP could be determined by the TPO at "nil" or whether the TPO is still under an obligation in such facts to determine the ALP by following one of the methods prescribed under the Act. In our view, several instances have come where the assessee has not been able to demonstrate with supporting agreement or evidences to prove that the expenses made to AE are being supported by actual rendition of services or whether these expenses are in relation to services which have any co-relation with the business of the assessee in India. In our view, we are in agreement with the Revenue that though the TPO cannot determine arms length price at "nil" by questioning the necessity of the expenses or questioning the benefits of expenditure incurred, however, at the same time, the onus is on the assessee to prove that there was actual rendition of services by the AE. In a situation the assessee is unable to prove any rendition of services or that the services had any connection with the business of the assessee in India, in our considered view, on such facts, the ld. TPO can determine the arms length price at "nil". The onus of proving the actual rendition of services primarily lies on the assessee in respect of an international transaction. In the case of **Akzonobel India Pvt. Ltd. vs. Addl. CIT 145 taxmann.com 468 (Delhi),** the High Court held that where assessee has failed to furnish evidence to demonstrate that administrative

services were actually rendered by AE and assessee has received such services, the TPO righty determined ALP to service fee at "nil". While passing the order, the Delhi High Court made following observations:-

> ***"5.*** *Upon a perusal of the paper book, this Court finds that all the three authorities below have given concurrent findings of fact that the Appellant had failed to furnish evidence to demonstrate that administrative services were actually rendered by the AE and the assessee had received such services. In fact, the ITAT has noted in the impugned order:*
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> *"….On a specific query made by the Bench to demonstrate the receipt of services from AE through cogent evidence, including any communication with the AE, learned counsel for the assessee expressed his inability to furnish any evidence and repeated his submission to restore the matter back to the Assessing Officer for enabling the assessee to furnish evidence, if any."*

6.1 In the case of **Gemplus India Pvt. Ltd. Vs. ACIT (ITA 352/Bang/2009),** the assessee made certain payments to its overseas AE. The contention of the Department was that the assessee has not proved anything to establish that the so-called services rendered by Gemplus Singapore to the assessee company in India. Further, the assessee has not even established the necessity for availing services by the assessee from Gemplus Singapore. The Department further pointed out that the cost has been apportioned by Gemplus Singapore for different country centres on mutually agreed basis and not on the basis of actual services rendered. On these facts, the ITAT dismissed the assessee's appeal with the following observations:-

> *"20. We heard both sides in detail and also perused the records of the case including the paper book filed by the assessee company running in to 390 pages. The necessary facts of the case have already been discussed in paragraphs above. On examination of the facts and circumstances of the case and the terms of the agreement entered into by the assessee and its Singapore associate, the TPO has*

come to certain pertinent observations in her order. She has observed that the terms prescribed in the agreement in respect of the payments to be made by the assessee company are independent of the nature and volume of services, if any rendered by the Singapore Associate. This is a vital observation made by the TPO which goes to the root of the issue. The function of the TPO is to compare the payments made by the assessee company for services received if any and to see whether ITA No.352/B/09 those payments are comparable. In a given scenario, the TPO has to examine whether the payments were ALP conducive. Therefore it is very imperative on the part of the assessee to establish before the TPO that the payments were made commensurate to the volume and quality of services and such costs are comparable. The payment terms as pointed out by the TPO are independent of the nature or volume of services. The assessee has defeated in this primary examination itself. The TPO is also justified in making a pertinent observation that the expenses are apportioned by Singapore affiliate among different country centers on the basis of their own agreements and not on the basis of the actual services rendered to the individual units. It is in addition to the above fundamental flaw, that the TPO has made a clear findings that there are no details available on record in respect of the nature of services rendered by Singapore affiliate to the assessee company. Therefore, we are of the considered view that the TPO is justified in holding that the assessee has not proved any commensurate benefits against the payments of service charges to the Singapore affiliate. Therefore, the TPO is justified in making the adjustment of ALP under sec. 92CA of the Income-tax Act 1961.

21. In view of the above finding, we hold that the addition made by the Assessing Officer is justified and the CIT(A) is right in law in confirming the addition in this regard.

22. In result, the appeal filed by the assessee is dismissed."

6.2 In the case of Deloitte Consulting India (P.) Ltd. v. DCIT [2012] 22 taxmann.com 107 (Mumbai), the ITAT held that when assessee had not furnished evidence to prove that those three personnel had rendered marketing services to it and, in fact, assessee-company had no revenue which had been derived as a result of those marketing expenses, TPO was justified in determining ALP of marketing expenses at "nil". While passing the order, ITAT observed as under:

> *"as per joint venture agreement Deloitte assisted assessee in generation of sales, management and delivery of projects, and in managing and maintaining customer relationships. For that purpose, three senior managers had been assigned by Deloitte to undertake full-time marketing only for assessee. Cost incurred on assignment of said managers consisting of their salary and related expenditure, was charged by Deloitte on actual basis. TPO held that marketing costs incurred and allocated by Deloitte to assessee did not result in rendering of any service to assessee and, therefore, determined arm's length price for same, at Nil. The ITAT held that it was very imperative on part of assessee, to establish before TPO, that payments made were commensurate to volume and quality of services and such costs were comparable. The ITAT further held that when assessee had not furnished evidence to prove that those three personnel had rendered marketing services to it and, in fact, assessee-company had no revenue which had been derived as a result of those marketing expenses, TPO was justified in determining ALP of marketing expenses at "Nil".*

6.3 In the case of **Cranes Software International Ltd. v. DCIT [2014] 52 taxmann.com 19 (Bangalore - Trib.)**, the ITAT held that where assessee had not been able to bring anything on record to prove that services had been actually rendered by AE to it, lower authorities were justified in considering ALP to be "Nil". While passing the order ITAT observed as under:

> *"When assessee is not able to bring on record anything to show any services to have been rendered by AE to it and there are no documentations to show any services to have been received from AE, in our opinion it will be fair conclusion that no services were in fact rendered the by AEs to the assessee. There is no dispute that both the AEs were subsidiaries of the assessee. Therefore, the agreements between such subsidiaries, which have been brought before us as well as lower authorities for justifying the payments could be best considered only as self-effectuating documents. There was considerable onus on the assessee to show that actual services were rendered by its subsidiaries. It is a well settled principle of law that a court has to go into substance and not be satisfied with the and form has to get behind the smoke screen to find the true state of affairs. In our opinion, the assessee was unable to show any services to have been received from sister concerns. When no services were received then lower authorities in our opinion were justified in considering the ALP to be zero."*

6.4 In the case of **Cisco Systems Capital (India) (P.) Ltd. v. Addl CIT [2014] 52 taxmann.com 17 (Bangalore - Trib.)**, the ITAT made the following observations in respect of necessity to prove rendition of services:

> *"In order to substantiate the claim, the assessee not only has to file the copies of agreement with the associated enterprise to show that there is a liability of the assessee to pay, but that it is also essential to prove that the associated enterprise has rendered services to the assessee for which management fee is being paid."*

6.5 In view of the above observations, since in the instant set of facts, the assessee has not been able to prove the actual rendering of services/expenditure in respect of the assessee's business by its oversees associated enterprise either by way of producing the necessary agreement in respect of rendering of services or in the form of any other communication which could convincingly/conclusively establish such rendering of services/incurring of expenditure, we are of the view that the ld. TPO was justified in determining the arms length price at "nil". Accordingly, we find no infirmity in the order of ld. TPO/DRP.

7. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 17-01-2023

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 17/01/2023

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद