**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT), 'J' BENCH MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM**

**&**

**SHRI RAM LAL NEGI, JM**

**ITA No.1909/Mum/2016**
(**Assessment Year :2011-12**)

| | | |
|---|---|---|
| M/s. Sermed Services India Pvt. Ltd., Formerly known as Star Den Media Services P. Ltd.,<br>Star House, Urmi Estate<br>95, Ganpat Rao Kadam Marg<br>Lower Parel (W)<br>Mumbai – 400 013 | Vs. | Asst. CIT 16(1)<br>R.No.467, 4th Floor<br>Aayakar Bhavan<br>M.K.Marg<br>Mumbai – 400 020 |
| **PAN/GIR No.ACCD7658Q** | | |
| (**Appellant**) | .. | (**Respondent**) |

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|---|---|
| Assessee by | Shri Porus Kaka |
| Revenue by | Shri Shreenivasaraghava Iyengar |
| **Date of Hearing** | **18/12/2020** |
| **Date of Pronouncement** | **30/12/2020** |
| | |

## आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.1909/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 27/01/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld.

Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 14/12/2015 for the A.Y.2011-12.

2. The ground No.1 raised by the assessee is general in nature and does not require any specific adjudication.

3. The ground No.8 raised by the assessee was not pressed by the ld. AR at the time of hearing, accordingly, the same is dismissed as not pressed.

4. The only issue to be decided in this appeal is with regard to transfer pricing adjustment made on account of payment of license fee for distribution of TV channels for which assessee has raised ground Nos. 2-7 before us.

5. We have heard rival submissions and perused the materials available on record. The assessee, Star Den Media Services Private Limited (hereinafter referred to as 'Star Den') is a Joint Venture (hereinafter referred to as 'JV') between Star India Private Limited (hereinafter referred to as 'SIPL') and DEN Networks Limited (hereinafter referred to as 'DEN'). SIPL and DEN entered into the JV to leverage on the capabilities of both entities and to establish a platform for distributing television channels in India. The JV agreement was entered into with effect from January 2008. Star Den has obtained licenses to distribute television channels owned by its Associated Enterprises (hereinafter referred to as AEs ) and by third parties

5.1. We find that the assessee has aggregated the international transaction relating to provision of services in relation to distribution of channels, with the transaction pertaining to obtaining license for distribution of channels for benchmarking purposes. The assessee, in its transfer pricing report, has documented that the two international transactions entered into by Star Den, are similar in nature with minor variations in the terms of their arrangement. The assessee claimed that since the functions performed and the nature of efforts, expended for both transactions are similar, the fact that an insignificant portion of Star Den's total revenue is generated from provision of services for distribution of channels in Sri Lanka and Bangladesh and given the similarity in the efforts involved and the commonality of the resources, it is practically not possible to identify the profit generated from the activities separately ie. it is not possible to prepare segmented accounts for the two international transactions. The assessee accordingly, due to the similarity in the functions performed for international transactions, insignificant value and the inability to bifurcate the profit and loss account has aggregated and analyzed both the transactions under the main business activity of the assessee i.e. obtaining license for distribution of channels for the purpose of benchmarking the Arm’s Length Price (ALP). Thus, the overall entity level Transaction Net Margin Method (TNMM) approach is adopted to benchmark the international transactions by the assessee and is found to be appropriate.

5.2. We find that the assessee is engaged in the business of distribution of television channels. For the purpose of conducting its business, the assessee has obtained the rights for distribution of various television channels from its AEs. In consideration, the assessee has paid license fees to its AEs.

5.3. The search process was undertaken by the assessee for determining the comparable companies, wherein it was noted that distribution of channels in the entertainment industry was mostly within group companies and there was no publicly available data to compare the pricing. The assessee then expanded the search process and submitted that distribution of channels was akin to distribution of computer software as both required selling the content on a magnetic medium. Accordingly, the assessee considered companies engaged in distribution of computer software appropriate for benchmarking the international transactions entered into by it.

5.4. The Assessee has adopted TNMM to be the Most Appropriate Method (MAM) to benchmark the transaction with Operating Profit / Total Revenue (OP/TR) as the Profit Level Indicator (PLI) and with the assessee as the tested party. The assessee has given entity level PLI working at 2.96%, Based on the PLI working taking into account the data for F.Y. 2010-11, the updated margin of the comparable companies considered by the assessee was given to be at 1.62%:

5.5. We find that the ld. TPO adopted the similar comparables in the film distribution business chosen by him in assessee's own case in A.Y.2010-11 except Fame Motion Pictures for benchmarking the international transaction of the assessee. The assessee filed objections before the ld. TPO for consideration of comparables which are engaged in film distribution and submitted that those comparables are functionally different from that of the assessee. The ld. TPO however, did not agree to the contentions of the assessee and observed that functions of film distribution are more akin to the activities of the assessee than that of cable operation, DTH activities. Accordingly, the ld. TPO rejected the comparables engaged in cable operation / DTH activities as functionally not comparable. The ld. TPO observed that the margin of the assessee was 2.96%. The final comparables chosen by the ld. TPO are as under:-

| Sr. No | Company Name | Operating Margin on revenues |
|---|---|---|
| 1 | Baba Arts Limited | 6.50% |
| 2 | National Film Development Corporation Limited | 22.10% |
| 3 | Inox Leisure Limited | 6.09% |
| 4 | Mediaone Global Entertainment Limited | 6.73% |
| | **Arithmetic Mean** | **10.36%** |

5.6. Since the arithmetic mean of comparable companies was much higher than the assessee's margin, the ld. TPO proposed an adjustment to arm's length price in respect of subject mentioned international transaction and made adjustment of Rs.7,63,08,017/- as under:-

| Particular | Amount | Amount |
|---|---|---|
| Sale | 10,75,38,69,512 | 10,75,38,69,512 |
| License fee | 7,99,10,19,402 | 7,19,49.84,968 |
| Other cost | 2,44,47,83,663 | 2,44,47,83,663 |
| Total cost | 10.43,58,03,065 | 9,63,97,68,631 |
| Profit | 31,30,66,447 | 1,11,41,00,881 |
| Margin | 2.96% | 10.36% |
| Difference in the License fees at entity level | | 79,60,34,434 |

| | | |
|---|---|---|
| Difference in the license fees at entity level as % of actual license fees | | 9.96% |
| Actual value of the international transaction | | 76,61,44,747 |
| ALP of the international transaction (Actual value- 9.96%) | | 68,98,36,730 |
| Value of the adjustment | | 7,63,08,017 |

5.7. The ld. DRP by following its own directions for A.Yrs. 2009-10 and 2010-11 on the subject mentioned issue in assessee's own case upheld the action of the ld. TPO.

5.8. Pursuant to the directions of the ld. DRP, the ld. AO passed the final assessment order u/s.143(3) r.w.s. 144C(13) of the Act on 27/11/2016 in respect of the international transaction carried out for AE, among others.

5.9. We find that both the ld. TPO as well as the ld. DRP had in principle followed their own set of orders for A.Yrs. 2009-10 and 2010-11 passed in assessee's own case. We find that the Tribunal in assessee's own case for A.Yrs. 2009-10 and 2010-11 had already considered the same issue in ITA Nos. 2113/Mum/2014 and 1829/Mum/2015 respectively dated 05/02/2020. Relevant operative portion of the said judgement are reproduced hereunder:-

*"11. The TPO was not satisfied with the comparable selected. He observed that the comparables selected by the assessee i.e. software distributors do not undertake functions which are similar to that of the assessee. The TPO rejected all the submissions and objections of the assessee and finally came to the following set of comparables :-*

| *Sr.No.* | *Name of company* | *Margin (in %) F.Y. 2008-09* |
|---|---|---|
| *1* | *Fame Motion Pictures Ltd./Shringar Films Ltd.* | *6.28* |
| *2* | *National films Development Corporation Ltd.* | *20.17* |
| *3* | *Asian Films Production and Distribution Ltd.* | *8.07* |
| | | ***11.51*** |

*12. In the light of the above, given that the assessee's margin of 4.62% is less than the arithmetic mean of 11.51% of the comparables and given that the same does not fall within plus and minus 5% safe limits, the transfer pricing adjustment was worked out.*

*13. The transfer pricing adjustment was also done, for A.Y. 2010-11 on similar facts. The TPO rejected the assessee's comparables. He referred to the order for A.Y. 2009-10. Out of the comparables selected for A.Y. 2009-10 he rejected the Turnover Asian Films Production and Distribution Ltd. by observing that the turnover was below Rs. 1 crore. The TPO added Baba Arts Limited during the year. Based upon it he came to the following comparables :-*

| *Sr.No.* | *Name of company* | *Margin (in %)* |
|---|---|---|
| *1* | *Fame Motion Pictures Ltd./Shringar Films Ltd.* | *-4.94* |
| *2* | *National Film Development Corporation Ltd.* | *17.66* |
| *3* | *Baba Arts Ltd.* | *5.45* |
| | *Arithmetic Means* | *6.06* |

*Thereafter the transfer pricing adjustment was done at Rs. 2,88,54,506/-. The assessee's objection against the above transfer pricing adjustment was rejected by learned DRP.*

*14. Against this order the assessee has filed the appeal before the ITAT.*

*15. We have heard both the counsel and perused the records. Learned Senior Counsel Shri Porus Kaka submitted that the issue is squarely covered in favour of the assessee by the decision of Delhi ITAT in the case of Turner International India (P) Ltd. Vs. ACIT (95 taxmann.com 285) and* *decision of ITAT Mumbai in the case of ACIT Vs. NGC Network (India) Pvt. Ltd. (10 taxmann.com 140). Referring to the said decision of Turner International India P. Ltd. (supra), learned Counsel of the assessee submitted that in the said decision it was noted that the assessee was mainly engaged in the business of marketing and distribution of satellite channels of Cartoon Network, CNN, POGO, HBO etc. The Tribunal gave a finding that the satellite TV channels and cable network operators had significantly different operating models and provide earning model and such channels content owner companies should not be included for the purpose of comparability analysis for distribution segment. It was held that since the assessee company was mainly engaged in marketing and distribution of satellite channels of Cartoon Network, CNN, POGO, HBO etc., the company engaged in trading in computer packages and who were mainly software distribution company could be taken as good comparable. Learned counsel contended that as per the Tribunal order in Turner International India Pvt. Ltd. (supra) following were the final comparables :-*

*Trijal Industries Ltd.• Softcell Technologies Ltd. • Sonata Information Technologies Ltd. • Empower Industries India Ltd. •*

*16. Learned Counsel of the assessee submitted that the assessee's selection of software distributor as comparable should be accepted on the touchstone of above decisions. He submitted that the assessee's comparable for A.Y. 2009-10 included Sonata Information Technologies Ltd. and Fintech communications Ltd. For A.Y. 2010-11 it also included Empower Industries India Ltd. He submitted that all these have been found by the ITAT in Turner International India Pvt. Ltd. to be good comparable. Hence, learned counsel contended if the comparables approved by the ITAT in the case of Turner International India P. Ltd. are adopted the assessee margin would compare favorably within the safe harbour rules of plus and minus 5% and no adjustment would be called for.*

*17. Per contra, learned Departmental Representative relied upon the order of DRP.*

*18. We have carefully considered the submissions and perused the record. We find that the submissions of learned counsel that identical issue was decided in the case of Turner International India P. Ltd. (supra) by the ITAT Delhi Bench has sufficient cogency. The business activity of the assessee in that case was marketing and distribution of satellite TV channels. Akin to that the assessee in the present case is also involved in distribution of various Star as well as third party channels in India. In such circumstances, selection of comparables engaged in software* *distributor has been accepted by the ITAT. Accordingly, we accept the submission of learned counsel and direct the TPO to examine his submission that if the comparables finally accepted by the ITAT in the case of Turner International India P. Ltd. are taken into account and the comparables of the assessee are selected with reference to it the margin should be accepted if they are plus and minus 5%. Needless to add assessee should be provided adequate opportunity.*

*19. In the result, assessee's appeals stand allowed as above."*

5.10. We find that this Tribunal in assessee's own case for A.Yrs.2009-10 and 2010-11 had held that companies engaged in software distribution would be valid comparables and assessee had already given PLI of comparable companies engaged in software distribution as under:-

| Name of Comparable Company | OP / OR |
|---|---|
| Sonata Information Technology Ltd., | 1.83% |
| Soft Cell Technologies Ltd., | 3.75% |
| Empower Industries Ltd., | -.384% |
| Advance Technologies Ltd., | 0.55% |
| Fintech Communications Ltd., | 0% |
| Svam Software Ltd., | -0.69% |
| **Average** | **0.27%** |

5.11. All these comparable companies were either accepted in assessee's own case by this Tribunal for A.Y.2011-12 or by Delhi Tribunal in the case of Turner International Pvt. Ltd., in ITA Nos. 296 & 908/Del/2016 dated 4.2.2019 on functional comparability basis. There is absolutely no change in the functions carried out by the assessee during the A.Y.2011-12 when compared to that of A.Yrs.2009-10 and 2010-11 in assessee's own case. When all these points were confronted by the ld. DR, the ld. DR relied on the orders of the ld. TPO and ld. DRP. We hold that since the issue in dispute is squarely covered in favour of the assessee by the order of this Tribunal for A.Ys.2009-10 and 2010-11, which is already reproduced hereinabove, we do not deem it fit to interfere in the said order and direct the ld. TPO to determine the arm's length price in the light of same directions given hereinabove for earlier years by this Tribunal. Accordingly, the ground Nos. 2-7 raised by the assessee are allowed for statistical purposes.

**6. In the result, appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 30/12/2020 by way of proper mentioning in the notice board.

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|---|---|
| **Sd/-** | **Sd/-** |
| **(RAM LAL NEGI)** | **(M.BALAGANESH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai; Dated 30/12/2020

KARUNA, *sr.ps*

**<u>Copy of the Order forwarded to</u> :**

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
**ITAT, Mumbai**