

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI**

**SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 2069/MUM/2022
(Assessment Year: 2018-19)**

**Booking.Com India Support &
Marketing Services Private Limited,**

03B124 C20 G Block, Wework Enam Sambhav,
Bandra (East), Bandra Kurla Complex,
Mumbai - 400051
[PAN: AAECB5759L]

..... **Appellant**

**The Deputy Commissioner of Income
Tax, Circle – 6(1)(2), Mumbai,**

AO Number – 2, Range Code – 661,
Mumbai
Circle 2(2)(1), Mumbai,
Aayakar Bhawan, Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Ajit Kumar Jain
Ms. Neha Rai
For the Respondent/Department : Shri Ajit Pal Singh Daia

Date : 09.08.2023
Conclusion of hearing : 25.09.2023
Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against the Assessment Order, dated 23/06/2022, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2018-19, as per directions issued by CIT(Dispute Resolution Panel-1), Mumbai-2 [hereinafter referred to as 'the DRP'] under Section 144C(5) of the Act.

2. The Appellant has raised following grounds of appeal:

"General Ground

1. *On the facts and in law, The Deputy Commissioner of Income Tax, Circle - 6(1)(2), Mumbai, ("Ld. AO") erred in passing the impugned assessment order dated 23 June 2022 pursuant to the directions of the Hon'ble Dispute Resolution Panel ("Hon'ble DRP") and computed the total income of the Appellant for Assessment Year ("AY") 2018-19 as INR 114,164,810 as against the returned income of INR 111,667,070.*

Jurisdictional Ground

2. *On the facts and in law, the Final Assessment order dated 23 June 2022 is non-est having been passed by Ld. AO as opposed to the National Faceless Assessment Centre ("NFAC") which had validly assumed jurisdiction over the Appellant, it was only NFAC which was competent to pass the impugned assessment order, failing which, the said order is non-est, liable to be quashed.*

Grounds relating to Transfer Pricing - Reimbursement of Employee Stock Option Plan ("ESOP") (Total Adjustment: INR 2,497,737)

3. *The Hon'ble DRP/Ld. AO/ Ld. TPO erred on facts and in law in proposing an adjustment of INR 2,497,737 to the income of the Appellant on account of alleged difference in the arm's length price ("ALP") of the international transaction of reimbursement of ESOP expenses during the relevant previous year by holding the same to be NIL*
4. *On facts and in law, the Hon'ble DRP/Ld. AO/ Ld. TPO erred in alleging that the reimbursement of ESOP expense of INR 2,497,737 was notional in nature and in doing so the Hon'ble DRP/ Ld. AO/ Ld. TPO disregarded the submissions filed by the Appellant including the documentary evidence to substantiate the pricing of the ESOPs and the factual details to substantiate that the actual payment was remitted, and appropriate TDS was deducted and deposited by the Appellant.*
5. *On facts and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in disregarding the benchmarking methodology with respect to the international transaction of reimbursement of ESOP expenses in the Transfer Pricing Documentation by application of "Other Method" as prescribed under Rule 10AB of the Income-tax Rules, 1962 ("the Rules") and determined the arm's length price as 'NIL' as against INR 2,497,737 by applying Comparable Uncontrolled Price Method ("CUP Method") without giving any cogent reasoning and without providing comparable uncontrolled transaction.*

6. *On the facts and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in not providing adequate opportunity to the Appellant of being heard and in doing so the Hon'ble DRP/ Ld. AO/Ld. TPO has violated the "Principles of Natural Justice".*

Other Grounds

7. *On facts and in law, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred on the fact by disregarding that the effect of adjustment has corresponding effect, thereby leading to reduction in the overall income of the Appellant and creating lower tax incidence in the hands of the Appellant. In doing so, the Hon'ble DRP/ Ld. AO/ Ld. TPO erred in upholding that arm's length price is notional and does not alter the cost base of Appellant.*
8. *On facts and in law, the Hon'ble DRP/ Ld. AO/Ld. TPO erred on fact and in law in initiating penalty under section 270A of the Act.*

The above Grounds of Appeal' are independent and without prejudice to each other.

The Appellant craves leave to supplement, withdraw, amend, add and/or otherwise alter or modify, any or all, grounds of the appeal stated hereinabove and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing."

3. The Assessee filed return of income for the assessment year 2018-19 on 30/11/2018 declaring total income of INR 11,16,67,070/-. The case of the Appellant was selected for scrutiny and notice under section 143(2) of the Act was issued to the Appellant. During the assessment proceedings the Assessing Officer noted that the Appellant had entered into International Transactions with its Associated Enterprises (AEs) during the relevant previous year and therefore, a reference under Section 92CA(1) of the Act was made to the Transfer Pricing Officer (TPO) vide letter, dated 29/01/2020, for **determination of Arm's-Length Price (ALP)** of the International Transactions.

4. Vide, order dated 22/07/2021, the TPO passed order under Section

92CA(2) of the Act proposing transfer pricing addition of INR 24,97,737/- in respect of international transaction of reimbursement of Employee Stock Option Plan (ESOP) Expenses. The TPO determined ALP of the aforesaid ESOP expenses as 'Nil' using Comparable Uncontrolled Price (CUP) Method as according to the TPO the ESOP expenses were notional in nature.

