

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4710/Del/2012 & 2316/Del/2015
(Assessment Year: 2007-08 & 2009-10)

ACIT. Circle-I, Block I-B, Faridabad	Vs.	M/s. BCEOM (India)P. Ltd, (Now known as Egis India Consulting Engineers Pvt. Ltd), 12/6, Saffron Square, Delhi Mathura Road, Faridabad PAN: AACCB6390F
(Appellant)		(Respondent)

ITA No. 583/Del/2014 & 6152/Del/2015
(Assessment Year: 2008-09 and 2010-11)

DCIT, Circle-I, Faridabad	Vs.	M/s. BCEOM (India)P. Ltd, (Now known as Egis India Consulting Engineers Pvt. Ltd), 12/6, Saffron Square, Delhi Mathura Road, Faridabad PAN: AACCB6390F
(Appellant)		(Respondent)

Revenue by :	Shri Sandeep Kr. Mishra, Sr. DR
Assessee by:	Shri Nitin Narang, AR Shri Amit Arora, CA Ms. Tarimi Nijhara, AR
Date of Hearing	04/02/2019
Date of pronouncement	22/04/2019

O R D E R

Per Prashant Maharishi, AM,

1. This is the bunch of four appeals in case of an assessee for four different years involving similar ground of appeal in dispute and therefore they are heard together and disposed of by this common order.
2. For assessment year 2007 - 08 in ITA No. 4710/Del/2012 the learned Assistant Commissioner of Income Tax, Circle - 1, Faridabad (the learned

AO) has filed this appeal against the order of the Commissioner of Income Tax (Appeals), Faridabad [the learned CIT(A)] dated 09/07/2012 wherein following grounds of appeal have been raised :-

- "1. *On the facts and in the circumstances of the case, the Id CIT(A) has erred on facts and on law in deleting the addition of Rs. 4,46,29,132/- made by the AO on account of Arm's length price of international transaction u/s 92CA(3) of the Act in view of the findings of the TPO order dated 04.10.2010 and as per the provisions of 92CA(4) of the IT Act.*"
3. The brief facts of the case shows that assessee, a company engaged in the business of engineering consultancy services and is providing consultancy, project monitoring and supervising services, in the 2nd year of its business, filed its return of income on 31/10/2007 declaring nil income. The assessee has entered into an international transaction with its associated enterprise of contract for technical services from its associated enterprise. The international transaction was referred by the learned assessing officer to the learned transfer pricing officer for determination of its arm's-length price. The learned transfer pricing officer determined the ALP of the transaction vide order dated 04/10/2009 and proposed an adjustment of Rs. 44629132/-. The learned AO further made an addition of Rs. 1177601/- on account of late payment of the provident fund. The learned assessing officer passed an order u/s 143 (3) of the act read with section 1144C of the Income Tax Act dated 07/01/2011. The assessee challenged the same before the learned CIT(A). The learned CIT(A) vide order dated 09/07/2012 partly allowed the appeal of the assessee. Therefore, the AO aggrieved with that order has preferred this appeal.
4. The solitary ground of appeal is with respect to deleting the addition of Rs. 44629132/- made by the learned Assessing Officer on account of arm's-length price of international transaction as determined by the learned transfer pricing officer vide order dated 4/10/2010.
5. The learned departmental representative placed the written submission dated 9/5/2018 and reiterated the same. The main argument of the

