

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2052 & 2053/Bang/2019
Assessment Years: 2011-12 & 2014-15

Deputy Commissioner of Income-tax Circle-1(1) Bangalore	Vs.	M/s. Adcock Ingram Limited #49, C & D Bommasandra Industrial Area Anekal Taluk Bangalore Karnataka PAN NO : AAGCA4343M
APPELLANT		RESPONDENT

Appellant by	:	Shri Sunil Kumar Singh, D.R.
Respondent by	:	Shri Bharath L., A.R.

Date of Hearing	:	08.09.2020
Date of Pronouncement	:	18.09.2020

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The revenue has filed this appeal challenging the orders passed by Ld. CIT(A) for assessment year 2011-12 and 2014-15. Since common issue is being urged in these appeals, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The common issue urged in both the appeals relates to Transfer pricing adjustment made by the A.O. and deleted by Ld. CIT(A).

3. The assessee is engaged in the business of manufacturing pharmaceutical formulation and also providing outsourced formulations manufacturing services. The assessee was incorporated in April, 2007 as a joint venture between M/s. Medreich Limited, India and M/s. Adcock Ingram Holding Pty Limited, South Africa (AIHPC). They hold 50.1% and 49.9% in the shareholding of the assessee company. The assessee declared international transactions with its associated enterprise. Hence, the A.O. referred the matter of determination of Arm's Length price of international transaction to TPO. The TPO accepted ALP of international transactions except payment of management fee to M/s. Medreich S.A. and license fee to AIHPL. The TPO determined the ALP value of both the transactions at Nil in both the years. Accordingly, he made transfer pricing adjustment of Rs.6,44,08,340/- in assessment year 2011-12 and Rs.12,75,98,570/- in assessment year 2014-15.

4. It is pertinent to note that the assessee had bench marked the transaction under TNMM method by aggregating all the international transactions. It is also pertinent to note that the TPO had benchmarked the transaction relating to payment of management fee and license fee separately in A.Y. 2009-10 and 2010-11. The assessee has challenged the action of the TPO by filing appeal before the Tribunal in those years. The ITAT, vide its order dated 31.1.2018 passed in IT(TP)A No.1039 & 1078/Bang/2015, has taken the view that the TPO has to determine the ALP of the transaction under one of the permissible methods and to hold the arm's length price as Nil under CUP method, the TPO had to necessarily demonstrate that the same services were available for Nil consideration in an uncontrolled situation. It was also held by coordinate bench that closely linked transactions have to be aggregated. Accordingly, the Tribunal has restored the matter of determining ALP of the transaction to the file of Ld. CIT(A) with a direction to examine the TNMM method adopted by the assessee by calling for a remand report from TPO. It was also

brought to our notice that the order passed by the coordinate bench in A.Y. 2009-10 & 2010-11 was followed in A.Y. 2012-13 & 2013-14 and the matter was restored to the file of Ld. CIT(A).

5. The Ld. A.R. submitted that the Ld. CIT(A), in the two years under consideration has taken note of the decision rendered by the ITAT in A.Y. 2009-10 & 2010-11. The Ld. CIT(A) also noted that the TPO has furnished remand report submitted for A.Y. 2013-14, wherein he has observed that the margin declared by the assessee at entity level is more than the margin of comparable companies.

6. Accordingly, the Ld. CIT(A) has called for a remand report from TPO for both the years under consideration. The TPO has reported that the tax payers margin is higher than the margin of comparable companies. Accordingly, the Ld. CIT(A) held that no TP adjustment is called for in both the years under consideration.

7. We heard the parties on this issue. We notice that identical issue has been restored to the file of Ld. CIT(A) by the coordinate benches. In the remand proceedings, the Ld. CIT(A) has called for a remand report from the TPO with regard to the margin declared by the assessee under TNMM. The TPO has also reported that the margin declared by the assessee for higher than the margin of comparable companies. Identical report has been given by the TPO for the years under consideration also. Accordingly, the Ld. CIT(A) has deleted the transfer pricing adjustment made during the years under consideration. For the sake of convenience, we extract below the operative portion of the order passed by Ld. CIT(A) in assessment year 2011-12.

