

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'K', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

Before Shri Shamim Yahya, AM & Shri Ram Lal Negi, JM

ITA No.244/Mum/2014 : Asst.Year 2009-2010

The Dy.Commissioner of Income-tax Range 10(3) Mumbai.	बनाम/ Vs.	M/s.RHI India Private Limited B-803-806, Great Eastern Summit Plot No.66, Sector 15, CBD Belapur Navi Mumbai – 400 614. PAN : AADCR6670R.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri Jayant Kumar

प्रत्यर्थी की ओर से /Respondent by : --- None ---

सुनवाई की तारीख / Date of Hearing : 24.07.2017	घोषणा की तारीख / Date of Pronouncement : 07.08.2017
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आदेश / ORDER

Per Shamim Yahya, AM

This appeal by the Revenue is directed against order of Assessing Officer passed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, dated 12.11.2013, passed under direction of the Dispute Resolution Panel-II, Mumbai dated 29.10.2013 and pertains to assessment year 2009-2010.

2. The grounds of appeal read as under:-

“ 1(i) Whether on the facts and in the circumstances of the case and in law, the Dispute Resolution Panel was justified in holding that Basiz Fund Services Pvt. Ltd. is not functionally comparable in the first place and asking for inclusions of other comparable i.e. ICRA Management Consulting Services Ltd. in the second place?

1(ii) Whether the Dispute Resolution Panel was justified in holding that the international transactions satisfy the arm's length test within +/- 5%?

3. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

4. The appellant prays that the direction of the DRP, Mumbai on the above directions be set-aside and that of the assessing officer be restored.”

3. Brief facts of the case are as under:-

3.1 The Assessee is engaged in the business of trading in refractory materials and provision of marketing support services to its Associated Enterprises ('AEs'). The assessee coordinates and liaisons information between the AEs and the customers with respect to direct sales made by AEs to the customers. The assessee also does after sales services. For these services RHI India is compensated on a cost plus mark up basis. The value of such transactions during the year was Rs.7,73,46,747/-.

3.2 The comparables as per assessee's search were as follows:-

S.No.	Comparable Companies	Operating margin / Operating revenue
1.	Educational Consultants (India) Ltd. (Segmental)	3.80%
2.	ICRA Management Consulting Services Ltd.	-2.78%
3.	IDC India Ltd.	9.99%
4.	In House Productions Ltd. (Segmental)	2.51%
5.	India Tourism Development Corporation Ltd. (Segmental)	1.86%
6.	Overseas Manpower Corp. Limited	-7.12%
	Arithmetic Mean	1.38%

3.3 The TPO in the order rejected ICRA Management Consulting Services Limited & Overseas Manpower Corporation Limited selected by the assessee companies on the ground that these companies have negative operating margins during Assessment Year 2009-10. The PLI was recomputed as under:-

S.No.	Comparable Companies	Operating margin / Operating revenue
1.	Educational Consultants (India) Ltd. (Segmental)	3.80%
2.	IDC India Ltd.	9.99%
3.	In House Productions Ltd. (Segmental)	2.51%
4.	India Tourism Development Corporation Ltd. (Segmental)	1.86%
	Arithmetic Mean	4.54%
	Assessee	10.07%

3.4 The TPO conducted a fresh search for determining the arm's length nature of the international transaction and the final comparables considered were as under:-

S.No.	Name of company	Margin (%)
1.	Basiz Fund Services Pvt. Ltd.	46.75
2.	Cameo Corp Serv	14.95
3.	HCCA Business Services Pvt. Ltd.	20.12
4.	TSR Darashaw Mean	26.98
5.	Educational Consultants (India) Ltd. (Segmental)	3.8
6.	In House Productions Limited (Segmental)	2.51
7.	India Tourism Development Corporation Limited (Segmental)	1.86
8.	Cyber Media Research Limited	10.44
	Average	15.93

Thus the TPO computed arm's length operation margin at 15.93% as against PLI of 10.7% computed by assessee and made an adjustment of Rs.41,18,178.

4. On the above facts, before the learned DRP the assessee's contentions were noted as under:-

6. *The assessee argued that conducting a fresh search after 30 September 2009 based on the financial information of the comparable companies for Financial Year 2008-09. the data pertaining to which was not available to the Assessee at the time of compliance with TP documentation requirements is not in accordance with the provisions of the law. Further, 3 year data should be considered for the purpose .of arriving at the arm's length margin as the same assist in reducing the distortions in the industry cycle and in most of the cases, the current year data is not available at the time of preparing the transfer pricing report. The TPO had also resorted to cherry picking of comparables which was not in accordance with the Indian transfer pricing regulations. The rejection of the comparables as loss making was not appropriate as these companies satisfy the comparability criteria as specified under the Rules.*

7. *It was contended that the companies selected by the TPO were significantly different vis-a-vis the marketing support services provided by the assessee as follows:*

<i>Name of the company</i>	<i>Description</i>	<i>Reasons for rejection</i>
<i>Basiz Fund Service Private Limited</i>	<i>The company is engaged in providing fund accounting services.</i>	<i>Functionally dissimilar as it provides fund accounting services. Owns significant intangible assets and</i>

			<i>therefore, cannot be considered to be a routine support service provider. Requires highly technical qualified and experienced employees for rendering services.</i>
<i>Cameo Services</i>	<i>Corporate</i>	<i>The company is an established Business Process Outsourcing (BPO) service, providing diversified services to a wide range of clients.</i>	<i>Functionally dissimilar as it provides IT enabled services, document management services, medical transcription and other BPO services.</i>
<i>HCCA Services Limited</i>	<i>Business Private</i>	<i>The company is engaged in providing BPO services.</i>	<i>The company did not exist in the search process undertaken by the Assessee. Functionally different as it provides payroll processing and compensation structuring, management of labour and legal compliances, payroll regulatory compliance, employee reimbursement processing and accounting services.</i>
<i>TSR Limited</i>	<i>Darashaw</i>	<i>The company is engaged in providing IT enabled services.</i>	<i>Non comparable activities as it is engaged in providing IT enabled services such as payroll processing, reward management and depository related services.</i>

