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

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND**

**SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No. 6877/MUM/2019**
**Assessment Year: 2011-12**

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| Hapag-Llyod India Private Limited,<br>403 & 404, Satellite Gazebo A Wing, 4th Floor, Guru Hargovindji Marg, Andheri (E),<br>Mumbai - 400093<br>PAN: AABCH7319B | **Vs.** | Assistant Commissioner of Income Tax (10(1)(1),<br>Room No. 209, Aayakar Bhawan, M.K. Road,<br>Mumbai - 400020 |
| **(Appellant)** | | **(Respondent)** |

Assessee by : Shri Rajan Vora & Pranay Gandi (ARs)
Revenue by : Shri Sushil Kumar Mishra (DR)

Date of Hearing: 07/07/2021
Date of Pronouncement: 23/07/2021

**O R D E R**

**PER SAKTIJIT DEY, JM**

Captioned appeal by the assessee is against assessment order dated 30.09.2019 passed for the assessment year 2011-12, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Ground no. 1 being general in nature, does not require adjudication.

3. In ground nos. 2 to 8, the assessee has challenged the transfer pricing adjustment of Rs. 5,58,93,844/-.

4. Briefly the facts are, the assessee, a resident company, is engaged in the business of shipping agency. For the assessment year under dispute, assessee filed its return of income on 30.11.2011 declaring total income of Rs.4,58,57,900/-. Noticing that during the year under consideration, the assessee had entered into international transactions with its overseas Associated Enterprises (AE), the Assessing Officer (AO) made a reference under

section 92CA(1) of the Income Tax Act, 1961 to the Transfer Pricing Officer (TPO) for determining the Arms Length Price (ALP) of the international transaction with the AE. In course of proceedings before TPO, the assessee furnished the details of international transaction in Form 3CEB and various other documents including the Transfer Pricing Study Report (TPSR). On perusing the TP study report, the TPO found that the assessee has benchmarked the international transaction with AE applying Transactional Net Margin Method (TNMM) and claimed the transaction to be at arm's length. The Transfer Pricing Officer, however, did not find assessee's benchmarking reliable. While examining the facts on record, the TPO found that assessee's AE had entered into an agreement with German Express Shipping Agency (GESA) in the year 1993 for availing similar nature of services as is provided by the assessee. He found that the said agreement with GESA continued until the end of 2006 after incorporation of the assessee company in India. He also noticed that after termination of agreement between the AE and GESA, the assessee had appointed GESA as a sub-agent w.e.f. 01.01.2007. Whereas, prior to appointment of the assessee as an agent, GESA was performing the role of agent for the AE in India. Thus, the TPO was of the view that the fee charged by GESA to AE earlier, should be considered as Comparable Uncontrolled Price (CUP) for benchmarking assessee's transaction with AE. He also observed that similar method was applied by the TPO and upheld by DRP in preceding assessment year. Thus, applying the rate/fee charged by GESA to the AE as CUP, the TPO proceeded to determine the ALP of the international transaction between the assessee and the AE and ultimately proposed an adjustment of Rs. 68,56,53,420/-.

5. The adjustment so proposed by TPO was contested before learned DRP and thereafter before the Tribunal. The Tribunal while deciding assessee's appeal in ITA No. 427/Mum/2016 dated 02.05.2016 restored the matter back to the AO for de-novo adjudication following the directions of the Tribunal, while deciding similar nature in dispute in assessment year 2008–09. In pursuance to the directions of the Tribunal, the TPO again undertook the

process of benchmarking the international transaction with AE. However, adopting the same method applied by him in earlier round, the TPO again determined the ALP by applying the fee/rate charged by GESA as internal CUP and proposed an adjustment of Rs. 6,77,26,127/-. The dispute again travelled to learned DRP.

6. Partly accepting the submissions of the assessee, learned DRP held that since the price for services rendered by GESA was available for only one month, the adjustment has to be made for that month by applying CUP method. Whereas, for rest eleven months, learned DRP directed the TPO to accept assessee's benchmarking under TNMM. As a result of the aforesaid directions of learned DRP, the adjustment was scaled down to Rs. 5,58,93,844/-, which was added back in the final assessment order under challenge in the present appeal.

