

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: '1-2' NEW DELHI**

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

I.T.A. No. 296/DEL/2016 (A.Y 2011-12)

Turner International P. Ltd. 5 th Floor, Radission Commercial Plaza, NH-8, Mahipalpur New Delhi AAACT3821H (APPELLANT)	Vs	DCIT Central Circle-25(2) C.R. Building New Delhi (RESPONDENT)
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I.T.A. No. 908/DEL/2016 (A.Y 2011-12)

DCIT Central Circle-25(2) C.R. Building New Delhi (APPELLANT)	Vs	Turner International P. Ltd. 5 th Floor, Radission Commercial Plaza, NH-8, Mahipalpur New Delhi AAACT3821H (RESPONDENT)
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Appellant by	Sh. Ravi Sharma, Adv, Sh. Rishab Malhotra, Adv
Respondent by	Sh. H. K. Choudhary, CIT(A)-DR & Sanjy Pandey, Sr. DR

Date of Hearing	29.01.2019
Date of Pronouncement	04.02.2019

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the Assessee as well as the Revenue against the order dated 23/12/2015 passed by DCIT, Circle-25 (2), New Delhi passed u/s 143(3) read with Section 144C(4) of the Income Tax Act, 1961.

2. The grounds of appeal are as under:-

I.T.A. No. 296/DEL/2016 (Assessee's appeal)

On the facts and circumstances of the case and in law, the learned Assessing Officer ("AO") has erred in passing the assessment order under section 143(3) read with section 144C of the Income-tax Act, 1961 ("the Act") after considering the adjustments proposed by the learned Additional Commissioner of Income Tax, Transfer Pricing Officer-3(2), New Delhi ("TPO") in his order passed under section 92CA(3) of the Act and subsequently confirmed by the Hon'ble Dispute Resolution Panel ("DRP").

Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.

That on the facts and circumstances of the case and in law,

- 1. the learned AO / TPO / DRP has erred in making an addition of Rs. 270,893,220 to the total income of the appellant on account of a transfer pricing adjustment to the distribution segment of the Appellant.*
- 2. the AO / TPO / DRP has erred by not accepting the economic analysis undertaken by the appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ("the Rules").*
- 3. the learned AO / TPO / DRP have erred in conducting a fresh comparability analysis based on application of incorrect keywords and filters, in contradiction of the Hon'ble ITAT's direction in appellant's own case, without providing any cogent reasons for rejecting appellant's economic analysis.*
- 4. the learned TPO/ AO/ DRP failed to understand and appreciate the functions performed, assets employed and risks assumed by the Appellant and its AEs, thereby comparing companies which are functionally incomparable vis-a-vis the distribution segment of the Appellant*
- 5. the learned TPO/ AO /DRP erred in passing order on incorrect factual assumption which is incorrect as per the records and submission made by the Appellant.*
- 6. the learned TPO / AO / DRP have erred in:*

a) *Not accepting the use of multiple year data, as adopted by the appellant in its Transfer Pricing ('TP') documentation; and*

b) *Determining the arm's length margins / prices using data pertaining only to financial Year ('FY') 2010-11 which was not available to the Appellant at the time of complying with the Indian TP documentation requirements. the learned AO / TPO / DRP have erred, in law and on facts and circumstances of the case, by rejecting certain comparable companies using "Turnover less than INR 1 Crore" as a comparability criterion.*

7. *the learned AO/ TPO / DRP have erred in rejecting functionally comparable companies; and instead selecting functionally dissimilar companies to determine the ALP for the distribution segment of the appellant based on the fresh search undertaken by him.*

8. *the learned AO / TPO have passed an order under Section 92CA (3) of the Act, which is in contradiction to the directions of the Hon'ble DRP*

9. *the learned AO / TPO have passed an order under Section 92CA (3) of the Act which suffers from several computational errors in determination of ALP and in the computation of adjustment to the total income of the appellant and ignoring the rectification application submitted by the appellant.*

10. *the learned AO / TPO / DRP have erred in not restricting the adjustment made to the appellant's distribution segment, to the value of international transactions with AEs, and instead making an adjustment to the entire cost base of distribution segment, which includes uncontrolled transactions with independent third parties as well.*

11. *the learned AO erred in not allowing complete credit of taxes deducted at source.*

12. *the learned AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.*

13. *the learned AO has erred in levying interest under section 234B and 234D of the Act while completely disregarding the provisions of the Act and the judicial precedence.*

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 the appeal.

The appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.”

I.T.A. No. 908/DEL/2016 (Revenue’s appeal)

1. *“On the facts and in the circumstances of the case, the DRP-2 erred in directing AO to complete the assessment as per observations made by DRP in the order which resulting in reducing the addition to Rs.27,08,93,220/- in place of original recommended ALP of Rs.54,37,09,859/- for the International transactions undertaken the assessee company with its associate/parent enterprise.”*

2. *“On the facts and in the circumstances of the case, the DRP-II erred in directing TPO to include below mentioned companies from the final set of comparables :*

3. *“Whether in the facts and in the circumstances of the case, Hon’ble DRP erred in taking companies engaged in distribution of software products as comparables to assessee for benchmarking its transactions”.*

4. *“Whether in the facts and in the circumstances of the case, Hon’ble DRP erred in not following the order of Hon’ble ITAT in the assessee’s own case for A.Y. 2007-08 and A.Y. 2008-09”.*

3. During the hearing, the Ld. AR submitted that if the Department’s appeal is decided in respect of Ground No. 2 then the assessee’s appeal will remain academic only. Therefore, we are taking up the Revenue’s appeal first.

4. Turner International India Private Limited is a subsidiary of Turner Broadcasting System Asia Pacific, Inc. The Company is primarily engaged in the business of distribution of subscription rights of satellite channels of Cartoon Network, WB, and CNN, POGO and HBO (collectively referred as ‘TV Channels’) and advertisement inventory to be telecasted on TV Channels. A reference was made to the TPO. The TPO rejected the set of companies engaged in distribution of software selected by the Company in the Transfer Pricing (‘TP’) documentation alleging that the comparable companies identified by the Company were not functionally similar to the distribution activity undertaken

by the Company i.e. segment involved in distribution of channel subscription/ advertisement inventory. The Ld. TPO then proceeded to conduct a fresh search including channel/ content owner companies. Accordingly, the final set of comparables selected in the TPO order were as follows:-

S.	Name of the company	OP / OR(%)
1	India Vision Satellite Communication	22.91
2	Maa Television Network Ltd.	17.41
3	Malayalam Communications Ltd.	36.44
4	Raj Television Network Ltd.	14.30
5	TV Today Network Ltd.	505
6	UTV Entertainment Television	30.89
7	Zee Entertainment Enterprises	37-55
8	Zee Media Corporation Ltd.	9-36
	Average	21.74

Accordingly, the TPO made an adjustment of INR 54,37,09,859/-. The Assessing Officer passed draft assessment order dated 13.03.2015. Aggrieved by the draft assessment order, the assessee company filed its objections with the DRP. The DRP issued the following directions vide direction/order dated 29.10.2015:

- Directed to include the companies i.e. Sonata Information Technology Ltd. and Soft cell Technologies Ltd. in the final list of comparables.
- Directed to re-compute the margins of comparable companies by considering provision for bad- debts, foreign exchange as non-operating and bank-charges as operating.

- Directed to compute the working capital adjustments on the margins of comparables.

After the directions of the DRP, the TPO passed an order dated 04.12.2015 giving effect to the directions given by the DRP. Accordingly, the Assessing Officer passed the final assessment order on 23.12.2015 reducing the amount of TP adjustment from INR 54,37,09,859 to INR 27,08,93,220.

5. Aggrieved by the Assessment order, the assessee company as well as the revenue preferred appeals before us.

6. The Ld. AR submitted that assessee company also filed a rectification application with the TPO dated December 15, 2015 wherein the following mistakes apparent from record were highlighted:

- Incorrect unadjusted margin computation of companies identified in the final set of comparable; and
- Incorrect margin computation of the Company.

The TPO and the Assessing Officer passed rectification orders dated March 28, 2016 and May 04, 2016 respectively in which the margin of Turner International India Pvt. Ltd. was recomputed as 8.14%. Further, the following comparables and margins were considered.

