

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-2' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 318/DEL/2015 (A.Y 2010-11)

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| Siemens Industry Software (India) Pvt. Ltd. (Formerly known as Product Lifecycle Management Software (India) Pvt. Ltd.) E-20, 1 st & 2 nd Floor, Hauz Khas New Delhi AABCS7638E (APPELLANT) | Vs | DCIT Circle-8(1) New Delhi (RESPONDENT) |
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| Appellant by | Sh. Ravi Sharma, Adv & Sh. Anubhav Rastogi, Adv |
| Respondent by | Sh. H. K. Choudhary, CIT(A) DR |

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| Date of Hearing | 23.01.2019 |
| Date of Pronouncement | 28.01.2019 |

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the Assessment Order dated 13/11/2014 passed by the Assessing Officer u/s 143 (3) read with Section 144C of the Income Tax Act, 1961 for Assessment Year 2010-11.

2. The grounds of appeal are as under:-

1. *“On the facts and in law, the Learned Deputy Commissioner of Income Tax, Circle 8(1), New Delhi (“Ld. AO”) erred in passing the impugned assessment order dated 13 November 2014 pursuant to the directions of the*

Hon'ble Dispute Resolution Panel ("Hon'ble DRP") and computing the total income of the Appellant for Assessment Year ("AY") 2010-11 at Rs. 543,791,460 as against the returned income of Rs. 268,459,314.

2. The Ld. AO erred in proposing and the Hon'ble DRP further erred in confirming the addition of Rs. 275,332,146 to the Appellant's returned income of Rs. 268,459,314.

Transfer Pricing Adjustment - Rs. 238,365,237

3. On the facts and in law, the Learned Joint Director of Income Tax, Transfer Pricing Officer-II(2) ("Ld. TPO") and the Ld. AO erred in proposing and the Hon'ble DRP erred in confirming the adjustment of Rs. 238,365,237 in relation to the international transactions of provision of software development services, provision of competency center services, provision of IT support services and payment of royalty and license fees for maintenance enhancement support entered into by the Appellant with its Associated Enterprises ("AEs") during the relevant previous year.

4. On facts and in law, the Ld. TPO/ Ld. AO and Hon'ble DRP further erred in disregarding the transaction-by-transaction analysis carried out by the Appellant in compliance with Rule 10B(l)(e) of the Rules read with Section 92C of the Act and determining the arm's length price at entity level by merging the Purchase of Software Segment with Software Development segment. In doing so:

4.1 The Ld.TPO/ Ld. AO erred in not appreciating that the functional, asset and risk profile under these two segments are entirely different

4.2. The Ld. TPO/A.O erred in contradicting his own position taken in earlier years where the Purchase of Software segment was not merged with the software development segment

4.3. The Hon'ble DRP erred in merely relying upon the findings of the Ld. TPO without providing any cogent reason for disregarding the objections raised by the Appellant.

5. On facts and in law, the Ld. TPO/ Ld. AO and Hon'ble DRP erred in rejecting the economic analysis and filters applied in the Transfer Pricing (TP) documentation maintained by the Appellant u/s 92D of the Income Tax Act, 1961 ("the Act") read with Rule 10D of the Income Tax Rules, 1962 ('the Rules'), without providing any cogent reason and arbitrarily applying additional filters.

6. *On the facts and in law, the Ld. TPO/ Ld. AO and Hon'ble DRP violated the provisions of Rule 10B(2) of the Rules by arbitrarily rejecting the companies selected by the Appellant in the TP documentation/ fresh search which are functionally comparable to the Appellant.*
7. *On facts and in law, the Ld. TPO/ Ld. AO erred in not accepting the comparables, namely CG-Vak Software & Export Ltd and Goldstone Technology Limited identified by the Appellant in its TP documentation when the same were accepted in the prior year(s) and that there is no change in facts of the Appellant's case in the current year.*
8. *On the facts and in law, the Ld. TPO/ Ld. AO and Hon'ble DRP violated the provisions of Rule 10B(2) of the Rules by arbitrarily introducing companies namely, Accelya Kale Solutions Ltd., Kuliza Technologies Pvt. Ltd., Thinksoft Global Services Ltd., Larsen and Tubro Infotech Ltd., Persistent Systems and Solutions Limited and Wipro Technology Services Limited, disregarding that the functional profiles of the said companies are entirely different from that of the Appellant.*
9. *On the facts and in law, the Hon'ble DRP erred in not providing any cogent reason for accepting companies selected by the Ld. TPO and merely stating that the companies satisfy quantitative filters without appreciating that the companies selected by the Ld. TPO have different functional and risk profile and thus, fail to satisfy qualitative criteria.*
10. *Without prejudice to the above grounds, on facts and in law, the Ld. AO/ Ld. TPO erred in ignoring the directions of the Hon'ble DRP and incorrectly computing the operating profit margin of the finally selected companies by the Ld. TPO.*
11. *On the facts, the Ld. TPO/ Ld. AO and Hon'ble DRP erred in not considering the suo-moto adjustment of Rs. 18,966,029 offered by the Appellant in the tax return of year under consideration (i.e. AY 2010-11) for the Purchase of Software segment.*

12. *On facts and in law, the Ld. TPO/ Ld. AO and Hon'ble DRP erred in using the data for the current year (i.e. financial year 2009-10) which was not contemporaneous and which was not available in the public domain at the time of preparing the TP documentation by the Appellant, thereby grossly misinterpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply current year data, thereby breaching the principles of natural justice and 'impossibility of performance'.*

13. *On the facts and in law, the Ld. TPO/ Ld. AO and the Hon'ble DRP grossly erred in not allowing the risk adjustment in accordance with the provisions of Rule 10B(3) of the Rules to account for the differences in the risk profile of the Appellant and the comparable companies.*

Adjustment on account of Advance Billing- INR 37,119,144

14. *On the facts and in law, the Ld. AO erred in making and the Hon'ble DRP erred in confirming an ad-hoc addition of Rs. 37,119,144 (being 45% of Rs. 82,486,986) on account of income from maintenance, enhancement and support services (Advance Billing / Deferred Revenue) without appreciating that no income has accrued to the Appellant for the year under consideration and that on similar facts, the Hon'ble Tribunal deleted such additions in earlier years.*

15. *Without prejudice to above and in alternate, Ld. AO and the Hon'ble DRP has erred on facts and in law in disregarding the regular and the consistent method of accounting being followed by the Appellant in recognizing the revenue from maintenance, enhancement and support services provided by the Appellant to its customers.*

Adjustment on account of Business promotion expenses - INR 4,197,074

16. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in making and the Hon'ble DRP erred in confirming an ad-hoc disallowance of Rs.4,197,074 being business promotion expenses treating them to be of capital in nature and having an enduring benefit and therefore amortising them over a period of five years.*

17. *On facts and in law, the Ld. AO and the Hon'ble DRP completely erred in not appreciating that business promotion expenses constitute revenue*

expenditure for the applicant.

18. *On the facts and in law, the Ld. AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act.*

The above ‘Grounds of Appeal’ are independent and without prejudice to each other.

The Appellant craves leave to supplement, withdraw, amend, add and/or otherwise alter or modify, any or all, grounds of the appeal stated hereinabove and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

3. Siemens Product Lifecycle Management Software (India) Pvt. Ltd (now known as Siemens Industry Software India Private Limited) is a private limited company incorporated under the Companies Act 1956. The assessee company is a wholly owned subsidiary of UGS Corp. (“Associated Enterprise” or “A.E”). During the year under consideration, the assessee company is engaged in the business of sale and service of Computer Software Development and Running Software Consultancy and other services. During the relevant FY, the assessee company undertook the following international transactions with its AEs which were duly reported in the Accountant’s Report (Form NO. 3CEB), filed along with the assessee company’s return of income:

| Sr. No. | International Transaction | Amount (Rs.) |
|---------|---|----------------|
| 1 | Payment of Royalty for Software | 18,84,66,897 |
| 2 | Purchase of Software and payment of license fees for maintenance, enhancement and support of software | 17,94,90,302 |
| 3 | Provision of software development services | 1,08,09,46,382 |
| 4 | Provision of competency centre services | 3,70,21,317 |
| 5 | Provision of IT Support services | 13,30,62,645 |
| 6 | Payment of APHQ Charges | 3,62,51,053 |

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|----|-------------------------------------|-------------|
| 7 | Receipt of APHQ Charges | 1,21,64,775 |
| 8 | Infrastructure Utilization Expenses | 4,56,47,025 |
| 9 | Reimbursement of Expenses | 1,47,58,023 |
| 10 | Recovery of Expenses | 2,99,83,257 |

With regard to Provision of software development, competency centre and IT support services, the assessee company operates as a contract services provider for Group Companies. With regard to the segment of purchase of software, the assessee company has been granted a nonexclusive, nontransferable license authorizing the affiliate to use the software for internal business, demonstrate, market distribute or sublicense the software for end to end customers. The assessee company's benchmarking approach is summarized below:

| Particulars | Software Development | Page Ref | Software Trading | Page Ref. |
|------------------------|----------------------|----------|------------------|-----------|
| No. of Comparables | 12 | 1265 | 5 | 1259 |
| Comparable Mean Margin | 13.27 | 1265 | 1.87 | 1259 |
| Appellant's Margin | 15.37% | NA | 4.79% | NA |

4. The reference was made to the TPO by the Assessing Officer in respect of international transactions and the TPO after taking into consideration. The details given by the assessee merged the segment of software trading with software development which consist of software development, competency centre and IT Support Services. The TPO applied his own filters and rejected/modified the quantitative and qualitative filters applied by the assessee and arrived at his own set of comparables. The minimum margin of

the comparables was considered by the TPO at 25.4%. Finally, the TPO proposed an adjustment of Rs. 27.28 crores to the income of the assessee. The Assessing Officer passed draft assessment order 25/2/2014. The assessee company filed objection before the DRP. The DRP excluded Infosys Ltd. from the final comparable set and upheld the order of the TPO on all other matters. The Assessing Officer passed assessment order vide order dated 13/11/2014 thereby making ALP Adjustment of Rs.23,83,65,237/- and added the same to the income of the assessee. The Assessing Officer also made various other additions which amounted to Rs. 54,37,91,460/-.

5. Being aggrieved by the assessment order, the assessee is before us.

6. The Ld. AR submitted that Ground No. 4.2 is the main issue contested by the assessee before the DRP as well as before the Assessing Officer /TPO i.e. the TPO/A.O. The Ld. AR submitted that the TPO contradicted the stand of the revenue taken in earlier years wherein the purchase of software segment was not merged with the software development segment. The Ld. AR submitted that if this issue is decided then there is no need to go into the details of comparability and other aspects of the Transfer Pricing which are contested in Ground Nos. 1, 2, 3, 4, 4.1, 4.3, 5, 6, 7, 8, 9, 10, 11, 12, and 13. The Ld. AR submitted that there is a different FAR in both Segment i.e. Software Trading and Software Development. These two segments are separate. The Ld. AR further submitted the TPO erred in rejecting the segmentation carried out by the assessee and in further combining the Trading Segment with the Service Segment because the functional, asset and risk profile under these two segments are entirely different which are as below:

| Points for consideration | Software Trading Segment | Software Development Segment |
|--------------------------|-------------------------------------|--|
| Transactions covered | Purchase of software for re-selling | Provision of software development services |

| | | |
|---------------|---|---|
| Pricing model | Payment Transaction License and Royalty paid as a percentage of sales | Income Transaction Cost plus mark-up received |
| Customers | Third party domestic customers | Associated Enterprise |
| Risk Assumed | Assessee bears market risk, price risk, credit risk, etc. | Assessee is low risk bearing captive service provider |

Thus, the Ld. AR submitted that the TPO changed the characterization which is not proper in respect of the Transfer pricing issues. The Ld. AR further submitted that the TPO has incorrectly stated that “the assessee has a full-fledged manufacturing facility”. In-fact, the assessee is only engaged in duplicating the PLM Software and reselling such softwares in the Indian market. For such trading/re-selling activities, it cannot be characterized as a manufacturer. The Ld. AR further submitted that the assessee had followed the same approach i.e. bench marking the Software Trading Segment and Software Development Segment separately and the same was accepted by the TPO in all earlier years as well as in preceding year. The Ld. AR submitted that adjustment in Trading Segment resulted adjustment in Third Party Transactions. Since under the purchase of Software Segment, the Revenue was derived from sale to unrelated parties, imputing a mark-up on cost and expecting that the assessee would have earned higher revenue from the dealings with unrelated parties, is totally contrary to the Transfer Pricing Provisions. The Ld. AR submitted that most of the software distribution comparables selected by the assessee company has been accepted by the Transfer Pricing Officer for the preceding years. The Ld. AR further submitted that there is a wrong application of filters by the TPO in respect of selection of comparables in Software Development Services Segment for rejecting the assessee’s comparables for the Software Distribution Segment. The Ld. AR

relied upon the decision of the Tribunal for Assessment Year 2008-09 in case of Siemens Product Lifecycle Management Software (India) Pvt. Ltd. Vs. ACIT (2018) 90 taxmann.com 165 (Delhi Tribunal). In case of Siemens Industry Software India Pvt. Ltd. vs. DCIT A.Y. 2009-10 being ITA No. 1307/Del/2014 order dated 14.09.2018 also the revenue as separately taken into account Software Trading Segment and Software Development Segment as can be seen from the Tribunal's order in Para 3,4,5. The Ld. AR further relied upon the order of the TPO for Assessment Year 2011-12 wherein these two segments were separately taken into account. The Ld. AR also relied upon the decisions of the Delhi Tribunal and Mumbai Tribunal in case of DCIT Vs. Allied Domecq Spirits and Wine India Pvt. Ltd. (193 TTJ 920 Del. Tri.) and Paradigm Geophysical (I) (P) Ltd. Vs. DCIT (2016) 72 taxmann.com 108.

7. The Ld. DR submitted that the TPO was right in aggregating these two segments and relied upon the order of the TPO.

8. We have heard both the parties and perused the material available on record. This is the first time that the TPO has taken a different view from the earlier Assessment Years as well as subsequent Assessment Years by aggregating Software Trading Segment with Software Development Segment, but while doing so, there was no finding as to why these two segments has been aggregated/merged/clubbed by the TPO. Therefore, it will be appropriate to remand back this issue to the file of TPO/A.O. to decide the same afresh by taking into account FAR analysis given by the assessee in TP Study as well as principle of consistency. Therefore, Ground No. 4.2 is partly allowed for statistical purpose. Since this issue is remanded back, the subsequent grounds which were raised by the assessee in respect of Transfer Pricing Adjustment will also be decided by the TPO/A.O. according to the decision of aggregation/segregation of these two segments. Therefore, Ground Nos. 1 to 13 are partly allowed for statistical purpose.

9. As regards Ground Nos. 14 & 15 relating to adjustment on account of advance billing, the Ld. AR submitted that this issue is already covered in favour of assessee vide order passed by the Co-ordinate Bench of the Tribunal in ITA Nos. 584 & 585/Del/2006 & 322/Del/2007 for Assessment Years 2001-02 to 2003-04 in UGS India Pvt. Ltd. Vs. ACIT and also in assessee's own case for Assessment Year 2008-09 and 2007-08 (90 Taxman.com 165).

10. The Ld. DR relied upon the order of the TPO/A.O but could not distinguish the factual aspect of the Tribunal's decisions.

11. We have heard both the parties and perused the material available on record. This issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench in assessee's own case for Assessment Years 2008-09 & 2007-08. Thus, Ground Nos. 14 & 15 are allowed.

12. As regards Ground No. 16 & 17 relating to adjustment on account of business promotion and conference, the Ld. AR submitted that from the details of expenses given by the assessee before the A.O., it can be clearly seen that these business promotion expenses were incurred wholly and exclusively for the purpose of business and were necessitated in view of commercial exigency and are earned year on year. Hence, the Ld. AR prayed that the same may be allowed as business expenses u/s 37 of the Act. Besides that the Ld. AR submitted that this issue is also covered in favour of the assessee in assessee's own case for Assessment Year 2009-10 (ITA No. 1307/Del/2014).

13. The Ld. DR could not controvert this aspect.

14. We have heard both the parties and perused the material available on record. Since, this issue is covered in favour of the assessee in assessee's own case for Assessment Year 2009-10. Ground No. 16 & 17 are allowed.

15. In result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 28th JANUARY, 2019.

**Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER**

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 28/01/2019
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date of dictation | 21.01.2019 |
| Date on which the typed draft is placed before the dictating Member | 21.01.2019 |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr. PS/PS | 28.01.2019 |
| Date on which the final order is uploaded on the website of ITAT | 28.01.2019 |
| Date on which the file goes to the Bench Clerk | 28.01.2019 |
| Date on which the file goes to the Head Clerk | |