

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'B', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

1. I.T(TP).A No.308/Bang/2016

(Assessment Year : 2011-12)

Deputy Commissioner of Income-tax,

Circle – 2(1)(1), Bengaluru

.. Appellant

v.

M/s. Cisco Development (India) P. Ltd,

SEZ Unit, Cessna Business Park,

Sarjapur Marathahalli, Outer Ring Road,

Bengaluru 560 101

PAN : AADCC1360P

.. Respondent

2. Cross Objection No.09/Bang/2017

(In I.T.(TP)A.No.308/Bang/2016)

(Assessment Year : 2011-12)

(By the Assessee)

Assessee by : Shri. Rajan Vora, CA

Revenue by : Smt. Neera Malhotra, CIT-DR

Heard on : 27.03.2019

Pronounced on : 05.04.2019

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

These are appeal and cross objection filed by the Revenue and the assessee against the order of the DCIT, passed u/s.143(3)

r.w,s.144C(13) of the IT Act, dt.30.12.2015, in pursuance to the directions of the DRP, for the assessment year 2011-12.

IT(TP)A.308/Bang/2016 – A. Y. 2011-12 – By the Revenue :

02. The Revenue in this appeal has raised the following grounds of appeal :

1. "In the facts and circumstances of the case, Whether the Hon'ble DRP is correct in holding that the foreign exchange transactions are to be considered as operating in nature, when the Rule 10 B(2)(d) stipulates that the net profit margin realized by the taxpayer in the international transaction shall alone be computed for comparability analysis under TNMM."
2. "In the facts and circumstances of the case, Whether the Hon'ble DRP is correct in directing the TPO to adopt mean margin of 18.06%, while the comparable mean margin of the companies retained by the DRP is 19.36%, stating that the difference of 1.30% would take care of working capital and risk adjustments, if any, without calculating the Working Capital Adjustment".

03. The Ld. DR had drawn our attention to the order passed by the DRP, more particularly to para 6.1.4 with respect to the working capital adjustment and ground 2.3 of the DRP order where the DRP directed the AO to consider the foreign exchange fluctuation in respect of the assessee company as well as the comparable company as operating in nature, wherein the DRP has observed as under :

From the above, it is clear that the TPO having examined the records and the Annual Reports of the comparables, is of the opinion that it is not practically possible to give working capital calculation in respect of all the comparables due to the inadequate information of segmental accounting and no uniform accounting heads followed by various comparables etc, lest it leads to factually incorrect results. Assessee had neither requested for a working capital adjustment nor submitted any calculation of the adjustment. However,

after giving effect to the directions in respect of comparables given above, in respect of the comparables retained by this order, the mean margin works out to 19.36% as under :

SI.No.	Name of the Company	OP/OC % -
01	<i>Crisil Risk & Infrastructure Solutions Ltd</i>	16.86%
02	<i>ICRA Management Consulting Services Ltd</i>	15.71%
03	<i>Kitco Ltd</i>	27.48%
04	<i>Wapcos Ltd</i>	17.40%
	<i>Mean Margin (77.45 / 4)</i>	19.36%

The mean margin computed above, is more by 1.30% of the mean margin of 18.06% computed by the TPO, we are of the view that retaining the mean margin of 18.06% take care of the adjustment if any, required to be made in regard to difference in working capital, risk etc., accordingly, we are of the view that there is no need of allowing the working capital adjustment and accordingly, we upheld the adjustment of Rs.4,72,20,039/- made by the TPO.

The Ld. DR relies upon the order passed by the Tribunal in the matter of *Mercedez Benz R & D India P. Ltd. v. ACIT [90 taxmann.com 300]* and also has drawn our attention to para 6.1, 6.2.1 to the following effect :

6. Ground Nos.2 & 3 - Treatment of Foreign Exchange Gain / Loss.

6.1 *In these grounds, the Revenue contends that the DRP has erroneously considered foreign exchange gain / loss as part of operating income when the TPO has excluded this item while computing the operating margins of the assessee. On the contrary, the assessee contends that the foreign exchange loss / gain are closely linked to its business operations and therefore should be considered as operational in nature as has been held by the DRP.*

6.2.1 We have heard the rival contentions, perused and carefully considered the material on record. In the case on hand, the DRP has accepted the assessee's contention that foreign exchange loss / gain is operational in nature, by following the decision of the co-ordinate bench of this Tribunal in the case of SAP Labs Ltd. v. Asstt. CIT[2012] 134 ITD 253/17 taxmann.com 16 (Bang.) and of another co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08. We find that another co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2010-11 in its order in IT(TP)A Nos.291 & 427/Bang/2015 dt.24.6.2016 has held that if foreign exchange gain / loss is operational in nature if it is linked to the exports / imports related to the particular year. To this extent, we find no infirmity in the order of the DRP. However, the facts related to the foreign exchange gain in this year, i.e. as to whether it is related to the business operations and whether they are in the capital or revenue field is not clear from the orders of the authorities below. The TPO has also not rendered any finding in this regard. In this factual matrix of the case, the finding of the DRP is being set aside and the matter is remanded to the file of the TPO for the limited extent of factual verification in this regard as observed above, before allowing it as operational in nature in keeping with the orders of the co-ordinate bench in the assessee's own case for Assessment Year 2010-11 (supra). Consequently, Revenue's grounds at S.Nos.2 & 3 are partly allowed for statistical purposes.