learned departmental representative is that the learned CIT(A) has accepted internal TNMM benchmarking of the assessee without appreciating the reasons given by the learned transfer pricing officer in para No. 3.1 of his order for rejection of the internal TNMM. It was further stated that TPO has clearly held that the associated enterprise and non-associated enterprise segments are not comparable as the service income is only Rs. 17,900,000/- in non AE segment compared to service income of Rs. 192,000,000/- in the Associated Enterprise segment. It was further stated that transfer pricing officer has further held that it is not possible for the segment having revenue of only 8.5% of the total revenue to take down the other segment from the profit of 10% on entity level to loss. He submitted that segmental account has been drawn with an intention to establish its transactions with associated enterprise at arm's-length. The learned DR further relied upon the decision of the coordinate bench in case of FCIOEN connectors Ltd vs ACIT 77 taxmann.com 223 wherein it has been held that internal TNMM cannot be adopted in case of huge difference in turnover of associated enterprise and non-associated enterprise. It was further stated that authenticity of the above segmental account is highly doubtful as the assessee itself has provided different segmental accounts in audited accounts wherein the assessee has disclosed Margin of 1.36% and (-)16.10% for the AE and non-AE segment respectively. He further stated that in transfer pricing study report the assessee has disclosed and margin of 10.6% and (-) 50.1% of the AE and Non AE segment respectively. Assessee has failed to explain this huge difference in computation of margin of the above two segments. He further stated that the assessee has disclosed that profit of Rs. 844,000/- from the receipt of Rs. 17,900,000/- from the Non AE segment which is completely at variance with the above two segmental accounts where the assessee is incurring loss in non associated enterprise segment. It was further argued that the assessee has claimed business development cost of Rs. 16,400,000/- on total revenue of Rs.

17,900,000/- in the Non AE segment and has not furnished any details regarding those expenses. He submitted that assessee has also claimed Rs. 28,81,000/- on account of AMP expenditure from Non AE transactions in profit and loss account. He therefore strongly stated that the reliability of the above two segments is highly doubtful and cannot be accepted for internal benchmarking. Learned DR further stated that there is no reference about the kind of services provided to the nonassociated enterprise and their functional analysis is also not available and therefore they cannot be compared with the transactions of associated enterprise. It was further stated that the non-AE segment consist of 7 different parties and therefore unless their transactions are analysed and found to be comparable with the transactions of the associated enterprise, internal TNMM cannot be accepted. Even otherwise, he submitted that the learned CIT(A) accepted NTPC as a valid comparable by holding that this company is functionally comparable without providing any reason. He stated that NTPC is functionally completely different on account of the fact that it is providing advisory and consultancy services and is also involved in the implementation of rural electrification work on turnkey basis. Even otherwise, it is a government public sector undertaking, therefore, it is not a good comparable, profitability is not the main concern. It was further stated that the learned CIT(A) has rejected 7 out of 8 comparables selected by TPO without assigning any reason and therefore according to him the decision of the CIT – A is perverse and fit to be set aside. With respect to the certificate of chartered accountant he submitted that same is submitted only for assessment year 2007 – 08 and not for other years.

6. The learned authorised representative submitted that TPO has accepted the segmental account submitted by the assessee as per para No. 3.1 of his order. He further referred to page No. 32 of the order of the learned CIT(A) to show that the learned CIT appeal has considered all the arguments raised. He also referred to page number 115 of his paper book

which is as Transfer Pricing Study Report wherein it is submitted that the company does not incur any marketing or business development expenses for business procured from associated enterprise, however the company incurred substantial cost towards marketing and business development expenses for procuring business from independent 3rd parties. He therefore submitted that marketing cost is for the non-AE business only. He therefore submitted that there is no infirmity in the order of the learned CIT(A).

7. We have carefully considered the rival contention and perused the orders of the learned AO, TPO and the learned CIT(A). The brief functional profile of the assessee shows that it is engaged in rendering services of technical assistance, project management, undertaking of studies in the field of audit, consultancy, engineering, supplying of qualified experts, participation involves supervision, design, draft, inspection, estimate, survey, improvisation in the designing, supply, construction, installation, operation or maintenance of any structure, roads and highways et cetera. For bench making of international transaction of rendering of technical and consultancy services to its associated enterprise assessee adopted Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). It selected 3 comparables whose arithmetic mean of the Profit Level Indicator (PLI) of operating profit/total cost was 1.68%, whereas the assessee's profit level indicator was 1.36% and therefore it was stated that its international transactions are at arm's-length. The assessee computed its profit level indicator with respect to the transactions with associated enterprise and nonassociated enterprise as under:-