“5.0 Findings

5.1 In the light of the submissions of the appellant, it is observed from the record that an identical issue was there in the TP Assessments for AY 2013-14, 2009-10, 2010-11. It is seen from the record that consequent to the Hon'ble ITAT Decision for AY 2009-10 & 2010-11 remanding the issue to the CIT(A)1, the

matter was taken up for hearing to decide the issue as per the directions of the ITAT and finally decided in favour of the appellant.

5.1.1 During FY 2008-09, the margins on account of the international transaction despite pay-out of the license fee and management fee were 25.49% for FY 2008-09 and 19.42 for FY 2009-10 which are higher than the margins of the comparable companies identified by the Company at 9.05% for FY 2008-09 and 8.57% for FY 2009-10 respectively. The said margin has been arrived at after aggregating license fees, royalty and management fees. The TPO did not agree with the position taken by the company in aggregating the transactions. On appeal, the then Hon'ble CIT(A) upheld the Company's position in relation to the licence fee and management fee.

5.1.2 The revenue preferred appeal to ITAT. The Hon. ITAT in this case had held that aggregation of transaction is permissible under Act and Rules framed there under. The ITAT also held that the action of the TPO to hold that the arm's length price is 'nil' is incorrect and that the Revenue could not decide what was necessary for a taxpayer and what was not. The requirement of services should have been judged from the view point of the taxpayer as a businessman. The ITAT also noted that the assessee is joint venture company and the TPO cannot lose sight of various benefits which may flow to Indian partner due to provision for making the payment for the use of license. The ITAT has held that the TNMM adopted by the Company is correct.

The relevant part of ITAT decision is reproduced below:

"20 In view of the above and as well as in view of finding recorded herein above that all these international transactions are linked to the main business being carried on by the assessee and such closely linked transactions are to be analysed in aggregate to determine the arm's length price. Moreover, it is difficult to comprehend the manufacturing of drugs in India without there being any operation in licence to manufacture the drugs from the statutory authorities and for that to have the access on the formulation which is the technical knowledge and domain of AE. The prices charged by the assessee and the amount of licence fees paid to AE cannot be examined on stand-alone basis, because it will have effect of determination the net prizes received by the assessee. Further the charges paid by the assessee (11/) to AE for acquiring the technical know-how and is a valuable asset. In the present case, TPO has not brought on record any comparable uncontrolled party (JV or otherwise) which is manufacturing the drugs with the same prices or less prices as that of the assessee without separately charging the license fee, therefore the approach of the Transfer Pricing Officer to compute NIL charges for the license fee cannot be uphold as transfer prices adjustment can be made in accordance with the one of the method provided under the rules framed under the Income-tax Act. In view thereof, we find no merit in the analysis carried out by the TPO by benchmarking the licence fee. In fact, assessee by aggregation of transactions in the TP study had benchmarked the

arm's length price of all the transactions by comparing operating profit / operating cost at the entity level was 25.49% as against the non-AE it was 5.26 %. However, we observe that the comparability analysis in the TP study carried out by the assessee by aggregation of transactions adopting TNMM as the most appropriate method has not been examined by either of the authorities below who have merely concentrated merely on the issue of aggregation /segregation of transactions. The CIT (A) has mechanically accepted the results of the assessee to be at arm's length by accepting the operating profit/ operating cost of the assessee as 25.49% as against non-AE at 5.26%. In that view of the matter, we deem it appropriate to remand the issue to the file of the CIT (A) for examining the correctness of the ALP at the entity level by applying the TNMM as the most appropriate method by aggregating the transactions. The CIT (A) is directed to take the remand report from the TPO in this regard and afford the assessee adequate opportunity of being heard in the matter"

In relation to management fees, the Hon. ITAT similarly held the issues substantially in favour of the Company. The relevant paras have been reproduced below:

21..... The assessee has furnished the details of the services available by the assessee from Medreich to the assessing officer as mentioned at page 22-23 of the transfer pricing order. The TPO had mentioned the reply pursuant to the show cause notice in his order and the assessee has concluded "it is further submitted that after factoring in cost of all related party transaction the company has earned and operating margin of 22.53% which is significantly higher than 9.05% earned by the comparable companies thus establishing all the underlying transaction including the transaction for payment of licence fee and Management fee are at arm's length " (page 40 of TPO order). TPO had the recorded the contradiction findings inasmuch as it was mentioned that that there was duplication of services as alleged there was no evidence of rendering the services for the Management. In our view taxpayer could only be asked to maintain and produce the evidence of receipt of service which a businessman keeps and maintains regarding services received from a third party. The burden of maintenance of documents / evidences could not be higher on the taxpayer merely due to the reason that it was receiving services from its AEs further TPO has not held that the similar kind of services was already available with the taxpayer with any concrete evidence. In the absence of any instances of services provided by the AE and from the fact that services availed by the taxpayer from the third parties were similar in nature, the TPO's viewpoint on duplication test was not acceptable.

22.....In our considered view, the facts of the case before us are materially similar inasmuch as the services are indeed rendered by the AE, as evident from the documentary evidences on record and yet its arm's length value is held to be NIL only because, according to the authorities below, these services were worthless, these services were not required by the assessee, the

assessee could have performed these services on its own and the services were not rendered by the group entity. The TPO has rejected the determination of arm's length price on the basis of TNMM, at entity level, but then he has not adopted any other permissible method for determination of arm's length price. Such a course of action, as noted above, is not permissible in law. Just because these services are worthless in the eyes of the revenue authorities, the arm's length price of these services cannot be held to be NIL. Similarly, the findings that no services were rendered and that the assessee could have performed these services on its own are contradictory. If no services were rendered, which services the authorities below hold that the assessee could have performed on its own. The computation of nil for Management services by the TPO was done on the basis of method not permissible under the laws by bringing in the comparable uncontrolled transaction by the TPO. However, we observe that the comparability analysis in the TP study carried out by the assessee by aggregation of transactions adopting TNMM as the most appropriate method has not been examined by either of the authorities below who have merely concentrated merely on the issue of aggregation / segregation of transactions. The CIT (A) has mechanically accepted the results of the assessee to be at arm's length by accepting the operating profit / operating cost of the assessee as 25.49% as against non-AE at 5.26%. In that view of the matter, we deem it appropriate to remand the issue to the file of the CIT (A) for examining the correctness of the ALP at the entity level by applying the TNMM as the most appropriate method by aggregating the transactions. The CIT (A) is directed to take the remand report from the TPO in this regard and afford the assessee adequate opportunity of being heard in the matter"

5.1.3 In view of the above, the Hon. ITAT affirmed the approach adopted by the Company but remanded the matter back to this office to examine whether the Company has correctly aggregated the transactions of license fee and management fee to determine the arm's length price using the TNMM. Consequently, the CIT(A)-1, after obtaining report from the TPO after examining the correctness of the ALP at the entity level by applying the TNMM as the most appropriate method by aggregating the transactions, decided the issue in favour of the appellant as the margins of the appellant were more the ALP.

5.2 Identical view was taken by the Hon'ble tribunal in the case of the appellant under identical circumstances for AY 2013-14 affirming their decision for the AY 2009-10 & 2010-11.

5.4 Thus, the Hon. ITAT for AY 2013-14 also affirmed the approach adopted by the Company but remanded the matter back to this office to examine whether the Company has correctly aggregated the transactions of license fee and management fee to determine the arm's length price using the TNMM. Consequent to the directions of the Hon. ITAT, the CIT(A) after calling for a remand report from the Ld. TPO, pursuant to undertaking a fresh benchmarking analysis after aggregating the international transactions of 'management fees' and 'license fees' with

manufacturing activity. The Ld. TPO in his remand report dated 20-02-2019 has concluded as under:

"The taxpayer's margin of 29.70% (Page 3 of TPO's order dated 28.10.2016) as computed by the TPO at entity level, is higher than the TPO's comparables margin 18.05%. Thus, the taxpayer's margin is much higher than the ALP determined by the TPO."

5.6 Finally, after considering the Remand Report, it was held by the CIT(Appeals), as under :

"Considering the directions of the Hon'ble TAT in the first round of litigation referred supra, the matter was referred to the TPO, for examining the correctness of the ALP at the entity level by aggregation of transactions after applying the TNMM as the most appropriate method. The TPO, DCIT, Transfer Pricing 1(1)(1), Bengaluru vide remand report dt 20-02-2019, remarked that the tax payers margin being higher than the comparable's margin, and suggested no adjustment. Considering the same, the adjustment made in the original order in respect of license fee and management fee (impugned order) is deleted on this ground."