04. The Ld. AR in respect of ground.1 relied on page 94 of the paper book to submit that this year is the first year of business and there was no transaction for the previous year and hence forex gain/ loss arose to the assessee was for the assessment year under consideration.

06. With respect to ground.2, it was submitted that the TPO has worked out the working capital adjustment after taking the mean of six comparables as per the TP order para 7, wherein the working

capital adjustment was worked out at 18.06%. It was the case of the Ld. AR that the details of the working capital adjustment were given and based on said details working capital adjustment was worked out by the assessee in respect of the companies, namely Crisil Risk & Infrastructure Solutions Ltd, ICRA Management Consulting Services Ltd, KITCO Ltd, Wapcos Ltd, It was submitted that the contention of the Ld. DR that the details of working capital adjustment were not given, was factually incorrect. In the light of the above it was submitted that the matter may be remanded back to the DRP with a direction to work out the working capital adjustment on the basis of ground 6 in appeal before the DRP.

07. We have heard the rival contentions and perused the material on record. Firstly we will deal with forex fluctuation. In this regard, reliance of Ld. DR on Mercedes Benz R & D India P. Ltd (supra), wherein at para 6.2.1 had recorded the finding that if the forex gain / loss is operational in nature as long as it pertains to assessment year under consideration and is having nexus with export / import of the particular year than the same is required to be treated as operative in nature. In our view this proposition of law held by the coordinate bench, though correct, will not be applicable in the facts of the present case as the assessment year under consideration was the first year of operation and therefore there cannot be any question of carry forward of forex gain / loss of the previous year to the AY under consideration. Accordingly the finding recorded by the AO, on account of peculiarity of the present

case, is incorrect. However as noted by the Tribunal in the matter of Mercedes Benz (supra), only the forex gain / loss which are relevant to the assessment year under consideration and are having nexus between export / import in the assessment year are required to be taken into account. In view of the above, ground.1 of the Revenue is dismissed.

08. **Ground no.2 of revenue appeal and Ground no.6 of the cross objection** deals with working capital adjustment. If we look into the order of the DRP, it is clear that the DRP had calculated the working capital adjustment by taking the OP /OC mean at 19.6%. However it was directed to take at 18.06% on the assumption that it will take care of the working capital adjustment. We are at a loss to understand as to how, once the working capital adjustment details are given in the annexure-6 of the grounds of appeal of DRP how the DRP can pass order in adhoc/ lump sum manner. It is the duty of the lower authorities to arrive at actual calculation of working capital adjustment and then grant working capital adjustment , when detailed working is given by the assessee, and lump sum or exgratia grant of working capital adjustment is not expected from a specialised authority, viz., DRP. In view of the above, this ground of working capital is remanded back to the file of DRP with a direction to recompute the working capital adjustment based on the details furnished by the assessee in Annexure -6 to grounds of appeal. Needless to say that DRP while doing so shall give opportunity of being heard to the assessee and pass a detailed order.

Cross objection No.09/Bang/2017 – By the Assessee :

The grounds raised by the Revenue in the cross objection are as under :

Grounds objecting to department's appeal

1. The learned AO has erred in filing the appeal, beyond period of 60 days stipulated under section 253(3A) of the Act, without filing application for condonation of delay, and hence, the appeal ought to be dismissed.
2. The learned AO/ learned TPO have erred, by not accepting the directions given by the Dispute Resolution Panel ('DRP') and by filing an appeal against the directions of DRP which are based on jurisdictional Tribunal rulings and hence, the appeal ought to be dismissed.

Transfer pricing issues:

3. The learned AO/ TPO has failed to appreciate the fact that the foreign exchange fluctuation is incurred by the Respondent on current account transactions; and hence it is operating in nature.

Our appeal points:

4. The Hon'ble DRP/ learned TPO/ learned AO have erred by retaining/ considering Kitco Limited and Wapcos Limited as comparable companies based on unreasonable comparability criteria.
5. The Hon'ble DRP/ learned TPO/ learned AO have erred, by rejecting Tata Services Limited and Telecommunications Consultants India Limited based on unreasonable comparable criteria.
6. The Hon'ble DRP/ learned TPO/ learned AO have erred, by not calculating the adjustments to account for differences in working capital levels between the Respondent *vis-à-vis* the comparables at actuals.
7. The learned TPO/ AO have erred, in law and in fact, by not appreciating the economic analysis undertaken by the Respondent in accordance with the provisions of the Act read with the Rules, conducting a fresh economic analysis for

the determination of the ALP in connection with the impugned international transaction and holding that the Respondent's international transaction is not at arm's length.