7. At the outset, Shri Rajan Vora, learned Authorized Representative of the assessee submitted, the issue is squarely covered by the decision of the Tribunal in assessee's own case in assessment year 2010-11. In this context, he drew our attention to the observations of the Tribunal while deciding assessee's appeal in ITA No. 7145/Mum/2018 dated 27.09.2019. Thus, he submitted, the addition made on account of transfer pricing adjustment should be deleted.

8. The learned Departmental Representative, though, fairly submitted that the issue is squarely covered by the decision of the Tribunal in assessment year 2010-11, however, he submitted, following the direction of the Tribunal in assessment year 2010-11, the issue may be restored back to the AO for examining assessee's benchmarking under TNMM.

9. We have considered rival submissions and perused the materials on record. Undisputedly, identical issue relating to benchmarking of international transaction between the assessee and the AE came up for consideration before the Tribunal in assessee's own case in assessment year 2010-11. While deciding the issue, the Tribunal, in the order referred to above, has clearly and categorically held that the price charged in the transaction between GESA and

the AE cannot be considered as CUP. Further, the Tribunal has also given a finding that in the peculiar facts and circumstances of assessee's case TNMM would be the most appropriate method. The observations of the Tribunal on the issue are reproduced herein below:

> *"18. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. The core issue which arises for consideration is, whether in the given facts and circumstances, determination of arm's length price of Business Support Services provided to AE by applying internal CUP is correct or not. Undisputedly, while the assessee has benchmarked the aforesaid transaction by applying TNMM as the most appropriate method, the Transfer Pricing Officer has rejected assessee's benchmarking and has determined the arm's length price by applying the sub–agency agreement between the assessee and GESA as internal CUP. Pertinently, in assessment years 2008–09 and 2009–10, under identical facts and circumstances, the Transfer Pricing Officer had determined the arm's length price of the business support services provided by the assessee to the AE applying the aforesaid agreement between the assessee and GESA as internal CUP. When the dispute ultimately cam up for consideration before the Tribunal, vide order dated 14th January 2015, in ITA no.7771/Mum./2012 and ITA no.1374/Mum./2014, the Tribunal dealt with the issue and restored it back to the Assessing Officer for deciding afresh keeping in view the decision of the Tribunal in UCB India Pvt. Ltd. v/s ACIT, [2009] 121 ITD 131 (Mum.). Relevant observations of the Tribunal are as under:–*
>
> *"6. We have considered the rival submissions as well as relevant material on record. Upto 31/12/2006 GESA was providing the services for booking shipments to HLAG under agency agreement of 1993. GESA was charging a certain percentage on the freight turnover as commission apart from fixed charges @ US$ 10 per inland box. Other fee is as per RBI guidelines as well a fee for consignment delivery and bill of lading.*
>
> *6.1 On the other hand the assessee was appointed as agent w.e.f. 01/01/2007 and is remunerated for the services rendered to AE at cost plus 10% mark-up. The assessee was also authorized by the AE HLAG to appoint GESA as sub-agent for providing services for certain territories of India and the entire territory of Nepal. The sub-agent is*

*remunerated on the same basis as it used to receive the commission under 1993 agreement. The assessee benchmarked its international transactions by adopting TNMM as most appropriate method. The TPO did not accept TNMM method and applied internal CUP being the price/commission received by GESA from HLAG under 1993 agreement, as well as under sub-agency agreement dated 27/02/2007 w.e.f. 01/01/2007. It is pertinent to note that after the termination of agreement between HLAG and GESA w.e.f. 31/12/2006, GESA was not providing services to HLAG, but under the sub agency agreement, the services are being provided to the assessee. The question arises whether the price charged for services by GESA to HLAG upto 31.12.2006 can be considered as internal CUP for the purpose of determination of ALP for the services provided by the assessee to AE during the FY 2007-08 onwards. The TPO supported his action by referring Rule 10B(4) and took the old price to compare with the current years price. It appears that the TPO misunderstood the proviso to Rule 10B(4) of the Income tax Rules. In ordinary situation only current year/contemporaneous data can be used for comparing uncontrolled price with the controlled price. Only in the case of exceptional circumstances, the data relating to earlier years but not more than two years prior to the current year, can be used, if, such data reveals facts which can have an influence on the determination of arms length-price in relation to the international transaction. Therefore, the two years prior data can be used along with the current year data. The situation under which the older data can be used is illustrated under proviso to Rule 10D(4) as under :-*

