

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH ' I-2', NEW DELHI)**

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

I.T.A. No. 1496/Del/2012
Assessment year : 2005-06

ACIT, CIRCLE 3(1),
New Delhi

Vs.

B.T. (India) Pvt. Ltd.,
JE 9/104, Khirki Extension,
Malviya Nagar, New Delhi

GIR / PAN:AABCC4785E

(Appellant)

(Respondent)

Appellant by : Sandeep Bandhu, Sr. DR
Respondent by : Ms. Ananya Kapoor, Adv.

Date of hearing : 22.09.2015
Date of pronouncement : 30.10.2015

ORDER

PER KULDIP SINGH, JM:

The appellant, ACIT, Circle 3(1), New Delhi by filing the present appeal, sought to set aside the impugned order dated 20.01.2009 passed by Ld. CIT(A) - XX, New Delhi for the Assessment Year 2005-06, on the grounds inter alia that:-

“The Ld. CIT(A) has erred on facts and in deleting addition of Rs.1,26,74,054/- on account of Arm’s Length Price.

ii) The Ld. CIT(A) has erred on facts and in deleting addition of Rs.22,150/- made by the A.O. on account of disallowance of extra depreciation claimed by assessee on computer peripherals.”

2. Briefly stated the facts of this case are: assessee had filed original return of income on 27.01.2006 declaring income of Rs.72,60,680/- and subsequently filed revised return of income on 10.11.10.11.2006 declaring 'nil' income after setting off of B/F unabsorbed depreciation of Rs.2,06,63,235/- in the statement of taxable income. The assessee was subjected to scrutiny and notice u/s 143(2) dated 14.06.2006 was served along with notice u/s 142(1) and pursuant thereto Shri Punit Gupta and Shri Gaurag Gupta CA/ ARs of the assessee company attended the proceedings and filed necessary details.

3. The assessee is into the business of providing telecommunication related services and support services. As per the form No.3CEB filed along with the return the assessee during the year had international transaction with the associated enterprise / concerns (AE) to the tune of Rs.27,62,69,637/- and as such in order to determine Arm's Length Price (ALP) in relation to international transactions, the case was referred to Transfer Pricing Officer (TPO) under rules.

4. Then TPO passed order u/s 92CA(3) dated 25.09.2008 wherein the ALP of international transaction with associated enterprises is computed at Rs.3,37,65,302/- as against transaction value of Rs.20,19,12,481/- declared by the assessee i.e. upward adjustment of RS.1,26,74,054/-. During the course of proceedings, the assessee was asked to show cause as to why addition should not be made on account of ALP to the tune of Rs.1,26,74,054/-. The assessee filed reply stating therein that their submissions before the TPO be treated as reply to the show cause. Finding submissions of the assessee not acceptable u/s 92CA(3), this issue has been dealt with in detail in order dated 25.09.2008 and addition of

Rs.1,26,74,054/- is made to the total income on account of adjustment of ALP on international transaction with associated enterprises.

4. During the year under assessment, the assessee has made addition to fixed assets under head 'computer' and claimed depreciation @ 60% on the ground that the assessee had made purchases of computer accessories and peripherals amounting to Rs.63,290/-. However, as per I. T. Rules, only computer and computer software are eligible for depreciation @ 60% and the same cannot be extended to computer accessories and peripherals and consequently, the assessee's claim of Rs.22,150/- was disallowed. So, the assessee's income for the year under consideration has been shown at Rs.55,47,340/-.

5. The assessee has challenged the order of A.O. before Ld. CIT(A) who has partly allowed the appeal vide impugned order. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

6. We have heard Ld. Authorized Representatives of both the parties, have gone through the material on record in the light of facts and circumstances of the case.

7. Ld. D.R. challenging the impugned order, contended inter alia that since the assessee has failed to demonstrate the circumstances for claiming adjustment of ALP, Ld. CIT(A) has erred in deleting the addition without verification; that Ld. CIT(A) has also erred in deleting the addition of Rs.22,150/- on account of disallowance of extra depreciation claimed by the assessee on computer peripherals whereas depreciation is only available on computer and computer software and as such the case is required to be restored to Ld. CIT(A) for afresh orders.

8. On the other hand Ld. A.R. repelled the contentions raised by Ld. D.R. by contending inter alia that the assessee has never claimed the assessment on account of ALP whereas it has claimed the working capital adjustment (WCA); that the only dispute raised by the Revenue is regarding verification of the claim of assessee and since the Ld. CIT(A) has powers co-terminus to the A.O., he has passed a valid order and relied upon the judgement of **Hon'ble Jurisdictional High Court in the case cited as CIT Vs BSES Yamuna Powers Ltd. in I.T.A. No. 1267/2010 dated 31.08.2010** and orders of **Delhi Bench 'I', New Delhi in the case cited as ITO Vs Heartland Delhi Transcription & Services Pvt. Ltd in I.T.A. No. 6043/Del/2012 dated 17.10.2014.**

9. Undisputedly, the assessee being engaged in the international transactions with Associate Enterprises (AE) to the tune of Rs.27,62,69,637/- a reference u/s 92CA of the Act was made to the TPO for determining the ALP in relation to the international transactions. The TPO has passed the order u/s 92CA(iii) dated 25.09.2008 wherein ALP of international transaction with AE is computed at Rs.3,37,65,302/- as against the transaction value of Rs.2,01,91,248/- declared by the assessee, i.e. an upward adjustment of Rs.1,26,74,054/-. Finding the explanation made by the assessee unacceptable, addition of Rs.1,26,74,054/- has been made on account of adjustment to ALP of international transaction with AE.

10. The first question arises for determination is, as to whether addition amounting to Rs.1,26,74,054/- on account of transfer pricing adjustment as made by the A.O. has been illegally and wrongly deleted by Ld. CIT(A) vide impugned order as contended by Ld. D.R.

10.1 Undisputedly, such working capital adjustments were not demonstrated by the assessee before the A.O. who was to work out the same

whether working capital adjustment on account of transfer pricing adjustment are admissible to the assessee. TPO has decided the issue as to the working capital adjustment in para 6.7 and 6.8 of his order dated 25.09.2008, which is reproduced below for ready reference:

“6.7 A working capital adjustment has been sought by the assessee in the margin to account for the difference in accounts payables and receivables position between the assessee and comparables. The biggest problem about this adjustment is the inability to find out the position of the payables and receivables at the beginning and end of the year. Moreover, the credit terms offered by the comparables are not known. The debtors and creditors shown in the balance sheet of the comparables contain both trade and non-trade creditors. In the absence of a break up, such adjustment cannot be reliable and justified.

6.8. Similarly, the assumption of prime lending rate as the interest rate applicable for making the working capital adjustment suffers from risks of inaccuracy. The cost of capital for MNCs is determined more by the global interest rates rather than Indian prime lending rate. There is always difference between prime lending rate of India that of international market rate of interest. Choosing one of these rates among multiple rates available in the market is as debatable as not allowing any working capital adjustment. This is more so because BT operates across the globe and having deep pockets for financing the activities anywhere, any part of the world borrowing from cheapest available interest rate. Any change in the interest rate in the working capital adjustment will give drastically different results making the results highly unscientific. Even though it possible for the comparable companies to borrow in the world market the reality is entirely different. A company with global presence like BT has a distinct advantage in terms of credit worthiness and ability to bargain based on its financial muscle. This is not true with most of the comparables chosen by the assessee. Therefore to make a working capital adjustment based on such broad approximations, estimations and assumptions may not lead to reliable results. Therefore, the same is not acceptable.

12. Ld. A.R. of the assessee by relying on the order passed by ITAT Delhi Bench 'I', New Delhi in case entitled **ITO Vs Heartland Delhi Transcription & Services Pvt. Ltd. in I.T.A. No. 6043/Del/2012 dated 17.10.2014** contended that the contention of Ld. D.R. that the assessee has not been able to demonstrate the significant circumstances and difference on the profit making of the comparable companies by deploying working capital is not sustainable. While examining reference u/s 92CA(1) TPO discussed the international transaction entertained by the assessee which are tabulated as under:

S.No.	Nature of transaction	Method	Value of transaction
1	Provision of telecommunication and related support services	TNMM	135427604
2	Provision of support services	CUPM	97093209
3	Transfer of fixed asset and liabilities	CUPM	11094859
4	Payment of interest on External Commercial Borrowing	CUPM	13151060
5	Import of hardware & software		19502905

13. Then the TPO issued a show cause notice dated 30.08.2011 to the assessee seeking certain specific information extracted below:

Type of International Transaction	Method selected	Total Value (INR)
Provision of telecommunication and related support services	TNMM using Operating profit as a PLI Operating cost	1548196287
Purchase of assets		215777093
Reimbursement of expenses to AEs		3065481
Payment of interest on External Commercial Borrowing (ECB)	CUP	33211250
Sale of equipment	TNMM using operating profit as a PLI operating cost	31684509
Purchase of Satellite services	TNMM using Operating Profit as a PLI Operating Revenue	43475178

14. The assessee has computed its margin @ 10% in the telecommunication and related support services and provisions for support service agreement. The assessee has selected 7 comparables and given average operating profit and taken the average of operating profit margin on these comparables computed @ 9.42%.

15. TPO after applying the filters of the correct area selected cases as comparable functionaries similar to that of the tested parties excluded the companies on the grounds inter alia that the companies whose data is not available for the financial year 2007-08 are excluded in view of the Rule 10B(4) of the I. T. Rules 1962, which says that the data for earlier two years can also be used if it is shown that such earlier year data had an influence in determining the transfer pricing; that companies whose business support services income at Rs. One crore have also been excluded on the ground that the analysis may not lead to a proper comparability; the companies whose revenue from business services is less than 75% and further operating revenue and the companies having more than 25% related parties transaction of income and the company having different year ending i.e. not march 31st, 2008 and data of company does not fall within 12 months period i.e. 01.04.2007 to 31.03.2008, have also been excluded; the companies that are functionally different from the taxpayer and that companies that are having exclusive economic circumstances have also been excluded

16. The TPO proposed to use last year data alone. He raised data pertaining to financial year 2007-08 and rejected the earlier year data on the ground that assessee has failed to show as to how the earlier year data has the influence on transfer pricing.

17. The comparables selected by the tax payer are inter alia that Access India Advisors Ltd. (accepted); Himachal Futuristic Communications Ltd. (rejected); Educational Consultants India Ltd. (rejected); ICRA Management Consulting Services Ltd. (accepted); IDC (India) Ltd. (accepted); In House Productions Ltd. (Rejected); India Tourism Development Corporation Ltd. (rejected); ORG Informatics Ltd. (rejected) and Telecommunications Consultation India Ltd. (accepted).

18. The TPO also rejected the documents by relying upon the provisions of Section 92C(3)(c) read with Section 92CA that on the basis of material information and documents in possession of the TPO, he is of the opinion that the information and data used in computation of ALP is not reliable and correct and TPO may proceed to determine ALP in relation to international transaction in accordance with Section 92C(1) and 92C(2) on the basis of such material information and documents available with him.

19. The TPO has highlighted the following defects in the transfer pricing analysis carried out by the tax payer:

“1. As per Rule 10B(4), it is mandatory to the use the current financial year data i.e. the financial year in which the international transactions took place. (FY 2007-08). But the taxpayer excluded the current year’s data in most o the comparable cases.

2. Some companies though qualify all the filters applied by the tax payer based on the data pertaining to the FY 2007-08, they have not been selected.

3. Many of the comparables chosen by the taxpayer are not functionally comparable.

In view of the above defect sand the fact that the information as well as the data used in computation of the arms length price is most reliable and correct, the provisions of Section 92C(3)(c) are invoked

and the TP documentation is proposed to be rejected. I proceed to determine arm's length price as proposed in the following paragraphs.”

20. The TPO has selected the final comparables based on the search of prowess capitaline database and examination of the following factors:

“7.a. The Annual Reports of the company.

No company is considered as a comparable without its Annual Report either downloaded from the public domain or obtained from the company. The Annual Reports of all the final comparables are enclosed as a soft copy with this notice.

b. Wherever complete information of a company is not available in the Annual Report, company was asked to submit the information u/s 133(6). Replies have been received in all cases. The decision on the choice of comparables is taken based on the information available in the public domain including the Annual Report as also the replies received in response to notice sent u/s 133(6).”

