IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.839/Bang/2019
Assessment year : 2013-14

M/s. Exide Life Insurance Company Ltd., No.3/1, JP Technopark Millers Road, Bengaluru – 560 001. **PAN : AAACI 7940 L**	Vs.	The Assistant Commissioner of Income Tax, Circle – 2(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri. Surya Narayana, Advocate
Respondent by	:	Shri. Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	26.07.2021
Date of Pronouncement	:	27.07.2021

O R D E R

Per N.V. Vasudevan, Vice President

This is an appeal by the assessee against the order dated 18.02.2019 of CIT(A), Bengaluru-2, Bengaluru, relating to Assessment Year 2013-14.

2. The first issue that requires adjudication in this appeal is as to whether the CIT(A) was justified in upholding the order of the AO in determining the ALP of the international transaction pertaining to payment for intra group services as Nil against a sum of Rs.4,06,89,430/- claimed by the assessee to have been paid to the AE and adding the sum of Rs.4,06,89,430/- as income of the assessee under section 92 of the Income Tax Act, 1961 (Act).

3. The facts with regard to the aforesaid issue are as follows:

4. The assessee is engaged in the business of life insurance and annuity. It offers a range of life insurance products to its customers which includes whole life, endowment, money back, unit linked products, pension and term policies. In Form 3CEB, the assessee reported international transaction i.e., transaction with an Associate Enterprise (AE) in the form of receiving technical, administrative and training support services for which the assessee has paid a sum of Rs.4,06,89,430/- as fees towards services received. The transaction is in the nature of intra group services. In its TP study, the assessee has given the following summary of the international transaction, which is to the effect that the assessee received technical, administrative and training support services from AE ING Insurance Asia Pacific (INGAP). It was the actual costs incurred by INGAP in rendering the services were reimbursed by the assessee and that INGAP did not charge any mark up on such services. These services rendered by INGAP are specialized in nature and provided to all the ING Group companies in the Asia Pacific region on a centralized basis. These centralized services assist the ING Group Companies, including the assessee in their regular operation and administration of the insurance business in India. It was claimed by the assessee that the technical service charges paid by the assessee is commensurate with the benefits accrued to the assessee. Since essentially these are the payments of actual cost incurred, it was claimed that the same are at arm's length from the Indian Regulations perspective.

5. The TPO in a questionnaire dated 24.08.2016 called upon the assessee to furnish copy of the agreement between the assessee and its AE for providing intra group services, break up of services received, need for

the above services, proof of receipt of required services, tangible benefits arising to the tax payers as a result of intra group services and cost benefit analysis. The assessee vide reply dated 16.09.2016 gave the details of the services received from the AE which were stated to be the following:

a. Actuarial services
b. Finance services
c. Human resources and management services
d. E- business services
e. IT services
f. Legal services
g. Compliance and operational risk management
h. Sales and Marketing services
i. Investment management services

It was also submitted by the assessee that, the support of the parent company is required for carrying out its business. In response to the basis on which payment for services were made, the assessee submitted that the payment was on cost to cost basis without any markup. The assessee furnished a copy of the technical services agreement dt 02/10/2005 wherein the scope of the services was mentioned. With regard to the specific query of as to whether any cost benefit analysis or any benchmarking analysis in terms of the expected benefits while entering the service agreement had been done, the assessee replied that no such analysis had been undertaken.

6. The TPO was of the view that the assessee did not furnish detailed documentation maintained by it in proof of services received from the AE except providing service agreement copy and few copies of emails. The AO was also of the view that as per article 3 of the service agreement, services were required to emanate from the assessee and no supporting documents were filed by the assessee to show that the assessee made request for services from the AE. The AO also observed that after 23.02.2013, the AE

who provided the services become an unrelated party to the assessee and therefore the assessee did not receive any services from the erstwhile AE. The AO was therefore of the view that the assessee failed to discharge its onus of providing evidence of receipt of services.

7. On appeal by the assessee, the CIT(A) confirmed the order of the AO incorporating the adjustments suggested by the TPO by treating the value of services received as Nil and making an addition of a sum of Rs.4,06,89,430/- paid by the assessee to its AE for intra group services as assessee's income. The CIT(A) in upholding the order of the TPO observed as follows:

> *"3.3 Further, observed that none of the benefits mentioned above are tangible or real. A mere facade has been raised to give an impression that some vital benefit has passed to the taxpayer which I not the case. Related parties are quite likely to give a form that will give an impression that a real service is being rendered by one to another but the necessity to look beyond the wheel is recognized across tax jurisdiction. In the above circumstances the payment of service fee is only an arrangement to change the tax base without any economic substance in the transaction. He further even discussed the relevant OECD guidelines in order to support his finding. The TPO further mentioned that base constitutes a serious risk to tax revenues, tax sovereignty and tax fairness for all While there are many ways in which domestic tax bases can be eroded, a significant source of base erosion is profit shifting. The issue of jurisdiction to tax is closely linked with the one of measurement of profits: once it has been established that a share of an enterprise's profits can be considered to originate from a country and that the country should be allowed to tax it, it is necessary to have rules for the determination of the relevant share of the profits which will be subjected to taxation. Transfer pricing rules perform this function. The internationally accepted principle underlying transfer pricing determinations is the arm's length principle, which requires that for tax purposes, related parties must allocate income as it would be allocated between independent*

