

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "C" : PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI G.D. PADMASHALI, ACCOUNTANT MEMBER

ITA.No.168/PUN./2022
Assessment Year 2017-2018

Emerson Climate Technologies (India) Private Limited, Plot No.23, Rajiv Gandhi Infotech Park, Phase-II, Hinjewadi, Pune. PIN – 411 057 PAN AAACK7291C	vs.	The Addl./Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer, National Faceless Centre, Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri Dhanesh Bafna
For Revenue :	Shri Shishir Shrivastava

Date of Hearing :	05.01.2023
Date of Pronouncement :	17.02.2023

ORDER

PER SATBEER SINGH GODARA, J.M.

This assessee's appeal for assessment year 2017-18 arises against the National Faceless Centre, Delhi's assessment framed vide Din No.ITBA/AST/S/143(3)/2021-22/1038900264(1) dated 19.01.2022 in furtherance to the CIT (DRP-3), Mumbai-1, Mumbai's DIN & Order No.ITBA/DRP/F/144C(5)/2021-22/1037939790(1), dated 20.12.2021 in Objection No.102184/2021-22 dated 27.04.2021, in proceedings u/s. 143(3) r.w.s.144C(13) r.w.s.144B of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties. Case file perused.

2. The assessee pleads the following substantive grounds in the instant appeal :

“The grounds stated hereunder are independent of, and without prejudice to one another:

1. *On the facts and in the circumstances of the case, and in law, the Learned Assessing Officer (‘Ld. AO’), following the directions of Hon’ble Dispute Resolution Panel (‘Ld. DRP’), erred in confirming the addition of Rs.26,31,30,651/- to the total income of the Appellant on under various sections of the Income Tax Act, 1961 (‘the Act’),*

The Appellant prays that various disallowances/additions/adjustments made by the AO be deleted.

Transfer Pricing related

2. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO/Learned Transfer Pricing Officer (‘Ld, TPO’) erred in determining the arm’s length price of the international transaction pertaining to payment of fees for advisory and other services by the Appellant to its associated enterprise (‘AE’) as ‘Nil’ as against Rs.15,75,65,912/- determined by the Appellant and thereby making a TP adjustment of Rs. 15,75,65,912/-.*

The Appellant prays that the book value of the international transaction be accepted to be the arm's length price of the said transaction and the above TP adjustment be deleted.

3. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO/Ld. TPO while making a TP adjustment on account of payment of fees for advisory and other services erred in :*
- i. Ignoring that the Appellant had supported the claims with appropriate documentary evidences, which were filed on sample basis;*
 - ii. Ignoring that there was commercial rationale and expediency in availing the services from the AE;*
 - iii. Ignoring that the Appellant had submitted cost allocation working;*
 - iv. Ignoring that the Appellant is not required to establish the benefits arising out of the said services; and*
 - v. determining the arm's length price of the transaction under Comparable Uncontrolled Price ('CUP') Method without identifying any valid comparable uncontrolled transaction*

The Appellant prays that the benchmarking analysis conducted by the Appellant in the TP study ought to be accepted and the TP adjustment be deleted.

4. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO erred in disregarding the fact that the Hon'ble Pune Bench of the Tribunal in Appellant's own case for AY 2009-10 to AY 2016-17 on identical facts, has deleted the entire TP adjustment.*

The Appellant prays that following the rule consistency, due cognizance ought to be given to the Ruling of the Hon'ble Tribunal in Applicant's own case for the prior years and the TP adjustment ought to be deleted.

5. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO/ Learned Transfer Pricing Officer ('Ld. TPO') erred in making an addition of Rs.51,90,680 to total income of Appellant on account of the TP adjustment with respect to international transaction pertaining to provision of oracle support services by the Appellant to its AE.*

The Appellant prays that the book value of the international transaction be accepted to be the arm's length price of the said transaction and the above TP adjustment be deleted.

6. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO/Ld. TPO while making a TP adjustment on account of provision of oracle support services erred in:*

i. disregarding the appropriateness of benchmarking conducted by Appellant and quantitative/qualitative filters considered therein;

ii. modifying the set of comparables; and

iii. erroneously considering functionally dissimilar companies:

- Domex E-Data Private Limited*
- Informed Technologies India Ltd.*
- Inteq B P O Services Pvt. Ltd.*
- Manipal Digital Systems Pvt. Ltd.*

as additional comparables in final set of comparables.

The Appellant prays that the benchmarking analysis conducted by the Appellant in the TP study ought to be accepted, above mentioned companies be rejected from the final set of comparables and consequently, the TP adjustment be deleted.

Corporate Tax related

7. *On the facts and in the circumstances of the case, and in law, the Ld. AO as per directions given by Hon DRP has erred in denying the weighted deduction of Rs.18,63,37,428 (200% of revenue expenditure of Rs.8,82,53,166 and capital expenditure of INR 49,15,548) claimed by the Appellant under section 35(2AB) of the Act on the ground that Department of Scientific and Industrial Research ('DSIR') has not issued Form 3CL.*

The Appellant prays the Hon'ble Tribunal to allow the deduction under section 35(2AB) of the Act.