21. Consequently, the TPO concluded that the information as well as data used in the computation of ALP by the tax payer is not reliable and by invoking the provisions contained u/s 92C(3)(c), proposed to reject the TP documents and proceeded to determine the ALP of international transaction by using TNMM methodology as selected by the tax payer. The TPO discussed the comparables on the basis of search on the prowess of capital line data as under:

S. No.	Name	Database	Total Income (Rs. Cr.)	Service Income (%)	RPT (%)	PBIT/ Costs (%)
1	Apitco Ltd	Prowess	10.67	98.5	0	49.35
2	Best Mulyankayan Consultants Ltd	Prowess	1.11	92.79	11	12.85
3	Choksi Laboratories Ltd.	Capitaline	9.45	98.7	0	29.2
4	Genins India TPA Ltd	Prowess	5.34	96.69	0	9.22

5	ICRA Management Consulting Services Ltd.	Prowess	18.39	96.16	13.41	4.18
6	IDC (India) Ltd.	Prowess	15.77	99.43	0.95	15.48
7	Indus Technical & Financial Consultants Ltd.	Prowess	1.15	98.26	0	14.56
8	Rites Ltd. (Seg.)	Prowess	353.13	84.43	3.49	25.77
9	Technicom–Chemie (India) Ltd.	Prowess	1.97	94.42	0	7.32
10	Vapi Waste & Effluent Mgmt. Co. Ltd.	Prowess	19.9	79.85	0	18.53
11	WAPCOS Ltd. (Seg.)	Capitaline	81.97	97.55	0	40.37
12	Access India Advisors Ltd.					45.97
13	Telecommunications Consultants India Ltd.					6.16
	Averate					21.46

Data used: Data pertaining to the FY 2007-08 as mandated under Rule 10B(4):

Operating Cost	Rs.1362632678
Arm's Length mean margin	21.46%
Arms Length Price (ALP) @ 120.69% of operating cost	Rs.292420973
Price received	Rs.187381065
Shortfall being adjustment u/s 92CA	Rs.105039908

22. The TPO has disclosed off the objection filed by the tax payer for excluding the companies taken by it as comparable. TPO has also given the detailed reasons for selecting the comparables for transfer pricing study.

23. The assessee has claimed working capital adjustment reproduced by TPO in para 10.3A as under:

“a) Claim for Working Capital Adjustment:

The assessee has claimed adjustment on account of working capital adjustment. It is seen that the intensity of working capital as employed by the assessee and as employed by the different. The claim of working capital adjustment has been examined keeping in view the Revision of Chapter 1-III of OECD Guidelines as published by the OECD on 22.07.2010. It is relevant to mention that the Prime Lending Rate taken for the sake of this adjustment is 12.5% as per SBI guidelines and only average only average trade receivables and payable working capital adjusted margin of the com parables are as under:

S.No.	Name of the Company	Adjusted operating profits on operating cost (%) FY 2007-08
1	APTICO Ltd.	39.80
2	Best Mulyankayan Conmsultants Ltd.	-2.09
3	Choksi Lab Ltd.	22.25
4	Telecommunications Consultants India Ltd. (Seg)	8.08
5	ICRA Management Consulting Services Ltd.	-3.31
6	IDC (India) Limited	10.32
7	Indus Technical & Financial Consultants Ltd.	11.82
8	Rites Ltd.	29.81
9	Technicom Chemie (I) Ltd.	7.18
10	Vapi Waste & Effluent Mgmt. Co.Ltd.	3.87
11	WAPCOS Ltd. (Seg.)	52.37
	Average	16.37%

24. However, the TPO proceeded to dispose of the issue as to the working capital adjustment by making following observations:

“Working capital adjustment: The assessee submitted claim for working capital adjustment along with the response to the show cause notice. It was noticed that the assessee was using the same profit margin which had not been accepted earlier and also the PLR used was 13%. The PLR during the relevant year is 12.5% and the same has been used and a mentioned earlier the recalculated margins, which were explained to the assessee, have been used. Further, for the purpose of taking average receivables and payables, only trade receivables and payables have been taken and no other assets and liabilities have been considered. The working capital adjustment sheet is enclosed as Annexure-B.”

25. So, the TPO vide order dated 25.09.2008 directed the A.O. to enhance the income of the assessee by Rs.1,26,79,054/-. However, a perusal of order dated 22.12.2008 passed by A.O. apparently goes to prove that he has acted as a post office without examining the issue as to the working capital adjustment sought by the assessee, rather A.O. has preferred to keep mum and proceeded to make the addition as per ALP u/s 92CA(3) as proposed by TPO in his order dated 25.09.2008.

26. The assessee being aggrieved, carried the matter to Ld. CIT(A) who has deleted the addition on account of working capital adjustment by making following observations:

“5.10 The appellant had produced the full working of the working capital adjustment in its submission dated 19.01.2012 in annexure to the paper book. The working capital adjusted margin of the comparables are reproduced below:

<i>Margin analysis – Provision of Telecommunication and related support services after working capital adjustments</i>		
<i>S.No.</i>	<i>Name of the company</i>	<i>Operating profit on operating cost (%) F.Y. 2004-05</i>
<i>1</i>	<i>Educational Consultants India Limited</i>	<i>-0.47%</i>
<i>2</i>	<i>Engineers India Limited</i>	<i>-0.20%</i>
<i>3</i>	<i>Geefcee Finance Limited</i>	<i>-12.56%</i>
<i>4</i>	<i>IDC (India) Limited</i>	<i>-0.67%</i>
<i>5</i>	<i>Inmacs Management Services Limited</i>	<i>10.83%</i>
<i>6</i>	<i>Grow Talent Co. Ltd</i>	<i>12.01%</i>
<i>7</i>	<i>RITES Limited</i>	<i>14.20%</i>
<i>8</i>	<i>Tata Share Registry Limited</i>	<i>-0.99%</i>
	<i>Arithmetic mean</i>	<i>2.77%</i>

As the mean adjusted margin (OP/TC) of the comparables are less than what is earned by the appellant which is at 10%, the international transaction in respect of provision of telecommunication

and related support services are held to be at arm's length. The A.O./TPO is directed to delete the addition made in this regard."

27. Needless to say that when the A.O. has not examined the matter as to the working capital adjustment sought for by the assessee and rejected by TPO. The Ld. CIT(A) though having co terminus powers, was not authorized to proceed with deleting the addition without entertaining additional evidence during appellate proceedings and without calling the remand report from the A.O. When the working capital adjustment has been duly demonstrated by the assessee during proceedings before TPO, a quasi judicial authority, the A.O. as well as Ld. CIT(A) were legally bound to address the issue in accordance with law by applying the rule of natural justice. So, Ld. CIT(A) has erred in deleting the addition of Rs.12,67,405/-. So, we are of the considered opinion that the file is required to be restored to Ld. CIT(A) for fresh adjudication. Consequently, ground No.1 is decided in favour of the Revenue. Needless to say that Ld. CIT(A) shall pass the order afresh after providing proper opportunity of being heard to both the parties.

28. Ground No.2 raised by the appellant, *'the Ld. CIT(A) has erred on facts and in deleting addition of Rs.22,150/- made by the A.O. on account of disallowance of extra depreciation claimed by assessee on computer peripherals.'*

29. Undisputedly, during the year under assessment, the assessee has made addition to the fixed assets under the head 'computer' and claimed depreciation @ 60% and has filed the details of addition to fixed assets that the details filed by the assessee show the purchases of computer accessories amounting to Rs.63,290/-. However, the assessee claimed the depreciation @60% rather allowed the same @ 25% treating the same as normal plant

and machinery and the excess depreciation claimed at Rs.22,150/- was disallowed.

30. During appellate proceedings, Ld. CIT(A) has discussed the issue threadbare in para 7 at page 14 of the impugned order and proceeded to delete the addition of Rs.22,150/-.

31. The Hon'ble Jurisdictional High Court in case cited as CIT Vs BSES Yamuna Power Limited (I.T.A. No. 1267/2010) upheld the view taken by the Tribunal that computer accessories and peripherals such as printers, scanners and server etc. form an integral part of the computer system and as such found the assessee entitled to depreciation at the higher rate of 60%. So, relying upon the law laid down by Hon'ble jurisdictional High Court, Ld. CIT(A) has rightly deleted the addition of Rs.22,150/- made by the A.O. Hence, Ground No.2 is determined against the appellant.

32. In view of what has been discussed above, present appeal is partly allowed for statistical purposes and the case is ordered to be restored to Ld. CIT(A) for fresh decision in accordance with law without influenced by the findings returned by the TPO.

Sd./-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER
Date: 30.10. 2015

Sd./-
(KULDIP SINGH)
JUDICIAL MEMBER

Sp

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	23/9		Sr. PS/PS
2	Draft placed before author	24/9,15,16,26,30,30		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	30/10/15		Sr. PS/PS
6	Kept for pronouncement	30/10		Sr. PS/PS
7	File sent to Bench Clerk	30/10		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			