entities in the same or similar circumstances. When independent enterprises transact with each other, the conditions of the transaction are generally determined by market forces. When associated enterprises transact with each other, their relations may not be directly affected by market forces in the same way. The objective of the arm's length principle is for the price and other conditions of transactions between associated enterprises to be consistent with those that would occur between unrelated enterprises for comparable transactions under comparable circumstances. I do not find any infirmity in the order of the TPO which needs my interference and therefore the grounds taken by the appellant are dismissed."

8. The learned Counsel for the assessee submitted that the Revenue authorities erred in concluding that no services were received from the assessee and thereby disallowing the entire fees paid for intra group services. In this regard, he relied on the judicial pronouncements in support of his case that it was beyond the power of the TPO to call upon the assessee to prove the nature of services received from the AE. It was submitted that when evaluating ALP of the services, it is wholly irrelevant as to whether the assessee benefits from it or not and the question that ought to have been determined as to whether the price of the service is what an independent enterprise would have paid. The learned DR placed reliance on the orders of the Revenue authorities.

9. We have given a very careful consideration to the rival submissions. At the outset we observe in the case of Dresser Rand India (P.) Ltd. v. Addl. CIT 12011] 47 SOT 423/13 taxmann.com 82 (Mum.), the Hon'ble Mumbai Tribunal had an occasion to examine as to what is the approach that has to be adopted for determining ALP in the case of cost contribution agreement which is akin to the arrangement in the present case between the Assessee

and its parent company. The assessee in case of Dresser Rand India (P.) Ltd. (supra) entered into a 'cost contribution agreement' with its parent company pursuant to which it paid a sum of Rs. 10.55 crores as its share of the costs. The TPO, AO & DRP disallowed the expenditure on the ground that the ALP was 'Nil' as no real services had been availed by the assessee and the arrangement was not genuine. On further appeal by the Assessee, the Tribunal held as follows:

> *"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. An assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management, consultancy; it is not for the revenue officers to question assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for*

its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.

*9. ***

10. In case the Assessing Officer comes to the conclusion that the assessee has indeed received the services from the AE the next question which we have to decide is as to what is the arm's length price of these services received under cost contribution agreement. It hardly needs to be emphasized that even cost contribution arrangement should be consistent with arm's length principle, which, in plain words, requires that assessee's share of overall contribution to the costs is consistent with benefits expected to be received, as an independent enterprise would have assigned to the contribution in hypothetically similar situation. .."

10. The Hon'ble High Court of Delhi in the case of CIT v. EKL Appliances Ltd. [2012] 209 Taxman 200/24 taxmann.com 199/345 ITR 241 as well ell as CIT v. Cushman & Wakefield India (P.) Ltd. 12014] 367 ITR 730/46 taxmann.com 317 (Delhi) rendered similar ruling as was rendered in the case of Dresser Rand India (P.) Ltd. (supra). In the case of Cushman & Wakefield India (P.) Ltd. (supra), the Hon'ble Delhi High Court observed that whether a third party - in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. Further, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive

transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion.

11. We are of the view in the light of the law laid down as above, the issue with regard to determination of ALP has to be set aside to the AO for consideration afresh in the light of the law laid down that the AO cannot question the incurring of the expenses and has to confine his enquiry along with regard to the question whether the price for the services is what an independent enterprise would have paid. In a case where expenses are actually reimbursed with no mark-up, than as observed by the Hon'ble Delhi High Court, the transaction being an expense transaction, the tax base erosion can happen only if the costs said to have been reimbursed arc inflated. In such a situation the question would be to determine as to whether the costs claimed to have been apportioned between the various group companies has not been inflated or whether they are allocated on a proper basis. As a first step the TPO generally considers following aspects in order to identify intra group services requiring arm's length remuneration:

Whether services were received from related party.

Nature of services including quantum of services received by the related party.

Services were provided in order to meet specific need of recipient of the services.

The economic and commercial benefits derived by the recipient of intra group services.

In comparable circumstances an independent enterprise would be willing to pay the price for such services?

An independent third party would be willing and able to provide such services?

12. The answers to above questions would enable to determine if the assessee has received intra group services which requires arms' length remuneration. Determination of the arm's length price of intra-group services would thus involve:—

(I) Identification of the cost incurred by the group entity in providing intra group services to the related party.

Understanding the basis for allocation of cost to various related parties i.e., nature of allocation keys.

(iii) Whether intra group services will require reimbursement of expenditure along with markup.

(i) Identification of arm's length price of markup for rendering of services.

13. Question as to whether intra group services are duplication of services for which the AE has already paid in addition to what is paid by way of allocation is also to be looked into. If the AE charges a mark-up for the services rendered, than the ALP of such mark-up will have to be determined.

14. The assessee has in the present case filed material before the TPO to demonstrate the nature of services rendered. In the paper book filed before us the index of the paper book gives a description of the service. We are of the view that the above description alone would not suffice. As we have already seen the TPO had specifically called upon the assessee to

give details of the services rendered and how the same were utilized by the assessee and its relevance for the assessee's business. The evidence filed by the assessee in this regard is in the form of e-mails 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 the TPO take the issue forward to arrive at a proper conclusion. In our opinion filing of voluminous correspondence, reports etc., would not be a proper way of discharge of assessee's burden to establish the ALP of expenditure in question. We would therefore direct the assessee to comply with the queries raised by the TPO in his show cause notice which has been set out in his order u/s.92CA of the Act.

15. We therefore allow the appeal of the assessee for statistical purpose on this issue. The order of the CIT(A) is set aside and the issue is remanded to the TPO/AO for fresh consideration in the light of the directions given above. The TPO/AO will afford opportunity of being heard to the assessee in the set aside proceedings.

16. The next issue that arises for consideration in this appeal is whether disallowance under section 14A of the Act can be made in the case of the assessee who is engaged in the business of insurance. It is a plea of the assessee that the total income of the assessee has to be computed in the manner laid down under section 48 of the Act and therefore provisions of section 14A of the Act would not be applicable. Learned Counsel for the assessee brought to our notice that in assessee’s own case, this Tribunal in

IT(TP)A No.1297/Bang/2016 by order dated 03.02.2021 decided identical issue holding as follows:

> *"4. After hearing both the parties, we are of the opinion that this issue was considered by the Hon'ble Delhi High Court in the case of Pr. CIT v. The Oriental Insurance Co. Ltd. in ITA No.172/2020. The Hon'ble High Court vide judgment dated 4.3.2020 in para 9 held as under:-*
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> > *"9. We have heard learned counsels and are of the view that no substantial question of law arises for our consideration. The Tribunal has interpreted section 44 read with the first schedule and concluded that applicability of section 14A is excluded in relation to computation of income of an insurance company. We have examined the relevant provisions. Section 44 begins with a non-obstante clause and overrides the other provisions of the Act IT(TP)A No.1296 & 1297/Bang/2016, ITA Nos.838 & 840/Bang/2019 as mentioned therein including section 14A. We are not convinced with the submission of Mr. Ajit Sharma that section 14A would be applicable in respect of the Respondent. Section 14A does not have independent legs to stand on. Section 14A inter alia begins with the words "for the purposes of computing the total income under this chapter, no deduction shall be allowed in respect of expenditure incurred. . . . . ". The chapter in question is chapter IV. This chapter also contains the provisions relating to computation of profits and gains of business or profession. Section 44 specifically excludes the provisions of the Act relating to computation of income, inter alia, those contained in "Section 28 to 43B". Thus, the exclusion would take within its sweep section 14A which is an exemption for deductions as allowable under the Act, as provided under section 28 to 43B. Further, section 44 is a special provision applicable in the cases of insurance companies and applies, notwithstanding anything to the contrary contained in the provisions of the Income-tax Act relating to the computation of income chargeable under different heads. For computing the profits and gains of the business of insurance company, the AO had to resort to section 44 and the prescribed rules, and could not have applied section 28 to 43B, since the same were excluded from the purview of section 44. This necessarily includes the exception provision enshrined under section 14A of the Act.*

Therefore, in our view, the AO could not have travelled beyond section 44 in the first schedule of the Act. Besides, the tribunal has also invoked the rule of consistency since the same view of the Tribunal has prevailed in respect of the earlier assessment years i.e. 2000-01, 2001-02 and 2005-06.

10. We also do not find merit in the submission of Mr. Sharma that the Tribunal should have remanded back the matter to the Assessing Officer for computation of income of the Respondent-assessee in terms of first schedule of the Act, since that was not even a ground urged by the Revenue before the Tribunal. At this stage, it is too late in the day for the Revenue to argue that notwithstanding the grounds urged to challenge the order of the CIT (A), the Tribunal should have ventured into examining the merits of the computation of income of the Respondent assessee in terms of section 44 read with the first schedule of the Act. No doubt, the Tribunal is a final fact-finding body. However, when IT(TP)A No.1296 & 1297/Bang/2016, ITA Nos.838 & 840/Bang/2019 the Revenue confined its challenge only in respect of the applicability of section 14A, we cannot find fault in the impugned order, on the basis of submissions not advanced before the Tribunal. We, therefore do not find any substantial question of law arising in relation to the view taken by the Tribunal."

5. Being so, in our opinion, this issue is decided in favour of the assessee and against the department."

17. Respectfully following the decision of the Tribunal, we hold that the assessee is governed by section 44 of the Act read with first schedule to the Act which has special provisions governing computation of income of insurance business and those provisions do not provide for making any addition to disallowance under section 14A of the Act. The addition made by the Revenue authorities in this regard is therefore directed to be deleted.

18. In the result, appeal by the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 27.07.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.