5. In the Draft Assessment Order, dated 10.09.2021, the Assessing Officer incorporated the above transfer pricing adjustment of INR 24,97,737/-. The Appellant filed objections before the DRP against the aforesaid transfer pricing adjustment. However, the DRP declined to interfere and rejected the objections. Accordingly the Assessing Officer passed the Final Assessment Order, dated 23/06/2022, under Section 143(3) read with section 144C(13) of the Act making transfer pricing addition of INR 24,97,737/-.
6. Being aggrieved, the Appellant has preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 2 above.
7. The Ld. Authorised Representative for the Appellant advance argument challenging the merits of the transfer pricing addition of INR 24,97,737/- while the Ld. Departmental Representative relied upon the order passed by the TPO and DRP.
8. We have considered the rival submissions and perused the learned record. On perusal of record we find that the ultimate holding entity of the booking.com group (i.e. Booking Holdings Inc.), had established equity compensation plans wherein the group offered Employee Stock Option Plans (ESOPs) in the nature of Restricted Stock Units (RSUs) and Performance Share Units (PSUs) to employees eligible under the equity compensation plan to its group entity as incentives and rewards to encourage employees and

executives to contribute to the long-term success of the group.

9. During the relevant previous year, an amount of INR 73,71,854/- was recorded as having accrued in the books of accounts as ESOP Expenses in respect of charge towards RSUs out of which INR 47,18,775/- pertained to unvested grant expenses and therefore, the same was disallowed in the return of income. Whereas deduction was claimed for the balance amount of INR 26,53,078/- remitted to the AEs during the relevant previous year which pertained to vested grant expenses and included incremental gain of INR 10,16,057/- on the RSUs granted in 2015 and vested in Financial Year 2017-18.
10. On the basis of invoices raised by the AE on the Appellant, remittance of ESOP expenses of INR 26,53,078/- was made by the Appellant to its AE during the relevant previous year.
11. The ESOP expenses so remitted to the AE were debited to the profit and loss account as part of employee benefit expenses and treated as part of operating cost. Since the Appellant was compensated for its services at cost plus markup of 5%, the ESOP expenses of INR 26,53,078/- were recouped by the Appellant as compensation for services along with margin of 5% thereon. Therefore, by the Appellant to its AE service charge from the AE. In addition, the Appellant also margin of 5% on ESOP expenses of INR 26,53,078/-.
12. The TPO determined the ALP of ESOP Expenses at 'Nil' without appreciating that the Appellant had been invoiced for the cost of ESOP expenses. It is admitted position that the ESOP expenses pertained to already vested RSUs. On exercise of the option by the employees, the ultimate holding company of the Appellant was under obligation to make payment of RSUs to the employees of the Appellant as per the compensation scheme. The Appellant had

created the amount invoiced to the Appellant as employee personnel costs and had debited the same to the profit and loss account. Thus, the findings returned by the TPO that the ESOP expenses of INR 26,53,078/- are notional in nature is factually incorrect we note that in paragraph 5 of the order, dated 22/07/2021, passed by the TPO under Section 92CA(3) of the Act has recorded as under:

"5.reimbursement towards ESOP expenses

With regard to the international transaction of reimbursement towards ESOP expenses The Assessee has not explained in the submissions that the company actually incurred as expenditure on providing ESOPs rest of either expenses should be allowed to the assessee as the same are only notional and not actual. It is seen that the Assessee has disallowed the expenses on ESOPs amounting to INR 48,74,117/- in computation of income for the assessment year 2018-19. The same has been claimed as an expense in the assessment year 2019-20 on payment basis. However, the expenses on ESOP amounting to INR 24,97,737/- has been claimed in assessment year 2018-19. (Emphasis Supplied)

13. On perusal of above we find that the Assessing Officer and the TPO had failed to appreciate that the expenses for which deduction has been claimed by the Appellant pertain to RSUs granted in 2015 and exercised in the FY 2017-18. The ESOP expenses related to the RSUs granted and exercised were claimed as deduction by the Appellant over the vesting period. During the relevant previous year, the ESOP expenses of INR 26,53,078/- were also remitted outside India on the basis of invoices raised upon the Appellant by its AE. Therefore, deduction for the ESOP expenses of INR 26,53,078/- was claimed by the Appellant during the relevant previous year.
14. As regards the benefit accruing on account of ESOP plans is concerned we find merit in the contention advanced on behalf of the Appellant that for the purpose of granting the RSUs to the employee of the Appellant was to retain and motivate him for continuing his

employment with the Appellant. The cost incurred by AE on exercise of the RSUs by the employee of the Appellant is the cost reimbursed by the Appellant which was initially picked up by the AE.

15. In view of the above, we hold that given the facts and circumstances of the present case discussed hereinabove, the ALP of the ESOP Expenses cannot be taken as 'Nil'. The transfer pricing addition of INR.26,53,078/- is, therefore, set aside and TPO/Assessing Officer is directed to re-compute ALP and the transfer pricing adjustment, if any, by following the method adopted by the Appellant for determination of ALP of the international transaction of reimbursement of ESOP Expenses of INR 26,53,078/-. In terms of the aforesaid, Ground No. 3, 4 & 5 raised by the Appellant are allowed, Ground No. 6 & 7 raised by the Appellant is dismissed as being infructuous while Ground No. 1 & 2 raised by the Appellant are dismissed as not pressed since no submission were advanced on the same during the course of hearing.
16. In result, the present appeal preferred by the Assessee is partly allowed.

Order pronounced on 25.09.2023.

Sd/-

(S. Rifaur Rahman)
Accountant Member

Sd/-

(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 25.09.2023
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai