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**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 07.11.2017

+ ITA 881/2017

PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant

versus

MAKEMY TRIP INDIA PVT. LTD. .... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr. Rahul Chaudhary with Mr. Sanjay Kumar, Advocates.

For the Respondent : Mr. Mayank Nagi, Advocate.

**CORAM:-**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

**S. RAVINDRA BHAT, J. (OPEN COURT)**

1. The question of law urged is whether the Tribunal in affirming the Appellate Commissioner's Ruling with respect to the applicability of Transaction Net Margin Method (TNMM) was, in the circumstances of the case, erroneous.

2. The assessee is in the travel and tourism business. It provides on-line solutions for travel product and other comprehensive services for the global traveller including air tickets, hotel reservations, car bookings and holidays.



3. For AY 2005-2006, the Transfer Pricing Report, filed by the assessee, was examined by the TPO, who felt that the adoption of the Resale Price Method (RPM) was appropriate in the circumstances. This finding and the consequent adjustments made were set aside by the CIT(A). The CIT(A) was influenced by the fact that the services provided in the two business segments, by the assessee, rendered them incomparable at the gross margin level. The CIT also held that on account of high degree of functional congruence required for application of RPM, it could not be considered appropriate. The ITAT, in the revenue's appeal, considered the matter afresh and, after a detailed analysis, affirmed the CIT(A) findings.

4. The ITAT has returned its findings after taking into account the OECD commentary and also analysing the Transfer Pricing Report, filed by the assessee. The extract of the ITAT's order, in this regard, is as follows:-

*“15.5 Furthermore, the TPO did not draw any adverse inference from the economic analysis transaction of Customer Handling and data Management Services undertaken by the assessee. The same was not contested by the TPO while the same formed part of the economic analysis conducted by the assessee in the TP Study. Since all such transactions were part of the overall TNMM applied by the assessee and the very fact that the TPO himself has accepted the transaction relating to customer handling and data management services at arm's length, the approach followed by the TPO to modify the transfer pricing methodology used to benchmark the other two transactions is without any merit.*”



15.6 We also find that the TPO failed to appreciate the nature of functions performed and the risk assumed by the assessee in relation to the international transactions carried out by the assessee with its AEs. Since the assessee performed routine back office services (viz. Customer handling and data management services) for its AEs without being assigned or carrying out any key entrepreneurial function in relation to the offshore business of the AEs, the assessee can be characterized as a routine back office service provider. Hence, the approach adopted by the assessee to benchmark such transactions using TNMM as the most appropriate method by finding comparables engaged in providing similar services holds merit.

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15.10 We have gone through the working of adjustment provided by the assessee, wherein approximately 15.90 percent of AE's operating expenses will be allocated to the assessee, since the assessee will receive 15.90 percent of the total gross profit if the TPO's approach is applied. Accordingly, Rs. 16.67 mn (being 15.90 percent of the AE's operating expenses amounting to Rs. 104.87 mn) is required to be allocated to the assessee. For better appreciation of the working, same is extracted herein below:

<b>Incremental Costs attributable to MMT India</b>	
	<i>Amt (INR mn)</i>
<i>Total operating expenses of MMT U.S. (not included in Direct costs)</i>	
- Site hosting	2.63
- Customer handling and processing charges	48.60
- Depreciation	0.50
- Personnel expenses	2.25
- Operating and admin expenses	50.90
	<b>104.87</b>
<i>Percentage of US Gross profit</i>	<b>15.90%</b>



<i>attributed by the TPO to MMT India</i>	
<i>Amount of US operating expenses attributable to MMT India</i>	<b>16.67</b>

*As a result, of the above computation of the operating expenses, a downward revision amounting to Rs. 2.45 mn is required to be undertaken to the intercompany transfer prices as shown below:*

<i>Particulars</i>	<i>TPO's Approach</i>	<i>Assessee's Approach</i>	<i>Additional GP attributed to MMT India</i>
<i>Gross Profit – Ticketing (sub-agent)</i>	<b>₹17.58</b>	<b>₹4.18</b>	<b>₹13.40</b>
<i>Gross Profit – Tours &amp; Travels (sub-agent)</i>	<b>₹1.11</b>	<b>₹0.29</b>	<b>₹0.82</b>
<i>MMT India' total gross profit on sub-agent business</i>	<b>₹18.69</b>	<b>₹4.47</b>	<b>₹14.22</b>
<i>US costs attributed to India Net operating losses attributable to the appellant</i>			<b>₹16.67</b> <b>₹(2.45)</b>

*On perusal of the above computation, the adjustment computed by the TPO has the effect of downward adjustment to the book value of international transactions of the assessee. In this regard, we find that we have already rejected the approach adopted by the TPO, the claim of the assessee on account of downward transfer pricing adjustment does not survive. Hence, in our view the adjustment undertaken by the Ld. TPO to iron out the differences between the two segments is not warranted.*



*15.11 In view of the foregoing discussion, we are of the opinion that the selection of most appropriate method by the TPO of resale price method is incorrect as resale price method is inapplicable to the facts of the assessee. Apart therefrom, while determining the arm's length price, the TPO has benchmarked the margin of profit earned in subagent segment with the margin of profit earned by the assessee from its direct customers. In doing so, TPO has failed to appreciate that AE of the assessee is not the customer of the assessee, and it is assessee who is acting as subagent of the AE and in respect of such transactions, assessee has also been remunerated. Since the direct customer segment and subagent segment are materially different as such, the margin of profit earned by the assessee in respect of transactions entered with its AE is not comparable with the margin of profit earned by the assessee with its direct customers. Further, if the approach of the TPO is to be applied then the effect of the comparison would be that assessee will receive 15.90 percent of the total gross profit earned by the AE, and in such circumstances proper adjustment would be to allocate the proportionate operating expenses incurred by the AE, and in such circumstances, the effect would be that there would be downward adjustment to the book value of international transactions of the assessee, which itself contravenes the section 92 (3) of Income Tax Act. In summary, appeal of the revenue in relation to the benchmarking adopted by the assessee and the approach followed by the CIT(A) for the international transactions of the assessee is at arm's length and the grounds raised by the Revenue are dismissed, accordingly.”*

5. The Court is of the opinion that no substantial question of law arises. The difference of opinion between the CIT(A) and the TPO, as to the appropriateness of one or the other methods, cannot *per se* be a ground for interference; the appropriateness of the method unless shown to be contrary to the Rules specially Rules 10B and 10C, in the opinion of the Court, are hardly issues that ought to be gone into



under Section 260A of the Income Tax Act.

6. The appeal is, therefore, dismissed.

**S. RAVINDRA BHAT  
(JUDGE)**

**SANJEEV SACHDEVA  
(JUDGE)**

**November 07, 2017  
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