8. *On the facts and in the circumstances of the case, and in law, the Ld. AO as per the direction given by Hon DRP has erred in disallowing the amount of INR 72,05,345 under section 36(1)(va) of the Act being amounts of employee contributions deposited in the relevant fund after the due date prescribed under the Employees' Provident Fund and*

Miscellaneous Provisions Act, 1952 ('EPF Act') or the Employee State Insurance Act ('ESI') without appreciating the fact that the amounts were deposited before the due date of filing of return of income for AY 2017-18 and hence should be allowable under section 43B of the Act.

The Appellant prays the Hon'ble Tribunal to delete the addition under section 36(1)(va) of the Act.

9. *On the facts and in the circumstances of the case, and in law, the Ld. AO has erred in granting TDS credit of Rs.1,93,22,300 as against Rs.1,93,86,299 as claimed by the Appellant.*

The Appellant prays the Hon'ble Tribunal to direct the Ld. AO to grant TDS credit as claimed by the Appellant.

10. *On the facts and in the circumstances of the case, and in law, the Ld. AO has erred in levying the interest under section 234B of the Act of Rs.6,12,20,086.*

The Appellant prays the Hon'ble Tribunal to direct the Ld. AO to delete the interest under section 234B of the Act.

11. *On the facts and in the circumstances of the case, and in law, the Ld. AO has erred in calculating the interest under section 234C of the Act of Rs.29,38,852 however the*

interest under 234C of the Act as per returned of income of Rs.24,00,007,

The Appellant prays the Hon'ble Tribunal to direct the Ld. AO to compute the interest as per provision of section 234C of the Act.

12. *On the facts and in the circumstances of the case, and in law, the Ld. DRP/Ld. AO/Ld. TPO erred in initiating the penalty proceeding under section 270A read with section 274 of the Act and not giving the Appellant any opportunity to have its say.*

The Appellant prays to Hon'ble Tribunal to direct the Ld. AO to drop the penalty proceedings under section 270A read with section 274 of the Act.

The Appellant craves leave to add, alter, amend, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing so as to enable the Hon'ble Tribunal members to decide these according to the law.”

- 2.1. We proceed ground wise for the sake of completeness of our adjudication.

3. The assessee's first and foremost substantive ground is treated as general in nature. Rejected accordingly.

4. The assessee's 2nd to 4th substantive grounds seek to reverse transfer pricing adjustment of Rs.15,75,65,912/- pertaining to fee for advisory and other services involving its overseas associated enterprises "AE's" whose price has been taken by the TPO at NIL as affirmed in the DRP's directions. It emerges during the course of hearing that the assessee has filed its case law paper book running into 81 pages placing on record this tribunal's six orders i.e., common for assessment years 2010-11 and 2011-12 and 2012-13, and 2013-14 to 2016-17 each adjudicating the very issue against the department. We deem it appropriate to quote learned coordinate bench's last order dated 15.07.2021 for assessment year 2016-17 involving assessee's appeal ITA.No.190/PUN./2021 as follows :

"4. The only other surviving issue in this appeal through various grounds is against the confirmation of transfer pricing addition of Rs.14,56,09,180/-.

5. Briefly stated, the facts of the case are that the assessee is a company incorporated under the Companies Act, 1956. It was a 51:49 joint venture between Kirloskar

Brothers Limited (KBL) and Copeland Corporation, USA for carrying on the activities of Planning, Development, Manufacturing, Assembling, Marketing and Selling compressors and parts of various types, models and varieties. Subsequently, Copeland Corporation, USA purchased the stake of Kirloskar Brothers Limited. The assessee company filed its return declaring total income at Rs.1,63,47,34,240/-. Certain international transactions were reported in Form No. 3CEB. The AO made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions. One of the reported international transactions was "Payment of fees for Advisory and other services" with transacted value of Rs.14,48,84,020/-. The assessee applied the Transactional Net Margin Method (TNMM) as the most appropriate method for demonstrating this transaction to be at ALP. The TPO did not accept the assessee's point of view primarily on the ground that the assessee did not lead any evidence to demonstrate that the services were actually received. The evidence and communication etc., filed by the assessee in this regard were held to be general not justifying receipt of services. The assessee submitted that the Tribunal in its own case for the

assessment years 2009-10 to 2013-14 has deleted the transfer pricing adjustment proposed by the TPO under similar circumstances. The TPO rejected the assessee's contention on the ground that the order passed by the Tribunal for the earlier years was not accepted by the Department and the appeal was recommended. He, therefore, rejected the TNMM and applied the Comparable Uncontrolled Price (CUP) method for this international transaction. Accordingly, he determined Nil ALP of the international transaction of 'Receipt of Advisory and other services' and proposed transfer pricing adjustment of Rs.14.48 crore. The AO incorporated the transfer pricing adjustment in the draft order notified by him. The assessee carried the matter before the Dispute Resolution Panel (DRP) but without any success. The AO in the final assessment order made the transfer pricing addition of Rs.14.56 crore against which the assessee has come up in appeal before the Tribunal.