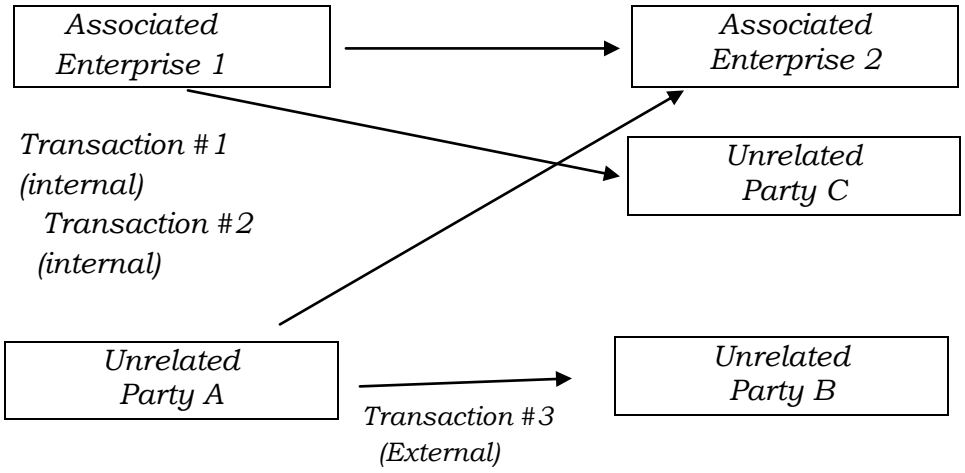
> *"10D(4) The information and documents specified under sub-rule (1) and (2), should, as far as possible, be contemporaneous and should exist latest by the specified date referred to in clause (iv) of section 92F: Provided that where an international transaction continue to have effect over more than one previous year, fresh documentation need not be maintained separately in respect of each previous year, unless there is any significant change in the nature of terms of the international transaction, in the assumptions made, or in any other factor which could influence the transfer price, and in the case of such significant change, fresh documentation as may be necessary under sub-rules (1) and (2) shall be maintained bring out the impact of the change on the pricing of the international transaction."*

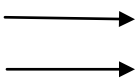
*6.1.1 Therefore, the use of earlier data is an exception and cannot be applied in exclusion of current year data. In other words, in the case of existence of exceptional circumstances the prior two years data along with current year data can be used. Once the GESA ceases to be agent of HLAG w.e.f. 31.12.2006, then in the absence of current/contemporary data / uncontrolled price, the price of prior year cannot be considered for determination of ALP in relation to international transaction entered in current year.*

*6.2 The another aspect of considering the said price between GESA and assessee as internal CUP is that it does not satisfy the basic ingredient of a transaction between an unrelated party and associate enterprise of the assessee in the parity of the services provided by the assessee to the AE. United Nations Practical Manual on Transfer Pricing for Developing Countries has discussed the comparable uncontrolled price (CUP) in para6.2.1.1 as under :-*

> *"6.2.1.1 The comparable Uncontrolled Price (CUP) Method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances. The CUP method may also sometimes be used to determine the arm''s length royalty for the use of an intangible asset. CUPs may be based on either "internal" comparable transactions or on "external" comparable transactions. Figure 6.1 below explains this distinction in the context of a particular case study.*