8. The learned TPO/ AO have erred, in law and in fact, by determining the arm's length margin/price using only FY 2010-11 data, which was not available to the Respondent at the time of complying with the transfer pricing documentation requirements.
9. The learned TPO/ AO ought to compute the ALP giving benefit of the 5% range as may be applicable.
10. The learned TPO/ AO ought to make suitable adjustments to account for differences in the risk profile of the Respondent *vis-à-vis* the comparables.

09. The ground nos.1 and 2 are not pressed being general in nature.

10. Ground no.3 is in support of the order of the DRP which we have already decided in ground no.1 of the Revenue appeal in IT(TP)A.308/Bang/2016, therefore, no separate adjudication is required.

11. Ground no.4 pertains to exclusion of Kitco Ltd and Wapcos Ltd, as comparables based on unreasonable comparable criteria., while ground no.5 pertains to inclusion of Tata Services Ltd and Telecommunication Consultants India Ltd. In this regard, the Ld. AR had submitted that there was material available on record of the lower authorities however , at the time of the proceedings before the lower authorities, the assessee has not raised ground pertaining to exclusion / inclusion of these comparables. It was submitted that in the cross objection the assessee may be permitted to take all these objections.

12. In response the Ld. DR as submitted that it is the duty of the assessee to take the objection at the appropriate stage and the assessee should not be permitted to raise these objections before the ITAT.

13. We have heard the rival submissions and perused the material on record. Undoubtedly the material pertaining to all these four comparables are available with the lower authorities and no fresh material is required to be furnished by the assessee. In view of the

above, admit the ground nos.4 and 5 of cross objection and remand these grounds to the file of DRP for denovo examination taking into consideration the FAR analysis and taking into account various filters as applied by the TPO. Needless to say while deciding afresh the DRP shall grant opportunity of hearing to the assessee and shall also consider the material and submissions, if any, made by the assessee in this regard. In the result the ground nos.4 and 5 of cross objection are allowed for statistical purposes.

14. Ground no.6 of the cross objection had already been considered by the Tribunal while deciding the ground no.2 of the Revenue's appeal.

15. Ground no.10 of the cross objection deals with risk adjustment on account of the difference in risk profile of the assessee and the comparables. The Ld. AR had drawn our attention to para 2.6, at page 8 of the DRP. Our attention was drawn to Annexure 5B to the grounds of appeal raised before the DRP and it was submitted that the assessee had provided the working of the risk management and the order passed by the DRP. The assessee has not brought on record how the difference in functional profile and risk as annexed, the result is wholly incorrect. He has drawn our attention to Annexure 9 at page 38 of the paper book, where the details as a risk assumed by the assessee vis-a-vis comparables were given. The assessee had also relied on various decision mentioned in Annexure 9.

17. On the other hand the Ld. DR relied upon the decision of Mercedes Benz (supra) for the purpose of risk adjustment.

18. We have heard the rival contentions and perused the material on record. Undoubtedly the finding recorded by the DRP at para 2.6 at page 8 is factually in contradictions with the grounds and Annexure 9 filed before the DRP where elaborate details were given by the assessee for claiming the risk adjustment. Further the DRP for the reasons best known had not considered the same and held that the assessee had not brought in any details entitling it for risk adjustment. In view of the above and in view of the finding recorded by the Tribunal in Mercedes Benz (supra) in para 7.3.2, to the following effect :

7.3.2 The Bangalore Benches of the Tribunal, while allowing risk adjustment to captive service providers, as a matter of principle has held in many cases, including the one cited (supra), that risk adjustment cannot be granted unless the assessee has submitted computation of the same before the authorities below. In the case on hand, we find that though the assessee in Form 35A submitted before the DRP, at Annexure/Objection 13 thereof, mentioned risk adjustment at 4.92%, no scientific basis or working in respect of the assessee's claim vis-à-vis the comparable companies had been provided. Even on pages 890 & 891 of paper book (Annexure 9-B), no working has been given in respect of risk adjustment claimed at 6.26% vis-à-vis the comparable companies. Since the assessee has not given the computation of risk adjustment of the assessee vis-à-vis the comparable companies, we hold that the assessee shall not be entitled to any risk adjustment and accordingly reverse the DRP's decision granting the assessee risk adjustment. In coming to this view, we place reliance on the decision of the co-ordinate bench of this Tribunal in the case of Syniverse Teledata Systems (P.) Ltd. (supra) which covers the issue squarely in favour of the revenue in the light of the factual matrix of the

case. Consequently, Ground No.4 of Revenue's appeal for Assessment Year 2011-12 is allowed.

Since sufficient details are provided by the assessee before the DRP, and DRP had not examined it, therefore We remand the matter back to the file of the DRP, in accordance with the principal of law and also in accordance with the decision of the Tribunal in the matter of Mercedes Benz.

19. In the result, cross objection filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is partly allowed for statistical purpose.

Order pronounced in the open court on 5th day of April, 2019.

Sd/-

Sd/-

(A. K. GARODIA)
ACCOUNTANT MEMBER

(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated :05.04.2019

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By order

Assistant Registrar,
Income Tax Appellate Tribunal, Bangalore.