5.7 The facts and circumstances of the issue involved in the present Asst Year being identical to that of the Asst Years 2009-10, 2010-11 & 2013-14, I am constrained to follow the decisions of the Hon'ble ITAT, Bangalore pronounced for these years (supra), and accordingly, it is decided to examine the correctness of the ALP at the entity level by aggregation of transactions after applying the TNMM as the most appropriate method.

5.8 For the above purpose, the matter was referred to TPO vide this office letter dated 01.10.2018, for examining the correctness of the ALP at the entity level by aggregation of transactions after applying the TNMM as the most appropriate method. The TPO, DCIT, Transfer Pricing 1(1)(1), Bengaluru vide remand report dt 08.05.2019, remarked that the tax payers margin being higher than the comparable's margin, suggested no adjustment.

5.9 Considering the same, respectfully following the binding decisions of the Hon'ble by Bangalore ITAT in appellants own case(supra), I am of the view that at entity level the tax payers margin being higher than the comparable's margin, no adjustment is called for. Consequently, the adjustment made in the original order in respect of license fee and management fee (impugned order) does not stand. Accordingly, the same is deleted, while allowing the ground No 2 of the appellant."

8. Thus we notice that the Ld. CIT(A) has deleted the addition after obtaining report from TPO on the TNMM method adopted by the assessee and after holding that the transactions of payment of management fee and royalty have to be aggregated in the facts and

circumstances of the case. Accordingly, we do not find any infirmity in the order passed by Ld. CIT(A) in both the years on this issue.

9. In A.Y. 2014-15 the revenue has raised one more issue relating to disallowance made u/s 43B of the Act on account of delayed payment of ESI. The Ld. CIT(A) deleted the same with the following observations:

"8.0 Ground No 10: Delayed payment of ESI

Ground 10: The LAO erred in disallowing a sum of Rs. 8,04,121/- being the employee's contribution to the provident fund since the Appellant had remitted the same beyond the due date under the provident fund regulations, despite the same having been remitted before the due date of filing income-tax return of the Appellant.

8.1.1 The Company had made a payment of Rs. 8,04,121/- being the employee's contribution to the provident fund beyond the due date prescribed under the relevant act but before the due date of furnishing the return of income. The Company placed reliance on the ruling of the Hon'ble Karnataka High Court in Essae Teraoka (P) Ltd. Vs. DCIT (43 taxmann.com 33) (see p. 335 of the case laws compilation), wherein it has been held that Section 43B of the Income-tax Act provides an extension to the employer to make payment of contribution to provident fund or any other fund till the 'due date' applicable for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with such return. In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under section 139(1). This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the 'contribution' on or before the due dates therein.

8.1.2 The Company submits that where the amount to be remitted to the provident fund is remitted before the due date for filing the income-tax return, a deduction can be claimed of the said amount under section 36(1)(va) of the Act and would not attract disallowance under section 36(1)(va) or section 43B of the Act. In this regard, assessee had placed reliance on the ruling by the Hon'ble Karnataka High Court in the case of Essae Teraoka Private Limited vs. DCIT (43 taxmann.com 33) (see p. 335 of the case laws compilation).

8.2 Having considered the submissions, it is observed that the appellant had remitted the employees' contribution to provident fund,

Page 9 of 9

amounting to Rs. 8,04,121/- before the due date for filing the income-tax return, and accordingly as held by the Hon'ble Karnataka High Court in the judicial precedents relied on by the appellant in the case of Essae Teraoka Private Limited vs. DOT (43 taxmann.com 33) & Shabari Enterprises, I allow this ground of the appellant."

10. We notice that the Ld. CIT(A) has followed the binding decision of Hon'ble Karnataka High Court rendered in the case of Essae Teraoka Private Limited (supra). Hence, we do not find any reason to interfere with the order passed by Ld. CIT(A) on this issue.

10. In the result, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 18th Sept, 2020

Sd/-
(George George K.)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 18th Sept, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.