S.No.	Company Name	Rectified adjusted OP/OR post directions of Ld. DRP(%)	Source
1	India Vision Satellite Communication Ltd.	17.65	Fresh Search of the Ld. TPO
2	Maa Television Network Ltd.	10.11	

3	Malyalam Communications Ltd.	25.54		
4	Raj Television Network Ltd.	-34.67		
5	TV Today Network Ltd.	2.09		
6	UTV Entertainment Television Ltd.	26.06		
7	Zee Entertainment Enterprises Ltd.	36.95		
8	Zee Media Corporation Ltd.	4.60		
9	Sonata Information Technology Ltd.	1.83		
10	Soft cell Technology Ltd.	3.75		
	Mean	9.29		Companies selected by the Company in its TP documentation

Since the variation between the Arm's Length Price ('ALP') determined after considering the corrected adjusted margins of the above mentioned companies and price at which the international transaction of distribution activity has actually been undertaken did not exceed 5% of the latter, the subject international transaction were considered to be at arm's length from Indian TP regulations perspective. However, the department not being satisfied with the relief given by the DRP has preferred an appeal before the Tribunal.

7. The Ld. AR submitted that exclusion of channel/ content owners companies held as functionally dissimilar to the distribution segment of TIPL by the Tribunal in AY 2006-07 in the second round litigation. The Ld. AR further submitted that the TPO has wrongly selected companies which were primarily channel and content owners, thus being functionally dissimilar to the assessee company. The Ld. AR relied upon the decision rendered by the tribunal in the assessee company's case for AY 2006-07 being I.T.A. NO.1204/DEL/2018) wherein the Tribunal rejected the DRPs and the TPO's action for mixing the functionality of distribution and production activities and held that the activities are independent in nature. The Ld. AR further submitted that for Assessment Year 2012-13 in assessee's own case, the Tribunal relied on the order for Assessment Year 2006-07 and directed the exclusion of channel owner companies from the final list of comparables to benchmark the distribution segment of the assessee. The Ld. AR submitted that during the year under consideration i.e. AY 2011-12, all channel owner companies that have been selected by the TPO/ DRP in the final list of comparables ought to be rejected. In view of the above, the Ld. AR submitted that all channel owner companies be excluded from the final list of comparable companies.

8. The Ld. AR further submitted that if the assessee company's contention for excluding all channel/content owner companies is accepted, following would be the average adjusted operating margin of the comparable companies:

Table 3: Revised adjusted operating margin after excluding all channel owner companies

S. NO.	Company Name	Adjusted OP/OR (%)
1	Sonata Information Technology Ltd.	1.83
2	Soft cell Technologies Ltd.	3.75

	Mean	2.79
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The weighted average OP/ OR of the comparable companies is 2.79% whereas the Company has earned operating margin of 8.14% which is more than the average operating margin earned by comparable companies. Therefore, the assessee company satisfies the arm's length standard. The Ld. AR submitted that exclusion of channel owner companies categorically rejected by the Tribunal in AY 2006-07 in second round of litigation.

9. The Ld. AR submitted that without prejudice to the above contention, the assessee company would like to highlight that in the assessee company's own case of AY 2006-07(second round), the Tribunal relied on the order of the Tribunal in AY 2005-06, 2006-07 (first round), 2007-08 and 2008-09, wherein it was held that channel/content owner companies cannot be taken as comparables. Categorically, the Tribunal directed the exclusion of the following companies-

- Malayalam Communications Ltd.,
- Raj Television Network Ltd.,
- TV Today Network Ltd.,
- Sun TV Network Ltd.,
- Zee Entertainment Enterprises Ltd.,
- Zee Media Corporation Ltd. and
- UTV Software Communications Ltd.

The Ld. AR submitted that during the year under consideration i.e. AY 2011-12, the companies - Malayalam Communications Ltd., Raj Television Network Ltd., TV Today Network Ltd., Zee Entertainment Enterprises Limited and Zee Media Corporation Ltd. have been selected by the TPO/ the DRP in the final list of comparables but ought to be rejected following the aforementioned order of the Tribunal. In view of the above, the Ld. AR submitted that the companies be excluded from the final list of comparable companies. The Ld. AR submitted

that if Malayalam Communications Ltd., Raj Television Network Ltd., TV Today Network Ltd., Zee Entertainment Enterprises Ltd. and Zee Media Corporation Ltd. is accepted, following would be the average adjusted operating margin of the comparable companies:

S. No.	Company Name	Adjusted OP/OR post directions of Ld. DRP (%)	Source
1	India Vision Satellite Communication Ltd.	17.65	Fresh search of the Ld. TPO
2	Maa Television Network Ltd.	10.11	Fresh search of the Ld. TPO
3	UTV Entertainment Television Ltd.	26.06	Fresh search of the Ld. TPO
4	Sonata Information Technology Ltd.	1.83	Directions issued by the Ld. DRP
5	Softcell Technologies Ltd.	3.75	Directions issued by the Ld. DRP
	Mean	11.88	

The Ld. AR further submitted that the weighted average OP/ OR of the comparable companies is 11.88% whereas the assessee company has earned operating margin of 8.14%. Since the variation between the ALP determined after considering the corrected adjusted margins of the above mentioned companies and price at which the international transaction of distribution activity has actually been undertaken did not exceed 5% of the latter, the same complies with the arm's length from an Indian TP regulations perspective. Inclusion of companies involved in the distribution of software held as functionally comparable by the Tribunal in AY 2006-07 (second round). The L. AR further submitted that during its TP assessment proceeding for AY 2011-12, the TPO rejected the set of companies engaged in distribution of software selected by the assessee company in the TP documentation alleging that the comparable companies identified by the Company were not functionally similar to the distribution and undertook a fresh comparability analysis wherein channel/content owner companies were identified. The Ld. AR submitted that the Tribunal in the assessee company's case for AY 2006-07 (second round of appeal) (I.T.A. NO.1204/DEL/2018) has ruled in favour of including softwares distribution companies to benchmark the distribution segment of the assessee company. The Ld. AR submitted that during the year under consideration i.e. AY 2011-12, the software distribution companies identified by the assessee company in its TP documentation ought to be selected for benchmarking the distribution segment of the Company. The Ld. AR further submitted that if the assessee company's contention for excluding all channel/content owner companies and including all software distribution companies identified by the assessee company is accepted, following would be the average adjusted operating margin of the comparable companies:

Table 5: Revised adjusted operating margin after excluding all channel owner companies and including all software distribution companies

S. No.	Company Name	Adjusted OP/OR (%)
1	Sonata Information Technology Ltd.	1.83
2	Soft cells Technology Ltd.	3.75
3	Avance Technologies Ltd.	0.55
4	Axon Infotech Ltd.	Contested as not comparable in TP Assessment
5	Crystal Software Solution Ltd.	Data not available
6	Empower Industries India Ltd.	-3.84
7	Svam Software Ltd.	-11.16
8	Unisys Software and Holdings Ltd.	5.57
	Mean	-0.55

The weighted average OP/ OR of the comparable companies is -0.55% whereas the Company has earned operating margin of 8.14% which is more than the average operating margin earned by comparable companies. Therefore, the assessee company satisfies the arm's length standard. As regards, inclusion of companies involved in the distribution of software categorically included by the Hon'ble ITAT in AY 2006-07 (second round), the Tribunal in the assessee company's case for AY 2006-07 (second round of appeal) (I.T.A. NO.1204/DEL/2018) has ruled in favour of assessee including software's distribution companies to benchmark the distribution segment of the assessee company. The Tribunal directed the department to include the following comparable companies in the final list of comparables:

- Sonata Information Technologies Ltd.
- Softcell Technologies Ltd.
- Empower Industries India Ltd.

- Trijal Industries Ltd.

Further, the Ld. AR submitted that in the assessee company's recent case for A.Y. 2009-10 and A.Y. 2010-11 also, the Tribunal relied on the findings of the Bench held in A.Y. 2006-07 and directed the inclusion of companies involved in the distribution of software in the final list of comparables to benchmark the distribution segment of the assessee company. Therefore, the Ld. AR submitted that the DRP has been correct in its approach of including Soft cell Technologies Ltd. and Sonata Information Technology Ltd. in the final list of comparables proposed by the TPO. The Ld. AR submitted that any modification to the approach of the DRP would be violation of the stand taken by the Tribunal in various years. Therefore, the direction of the DRP to include Sonata Information Technologies Ltd. and Soft cell Technologies Ltd. should be sustained. Further, in the present case, while the DRP had directed the TPO to include the comparable companies - Sonata Information Technologies Ltd. and Softcell Technologies Ltd. in the final list of comparables companies. The comparable company- Empower Industries India Ltd. is still not considered in the list. Thus, following the decision of the Tribunal and the DRP to take the working capital adjusted margins of four companies namely Sonata Information Technologies Ltd., Softcell Technologies Ltd., Empower Industries India Ltd. and Avance Technologies Limited and exclude channel/ content owner companies, the final set of comparables shall be:-

