

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

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI LALIT KUMAR, JUDICIAL MEMBER

IT(TP)A No. 385/Bang/2016
Assessment Year :2011-12

The Assistant Commissioner of Income Tax, Circle – 4 (1) (2), Bangalore.	Vs.	M/s. Momentive Performance Materials (India) Pvt. Ltd., Survey No. 9, Electronic City (West), Hosur Road, Bangalore – 560 100. PAN: AAACG 9931F
APPELLANT		RESPONDENT

C.O. No. 10/Bang/2017 (in IT(TP)A No. 385/Bang/2016)
Assessment Year :2011-12

M/s. Momentive Performance Materials (India) Pvt. Ltd., Survey No. 9, Electronic City (West), Hosur Road, Bangalore – 560 100. PAN: AAACG 9931F	Vs.	The Assistant Commissioner of Income Tax, Circle – 4 (1) (2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri T. Suryanarayana, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT (DR)

Date of hearing	:	05.12.2017
Date of Pronouncement	:	08.12.2017

ORDER

Per Shri A.K. Garodia, Accountant Member;

This appeal is filed by the revenue and the CO is filed by the assessee and these are directed against the assessment order dated 19.01.2016 for Assessment Year 2011-12 passed by the AO u/s. 143(3) r.w.s. 144C(13) of the IT Act, 1961 as per the directions of the DRP.

2. The grounds raised by the revenue in its appeal are as under.

“1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.

2. The Hon'ble DRP erred in directing the AO to delete the addition made on prior period expenses stating that the amount being claimed in current year on payment basis as per section 43B of the IT Act. , since assessee in the AY-2011-12 revised the company policy to pay the bonus to its employees based on calendar year. Hence, the change in company policy in later year cannot be the reason to claim the expenses of earlier Asst. Years.

3. The Hon'ble DRP erred in granting 1% risk adjustment arbitrarily without appreciating the facts of the case and its comparables.

4. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”

3. Similarly, the grounds raised by the assessee in its CO being revised specific grounds are as under.

“The grounds mentioned herein by the Respondent- Cross objector are without prejudice to one another.

1. That the order of the learned Assistant Commissioner of Income Tax, Circle – 4 (1) (2), Bangalore ("Assessing Officer" or "AO") to the extent prejudicial to the Respondent- Cross objector, is bad in law and liable to be quashed.

2. That the learned Dispute Resolution Panel – II, Bangalore ("Panel") erred both in facts and law in confirming the action of the learned AO/Additional Commissioner of Income tax (Transfer Pricing) – 2(1), Bangalore ("learned Transfer Pricing Officer or "learned TPO") of making an adjustment to the transfer price of the Respondent- Cross objector in respect of IT enabled services ("IT enabled services") segment amounting to Rs. 4,051,277, holding that the international transactions do not satisfy the arm's length principle envisaged under the Income Tax Act, 1961 (the 'Act').

3. That the Learned Panel erred in upholding the learned TPO's approach of rejecting the Transfer Pricing ("TP") documentation maintained by the Respondent- Cross objector, in respect of IT enabled services segment, contending that the information or data used in the computation of the arm's length price is not reliable or correct.;

4. That on the facts and in the circumstances of the case the learned Panel erred in:

a) Upholding the learned AO/learned TPO's approach in partially rejecting the comparability analysis undertaken by the

Respondent- Cross objector in accordance with the provisions of the Act read with the Rules and modification / application of certain arbitrary filters in determining the arm's length price with respect to IT enabled services segment and holding that the Cross objector's international transactions within IT enabled services were not at arm's length.

b) Upholding the learned AO/learned TPO's approach in disregarding the application of multiple year/prior year data as used by the Respondent- Cross objector in the TP documentation and holding the current year (i.e. Financial Year 2010-11) data for companies should be used for comparability.

c) Upholding the learned AO/learned TPO's approach of using data as at the time of assessment proceedings instead of the data that was available as on date of preparing the TP documentation for comparable companies while determining the arm's length price.

d) Upholding the learned AO/learned TPO's approach of rejection of certain companies similar to the Respondent- Cross objector while performing the comparability analysis with respect to the Cross objector's IT enabled services segment.

e) That, without prejudice and in any event, upholding the learned AO/TPO's approach in rejecting Microland Ltd and Informed Technologies India Pvt. Ltd., as comparable to the Respondent-Cross objector, despite the said companies being functionally similar to the Respondent and passing all filters applied by the TPO.

f) Upholding the learned AO/learned TPO's approach of inclusion of certain companies in the comparability analysis with respect to the Respondent- Cross objector's IT enabled services segment which do not satisfy the test of comparability.

g) That, without prejudice and in any event, upholding the learned AO/TPO's approach in including Accentia Technologies Ltd. and Jeevan Scientific Technology Ltd. in the list of comparables despite they being functionally dissimilar to the Respondent and failing the test of comparability in terms of functions performed, assets used and risks undertaken.

h) That, without prejudice and in any event, Jeevan Scientific Technology Ltd. fails the TPO's own filters of rejecting companies having IT enabled services income lesser than Rs. 1 cr and rejecting companies having IT enabled services and related services income lesser than 75% of the total operating revenues and thus ought to be rejected as a comparable.

5. That the learned AO erred in disregarding the specific directions issued by the learned Dispute Resolution Panel – II, Bangalore ("Panel"), with respect to the correction of the arithmetic inaccuracies in the computation of operating mark up on cost for certain companies while performing the comparability analysis in relation to the IT enabled services segment of the Respondent- Cross objector.

a) That specifically, without prejudice, the errors in computation of margins of e4e Healthcare Business Services Private Limited, ICRA Online Ltd., Jeevan Scientific Technology Ltd., Mindtree Ltd. and iGate Global Solutions Ltd ought to have been rectified by the learned AO/TPO in line with the directions of the DRP.

6. That the learned Panel erred in upholding the learned AO/learned TPO's errors in computation of working capital of the Assessee and the comparable companies.

7. That the learned Panel erred in upholding the learned AO/learned TPO's approach in limiting the working capital adjustment and not providing the working capital adjustment at actuals while determining the arm's length price.

8. That the learned AO erred in charging interest under section 234B and 234C of the Act.

That the Respondent- Cross objector craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”

4. We first take up the appeal of the revenue. It was submitted by Id. DR of revenue that ground no. 1 is general. Regarding ground no. 2, it was submitted that since no claim was made in the preceding year, no deduction can be allowed in the present year even u/s. 43B of the IT Act. As against this, it was submitted by Id. AR of assessee that on page no. 788 of the paper book, the details of payment of bonus in the present year is available. He submitted that most of the payments were made after November 2010 i.e. after the due date for filing the return of income for A. Y. 2010 – 11 and therefore, even if the claim is made in the preceding year i.e. Assessment Year 2010-11, then also, deduction cannot be allowed in that year because u/s. 43B of IT Act, deduction is allowable on payment basis and if the payment is made after the due date for filing the return of income then it has to be allowed in the year of payment only.
5. We have considered the rival submissions and in our considered opinion, in the facts of the present case, there is no infirmity in the order of DRP on this issue and therefore, ground no. 2 of the revenue's appeal is rejected.
6. Regarding ground no. 3 of the revenue's appeal, it was submitted by Id. DR of revenue that there is no calculation of risk adjustment filed by the assessee before the DRP and as per the DRP order on this issue at page nos. 11 and 12

of DRP order, it can be seen that DRP has simply followed a Tribunal order rendered in the case of Intellinet Technologies India Pvt. Ltd. Vs. ITO in ITA No. 1237/Bang/2010 and another Tribunal order rendered in the case of DCIT Vs. Hello Soft Pvt. Ltd. as reported in 32 taxmann.com 101 (ITAT, Hyderabad) and held that 1% adjustment to the average margin was to be allowed towards risk differential because the facts of the present case are same as in those two cases. She submitted that this direction is without any discussion in respect of facts of the present case and of those two cases. She submitted that under these facts, the issue should go back to the file of DRP for fresh decision by way of a speaking and reasoned order. The Id. AR of the assessee supported the order of DRP.

7. We have considered the rival submissions. In view of this fact that no working of risk adjustment was provided by the assessee before the DRP and in view of this fact also that the order of DRP is cryptic in respect of the facts of the present case and facts of those two cases which were followed by DRP, we feel it proper to restore this matter back to the file of DRP for fresh decision by way of a speaking and reasoned order. Ground no. 3 of the revenue's appeal is allowed for statistical purposes.
8. In the result, the appeal filed by the revenue is partly allowed for statistical purposes.
9. Now we take up the CO filed by the assessee. It was submitted by Id. AR of assessee that out of various grounds raised by the assessee in CO, the ground nos. 4e, 4g, and 4h along with ground nos. 5, 6 and 7 are pressed and the remaining grounds are not pressed. Accordingly the remaining grounds except 4e, 4g, 4h, 5, 6 and 7 are rejected as not pressed.
10. Regarding the issue raised in respect of ground no. 4e, Id. AR of assessee drawn our attention to page no. 8 of the order of DRP and pointed out that it is held by DRP that the assessee has raised this issue that there is mistake in computations made at certain points in certain comparables and it was held by the DRP that regarding this factual error in computation of some comparables,

AO / TPO is directed to verify the same and correct it if there is any inaccuracy in the same. The TPO was directed to look into the revised calculation of profit margins given by the assessee. He further pointed out that it is also held by DRP in its order that while reviewing profit margins only those arithmetical mistakes that may have crept in the calculation of profit margin / other calculations should be entertained and no fresh adjustment in profit margin calculations be entertained. He submitted that in respect of this direction of DRP, the AO has not carried out the necessary corrections. He also submitted that regarding the other issues being pressed by the assessee as per ground nos. 4g, 4h, 5, 6 and 7 also, the DRP order is very cryptic. At this juncture, this proposition was put forward by the bench that under these facts, it will be proper under these facts that the issues raised as per these six grounds i.e. 4e, 4g, 4h, 5, 6 and 7 are restored back to the file of DRP for fresh decision by way of a speaking and reasoned order. Both sides agreed to this proposition put forward by the bench. Accordingly, the issues raised by the assessee in ground nos. 4e, 4g, 4h, 5, 6 and 7 are restored back to the file of DRP with the direction that the DRP should pass a speaking and reasoned order after providing adequate opportunity of being heard to both sides.

11. In the result, the CO filed by the assessee stands partly allowed for statistical purposes.
12. In the combined result, the appeal filed by the revenue and the CO filed by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(LALIT KUMAR)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 08th December, 2017.
/MS/

Copy to:

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

By order

Senior Private Secretary,
Income Tax Appellate Tribunal,
Bangalore.