8. The Assessee being a captive service provider, an economic adjustment for risk should be allowed to the Assessee while comparing the activities of the Assessee to full fledged software service providers. As per Section 92C(2) of the Act, the

assessee further submitted that any adjustment to the income of the Assessee should be computed after considering a (+) 5 percent variation from the transfer price. Without prejudice to the above, it was stated that Basiz Fund Services Private Limited was rejected as functionally different, the arm's length margin would be 11.52% as against Assessee's margin of 10.07% and hence the transaction meets arm's length test considering the flexibility of 5% or if the two companies selected by the Assessee were accepted, as they are not persistent loss makers, the arm's length margin of the comparables selected by the Assessee and the TPO would be 11.49% as against Assessee's margin of 10.07% and hence the transaction meets arms length test considering the flexibility of 5%.

5. Considering the above submissions, the learned DRP has given following directions:-

“The submission of the assessee has been considered and the TPO has been given opportunity of hearing. Though the TPO is empowered to conduct a fresh search for determining the arm's length nature of the international transactions it is seen that one of the comparables i.e. Basiz Fund Service (P) Ltd. is not functionally comparable and if excluded arm's length margin would be 11.52% as against assessee's margin of 10.07%. In the alternative, if this comparable with high margin of 46.75%'s included then the two comparables of assessee excluded by the TPO ought to be considered as they are not persistent loss makers. Then the arm's length margin would be 11.49% as against assessee margin of 10.07%. In the circumstances it is held that the international transactions satisfy the arm's length test within +/-5%”

6. Consequent to the A.O.'s order pursuant to the above directions, Revenue is in appeal before us.

7. We have heard the learned Departmental Representative. None appeared on behalf of the assessee. It is noted that none has been appearing on behalf of the assessee since past several occasions. Accordingly, we proceeded to dispose off this appeal by the Revenue by hearing the learned DR and perusing the records.

8. The learned DR relied upon the order of the TPO. He submitted that the learned DRP has not assigned reasons for its direction. He also contested that the DRP's finding that the assessee and the comparable, Basiz Fund Services Private Limited are functionally dissimilar and hence not comparable.

9. Upon careful consideration we note that the assessee in this case is engaged in the business in trading of refractory materials and provision of marketing support services to its Associated Enterprises (AEs). The assessee coordinates and liaisons information between the AEs and the customers with respect to direct sales made by AEs to the customers. The assessee also does after sales services. For these services the assessee is compensated on a cost plus mark up basis. The Transfer Pricing Officer has rejected the comparables of the assessee and substituted the same with his own comparables. Out of the comparables selected by the TPO, assessee is contesting the inclusion of M/s.Basiz Fund Services Private Limited. It is the contention of the assessee that this comparable is functionally dissimilar to the assessee. As per the financial status of the company submitted in the paper book by the learned DR, M/s.Basiz Fund Services Private Limited is engaged in providing funds accounting services to fund administrators, insurance companies, prime brokers, private equity funds in selected

geographies, managed accounts / portfolio accounts, family offices and internal fund accounting for hedge funds. When we compare the function of the said comparable with that of the assessee, the said comparable's function are quite dissimilar and the assessee's contention against its inclusion in the list of comparable is quite justified. In these circumstances, in our considered opinion, the learned DRP is not in error in accepting the assessee's contention that M/s.Basiz Fund Services Private Limited is not functionally comparable. If this comparable is excluded, the arm's length margin has been computed at 11.52% against assessee's margin of 10.07%. In these circumstances, the learned DRP has held that the international transaction satisfies the arm's length test within + / - 5%. In our considered opinion, there is no infirmity in this finding by the learned DRP. Hence, we hold that the learned DRP is correct in holding that the comparable M/s.Basiz Fund Services Private Limited is not functionally comparable to the assessee. If the same is excluded the arm's length margin would be 11.52% as against assessee's margin of 10.07%. Hence, the international transaction satisfies arm's length test within + / - 5%.

10. Another limb of learned Dispute Resolution Panel's direction is that if the comparable M/s.Basiz Fund Services Private Limited which has a high margin of 46.75% is included then the other two comparables namely ICRA Management Consultancy Services Limited (Operating margin / operating revenue -2.78%) and Overseas Manpower Corp Limited (operating margin / operating revenue -7.12%) which have been excluded by the TPO as they are loss-making should also be included as they are not persistent loss-makers. From this point of view when these two are also included then the

arm's length margin would be 11.49% as against assessee's margin of 10.07%. In these circumstances, the learned DRP has held that the international transactions satisfy the arm's length test within +/- 5%. We find that this limb of the adjudication also has considerable cogency. When high profit margin of 46.75% is to be included, then the other comparables which are said to be not persistent loss-maker but have returned loss should also be included. If this is done it gives the mean of 11.49% which comes within +/- 5%. The computation aspect has not been disputed by the Revenue. In these circumstances, we also uphold this limb of learned DRP's direction.

11. Accordingly we do not find any infirmity in the directions of the learned DRP and hence we uphold the same.

12. In the result, this appeal filed by the Revenue stands dismissed.
Order pronounced on this 7th day of August, 2017.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 07th August, 2017.
Devdas*

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

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