Sr. No.	Name of Comparable company	Adjusted OP/OR (%)
1	Sonata Information Technology Ltd.	1.83
2	Soft cell Technologies Ltd.	3.75
3	Empower Industries India Ltd.	-3.84
4	Avance Technologies	0.55

	Ltd.	
	Mean	0.57

The Ld. AR submitted that the weighted average adjusted OP/ OR of the above three comparables is 0.57% whereas the Company has earned OP/OR margin of 8.14% which is more than the average operating margin earned by comparable companies. Therefore, the assessee company satisfies the arm's length standard.

5. The Ld. DR submitted that the Transfer Pricing Officer has rightly excluded these two comparables as the TPO pointed out in Para 21, 22 & 23 of the his order that the assessee is not a distributor of Software Products and has far more complex functions and is engaged in distribution of channel contained like HBO, CNN, Cartoon Network, Pogo etc. But the Ld. DR could not controvert the decision of the Tribunal in assessee's own case for Assessment Year 2006-07.

6. We have heard both the parties and perused the material available on record. It is pertinent to note here that the facts of the present Assessment Year are identical to that of the Assessment Year 2006-07 and the business profile of the assessee has not been different in the present year as well. The Tribunal for AY 2006-07 held as under:

11. The Tribunal in assessee's own case for the Assessment Year 2007-08 and 2008-09 and also in Assessment Year 2006-07 have held that Satellite TV channels and cable network operators have / significantly different operating models and provide earning model and once the Tribunal has held that such channel/content owner companies should not be included for the purpose of comparability analysis, then there is no reason why the TPO is

again selecting such companies for the purpose of benchmarking the ALP of the assessee's distribution segment. Before us, the learned counsel has already clarified on the basis of material available on record that distribution activity and ancillary/production activity of the assessee are two distinct set of transactions for which, not only separate benchmarking has been done but also separate remuneration has been earned for each of the said activities. So far as production activity is concern, the same has been found at arm's length by the TPO and once these are two different segments then there is no justification to mix up the functions of such ancillary activities with that of distribution activity so as to justify selection of such channel/content owner companies, especially when transaction from such ancillary services constitutes only 4% of the value of the international transaction of the assessee. Apart from that, the assessee is providing these services as a captive service provider for which it is remunerated separately and ALP of such transaction is not in dispute. Accordingly, we reject the DRPs and TPO action for mixing the functionality of distribution and production activities which are in fact independent and also separately benchmarked. We are in tandem with the contention of the learned counsel that these two activities cannot be mixed up for distorting the functionality and justifying the selection of channel owner companies."

"13. In so far as the aforesaid contention of the learned counsel that Software Distribution Company be accepted, we agree in principle that such companies can be taken for comparability analysis, when there are no direct comparable dealing with distribution of satellite channels are available. Such an acceptability of software distribution companies in the case of distribution of TV channels has found favour by the co-ordinate bench in the case of NGC India Pvt. Ltd. (supra). Thus, we hold that software companies can also be included for the purpose of comparability analysis, because in assessee's own case for the subsequent years such companies have been accepted to be good comparables and Trijal Industries Ltd. too has been accepted as a valid

comparable by the TPO in the Assessment Year 2013-14.”

Therefore, the DRP has rightly included these comparables. Therefore, appeal of the Revenue is dismissed.

7. As regards assessee's appeal is concerned, the same becomes infructuous as the issue contested therein are merely of academic in nature. Therefore, the appeal of the assessee is also dismissed.

8. In result, appeal of the Revenue and the assessee are dismissed.

Order pronounced in the Open Court on 04th February, 2019.

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

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

Dated: 04/02/2019
R. Naheed *

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	29.01.2019
Date on which the typed draft is placed before the dictating Member	30.01.2019
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	05.02.2019
Date on which the final order is uploaded on the website of ITAT	05.02.2019
Date on which the file goes to the Bench Clerk	05.02.2019
Date on which the file goes to the Head Clerk	