6. *We have heard both the sides and gone through the relevant material on record. It is found as an admitted position that the facts and circumstances of the instant appeal are similar to those of the earlier years. The Tribunal has passed orders starting from assessment year*

2009-10 to 2015-16, whose copies have been placed on record. In the lead order, which has been followed in later years, the application of the TNMM as the most appropriate method has been accepted in preference to the CUP method as applied by the TPO. After giving certain directions, matter has been sent back to the AO/TPO for deciding the issue accordingly. The ld. DR fairly conceded that the facts and circumstances of the instant appeal are mutatis mutandis similar to those of earlier years. Respectfully following the precedent, we set-aside the impugned order and remit the matter to the file of AO/TPO for deciding this issue afresh in accordance with the directions given by the Tribunal in assessee's own case for the earlier assessment years. Needless to say, the assessee will be provided adequate opportunity of hearing in such fresh proceedings."

5. Faced with the situation and in absence of any distinction on facts or law, we adopt judicial consistency and direct the learned TPO to decide the instant first and foremost ground afresh as per law after taking into consideration all the said preceding assessment years developments on the very issue. These assessee's 2nd to 4th substantive grounds are accepted in above terms.

6. Next comes the assessee's 5th and 6th substantive grounds seeking to delete ALP adjustment of Rs.15,90.680/- made by the learned lower authorities pertaining to its international transactions with overseas associated enterprises involving the provision of oracle support services in the relevant previous year. Mr. Bafna submitted during the course of hearing that the assessee only presses for substantive ground no.6(i) wherein the learned lower authorities have rejected one of the comparable entity M/s. Crystal Vox Ltd. for the sole reason that it had outstanding receivables of more than four months. The DRP's corresponding findings to this effect are in para6.2.2(a) at page-120 in its directions. The TPO's order u/s.92CA(3) dated 29.01.2021 has discussed this issue at page 10 onwards wherein no such filter of receivables having more than 04 months has been adopted. We make it clear that neither of the learned lower authorities holds the above entity M/s. Crystal Vox Ltd. as not a functionally comparable entity. This is indeed coupled with the assessee's pleadings on merits that both the learned lower authorities had not made available the corresponding financial statements. Mr. Bafna further highlighted the fact that the receivables in the said company of merely Rs.97,391/- out of Rs.2,21,26,002/- exceed 06 months time period as per the corresponding financial statements. Be that as it may, the

Revenue could hardly dispute that even if the said outstanding receivables are accepted as having more than four months, the same would hardly effect the relevant profit margin in the very segment. Sec.92B Explanation-(c) also treats such receivables as an international transaction itself. We further observe at the cost of repetition that we are yet to see even a single observation from the learned lower authorities rejecting M/s. Crystal Vox Ltd. as not satisfying “FAR” analysis. Faced with the situation, we accept the assessee’s corresponding substantive ground no.6(i) herein to this effect and direct the TPO to frame his afresh computation in very terms.

6.1. Learned counsel at this stage stated at the Bar that the assessee is not pressing its other sub-grounds in ground no.6. We thus accept the instant ground partly for statistical purposes.

7. Next comes the assessee’s 7th substantive ground challenging correctness of sec.35(2)(AB) weighted deduction disallowance of Rs.18,63,37,428/- on the ground that the prescribed authority i.e., Department of Science and Industrial Research [“DSIR”] has not issued Form 3CL qua the same. It emerges during the course of hearing that the said prescribed authority has now issued Form 3CL to the assessee on 25.04.2022 [pages 2336 and 2337 in paper book] before us.

Faced with the situation, we restore the assessee's instant 7th substantive ground to the Assessing Officer for his afresh factual verification as per law preferably within three effective opportunities of hearing.

8. The assessee's 8th substantive ground challenges correctness of the learned lower authorities action invoking sec.36(1)(va) disallowance of Rs.72,05,345/- pertaining to employees contribution stated to have been deposited beyond the due date prescribed under the corresponding statute. Suffice to say, hon'ble apex court's recent landmark decision in Checkmate Services P. Ltd. & Ors. vs. CIT & Ors. [2022] 448 ITR 518 (SC) has already decided the instant issue against the assessee and in department's favour that such a contribution ought to be deposited before the due date under the corresponding statute than that of filing sec.139(1) return. We accordingly uphold the impugned disallowance.

9. The assessee's 9th substantive ground challenging mismatch of TDS credit of Rs.1,93,22,300/- as against correct sum of Rs.1,93,86,299/- is restored back to the file of Assessing Officer for his afresh factual verification as per law since not requiring any substantive adjudication at our level.

10. The assessee's 10th to 12th substantive grounds are treated as consequential in nature. Ordered accordingly.

11. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open Court on 17th February, 2023.

Sd/-
(GD PADMASHALI)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune, Dated 17th February, 2023

VBP/-

Copy of the Order forwarded to :

1. The appellant
2. The respondent
3. Ld. CIT (DRP-3) Mumbai-1, Mumbai.
4. Ld. Pr. CIT, National e-Assessment Centre, Delhi.
5. TPO-ACIT(TP)-1(2), Pune
6. DR ITAT Pune-C Bench, Pune
7. Guard File.

//BY Order//

Assistant Registrar, ITAT, Pune Benches,
Pune.