*Figure 6.1 Comparable Uncontrolled Price Method*






*6.2.1 In the case of the assessee, GESA does not provide services to HLAG . Therefore, it cannot be considered as internal CUP. Moreover, the assessee is providing the services to the AE and receiving the remuneration and in turn getting part of the job done through sub agent GESA and remunerating it by paying the commission as per sub agency agreement. Out of the total services provided by the assessee a part is performed through sub-agent and the remaining is performed by the assessee itself. It is like export of goods partly manufactured by the assessee and partly purchased from third party. However, purchase price of the goods exported cannot be applied as CUP for sale price charged to the AE. Accordingly considering the price received by GESA as CUP is contrary to the transfer pricing regulation. We do not rule out the CUP as most appropriate method for determination of ALP of international transaction in question. However, the comparable uncontrolled price must be a proper uncontrolled price in compliance of provisions of transfer pricing.*

*6.2.2 There is one more fallacy in the TPO"s order regarding bifurcating the international transactions into two segments for determining the ALP. The TPO accepted the price charged by the assessee in respect of services provided through subagency, but while computing the ALP it had ignored the CUP and took the price charged by the assessee as ALP. Further, the services provided by the assessee on its own were compared with CUP. Therefore, two separate ALP were determined by the TPO for the same service provided by the assessee to AE. Even if the CUP is adopted as most appropriate method ALP cannot be more than price received by GESA. Whereas the TPO has taken into consideration the price charged by the assessee with 10% markup. Hence, the computation of ALP is otherwise not based on correct uncontrolled price.*

*6.2.3 We may clarify that the international transaction in question should be considered as one and price received by the assessee in total has to be compared with the ALP. The assessee received the price for providing the service as per the agency agreement. Therefore, the service provided by the assessee to the AE are closely interlinked and price of one part is dependent on the price of the other part. Therefore,*

*the entire services provided by the assessee has to be treated as one international transaction for the purpose of determining the ALP.*

*6.2.4 In view of the above discussion, as well as the facts and circumstances of the case, we set aside the issue to the record of TPO/AO, to decide the same afresh, by considering in the light of the above observation as well as the decision of this Tribunal in the case of UCB India Pvt. Ltd. vs. ACIT dated February 06, 2009 (2009-TII-02-ITAT-MUM-TP) ITA No.428 & 429/Mum/2007 for assessment years 2002-03 and 2003- 04(supra).*

*19. A careful reading of the observations of the Tribunal reproduced above would make it clear that the Tribunal had clearly and categorically observed that the price received by GESA under the sub–agency agreement cannot be applied as internal CUP to determine the arm's length price of business support services provided to the AE. The same view was expressed by the Tribunal while deciding identical issue in the first round of litigation in the impugned assessment year vide order passed in ITA no.1134/Mum./2015, dated 27th February 2015. Admittedly, the Revenue has not contested the aforesaid observations of the Tribunal. Thus, the fact of the matter is, non–applicability of the price paid under sub–agency agreement to GESA as internal CUP has attained finality by virtue of the decisions of the Tribunal as referred to above. That being the case, the same cannot be a subject matter of review or reconsideration by the Transfer Pricing Officer in the fresh proceedings in pursuance to the directions of the Tribunal. Thus, in our view, by again applying the price paid to GESA under the sub–agency agreement as internal CUP, the Transfer Pricing Officer has clearly violated the directions of the Tribunal, hence, has exceeded his jurisdiction. In fact, in the fresh order passed under section 92CA(3) of the Act, though, the Transfer Pricing Officer acknowledges the fact that as per the observations of the Tribunal, GESA does not provide service to Hapag–Lloyd AG, therefore, it cannot be considered as internal CUP, still, he proceeded to consider the commission paid to GESA as internal CUP for determining the arm's length price. In our view, the aforesaid approach of the Transfer Pricing Officer is unsustainable. Though, it is a fact that the Tribunal while restoring the issue to the Transfer Pricing Officer in the first round of litigation had not ruled out applicability of CUP as a valid method to determine the arm's length price of the business support services provided to the AE, however, the Tribunal has specifically observed that*

*the price paid to GESA cannot be applied as internal CUP. At this stage, we must observe, on verification of the nature of services provided by the assessee to the AE and GESA to the assessee under the sub–agency agreement, we are of the considered opinion that both cannot be compared due to their functional and risk differences as pointed out in a tabular form hereinbefore. It is evident, the Transfer Pricing Officer in his order passed under section 92CA(3) of the Act, has expressed his inability to find any external CUP to benchmark the transaction. In such circumstances, the only other alternative for determining the arm's length price of the transaction is TNMM. Admittedly, the assessee has benchmarked the provision of business support services applying TNMM. It is also observed, in subsequent assessment years i.e., A.Y. 2012–13 and 2014–15, the assessee had benchmarked the provision of business support service to the AE, applying TNMM and the Transfer Pricing Officer has accepted it. Thus, from the aforesaid facts, it can be concluded that when no external CUP is available, as submitted by the learned Counsel for the assessee and as has been admitted by the Transfer Pricing Officer, the transaction has to be benchmarked by applying TNMM, as, it is the most appropriate method under the given facts and circumstances of the case. Thus, the only issue which now requires deliberation is the acceptability or otherwise of the comparables selected by the assessee under TNMM. As could be seen from the facts placed before us, the comparables selected by the assessee were also selected in subsequent assessment years i.e., A.Y. 2011–12, 2012–13 and 2014–15 and the Transfer Pricing Officer accepted these comparables in the A.Y. 2012–13 and 2014–15. Keeping in perspective of the aforesaid factual position, we direct the Assessing Officer to verify the function, asset, risk (FAR) of the comparables selected by the assessee and thereafter determine the arm's length price by applying TNMM. For the aforesaid reasons, we set aside the assessment order on the issue with a direction to the Assessing Officer to determine the arm's length price of business support service provided to the AE by applying TNMM as the most appropriate method and following our observations hereinabove. If the comparables selected by the assessee are found to be good comparables, they should be accepted.*

10. Material facts concerning the issue in the impugned assessment year being identical to assessment year 2010-11, the aforesaid decision of the Tribunal would squarely apply. As regards the submission of learned

Departmental Representative that the benchmarking done by the assessee under TNMM may be restored back to the AO for examination, we must observe, there is no need to do so as learned DRP has accepted the benchmarking done by the assessee under TNMM and has directed the TPO to accept for the period of eleven months. Thus, the adjustment made is deleted.

11. In Ground no. 9, the assessee has raised the issue of addition of refund granted of Rs. 1,27,65,820/- along with interest under section 234D to the tax liabilities of the year under consideration.

12. Before us, learned Authorized Representative of the assessee submitted that the AO had earlier adjusted the refund of Rs. 1,26,68,820/- against the demand raised for assessment year 2008-09. Further, he submitted, ultimately by virtue of the order passed by the Tribunal in assessment year 2008-09, no demand remained. Therefore, the entire refund became due to the assessee. Thus, he submitted, a direction may be given to the AO to verify the facts and grant refund to the assessee.

13. Learned Departmental Representative also agreed that the issue requires factually verification.

14. Having considered rival submissions, we direct the AO to verify assessee's claim of refund after examining all relevant facts including the position of demand/refund after giving effect to Tribunal's order for assessment year 2008-09 and grant refund as per law. This ground is allowed for statistical purposes.

15. In ground no. 10, the assessee has raised the issue of non grant of refund of assessment year 2015-16 adjusted against the demand for the impugned assessment year. Having considered rival submissions, we direct the AO to verify assessee's claim vis-à-vis the facts on record and grant refund as per law. This ground is allowed for statistical purposes.

16. Ground no. 11 being consequential does not require adjudication at this stage.

17. In ground no. 12 and 13, the assessee has raised the issue levy of interest under section 234D of the Act. Having considered rival submissions,

we direct the AO to examine the issue having regard to the order passed by the Tribunal in assessee's case.

18. Ground no. 14 being consequential does not require adjudication at this stage.

19. In the result, appeal is partly allowed.

Order pronounced in the open court on 23rd July, 2021.

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| *Sd/-* | *Sd/-* |
| (PRAMOD KUMAR) | (SAKTIJIT DEY) |
| VICE PRESIDENT | JUDICIAL MEMBER |

मुंबई Mumbai; दिनांक Dated: 23/07/2021
*Alindra, PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / 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**