particulars	Associated enterprise	Non-associated enterprise
Operating income	192064997	17959145
Operating expenditure	189491737	21404968
Operating profit	2573260	(-) 3445823
Net contribution	1.36%	(-) 16.10%

margin		
--------	--	--

8. The learned transfer pricing officer challenged the above margin of 1.36 percentage earned by the assessee from associated enterprises and a negative margin of (-) 16.10% from non-associated enterprise. Therefore, the show cause notice was issued. In response to the show cause notice, assessee abandoned earlier 3 comparables chosen by it, and came out with 4 different altogether new comparables stating that their average profit level indicator of operating profit/operating expenditure is(-) 12.06%. Assessee came out with a new internal segmental profit and loss account between non-AE and AE as under:-

particulars	Nonassociated enterprise	Associated enterprise	Profit and loss account
Project income	17959145	192064997	210024142
Difference in exchange	02/05/2007	219309	239816
Amount written back	2528	27031	29559
Total operating income	17982179	192311338	210293517
Other income	19607	209691	229298
Total	18001786	192521029	210522815
Expenditure			
Salary	5646209	47108798	52755006
Professionals	1966600	24361012	26327612
Indirect expenses	22169953	65675620	87845572
Common cost now are located	3514086	37581570	41095656
Other expenses	2737065	-	2737065
Total operating expenses	36033912	174726999	210760912
Loss on sale of assets	13039	139445	152484

Provision for doubtful debts	163479	1748335	1911814
Total expenditure	36210430	176614779	212825210
Net profit/(loss)	(18208644)	15906249	2302395

9. On the basis of above segmentation of the profit and loss account, assessee prepared the internal comparable profitability comparability analysis of the transaction with associated enterprise and non-associated enterprise as under:-

particulars	Associated enterprise segment	Nonassociated enterprise segment
Operating income	192311338	17982179
Operating expenditure	174726999	36033912
Operating profit	17584338	(18021733)
Net profit margin	10.06%	(50.1)%

10. The learned TPO questioned the abandoning original search by the assessee in the transfer pricing study report and also the segmentation. Therefore, he rejected the segmentation created by the assessee for the reason that there is an inappropriate indirect expenses allocation, non-allocation of other expenses etc. Therefore, the learned Transfer Pricing Officer, computed the profit level indicator of assessee taking the total operating income of Rs. 210293517/- and the total operating expenses of Rs. 210760912/- and thereby deriving operating loss of Rs. 467395/- and stated that the profit level indicator of operating profit/operating expenses of the assessee is (0.22) percentage. Thereafter he selected the comparables afresh, allowed the assessee to object them and ultimately selected 8 comparables, whose profit level indicator of operating profit/operating expenditure was found to be 24.91% and then, against the total price paid of Rs. 192064997/- arm's-length price at Rs.

236694129/- and accordingly proposed an adjustment of Rs. 44629132/- . Consequently, the assessment order u/s 143 (3) of the act was passed on 7/1/2011 determining the total income of the assessee of Rs. 45806733/- against the returned income of Rs. Nil. The assessee preferred an appeal before the learned CIT(A). The learned Commissioner of Income Tax (Appeals) in para No. 6.1 of his order has accepted that internal uncontrolled transactions are the good comparables after relying upon the OECD guidelines. He therefore reached conclusion that these guidelines suggest preference for internal comparable of assessee. He relied on the decision of the coordinate bench in case of Birla soft India Ltd vs DCIT, wherein it has been held that the assessee was justified in undertaking internal comparison on standalone basis by placing on record working of operating profit margin from international transaction with its associated enterprise and transactions with uncontrolled prices undertaken in similar functional and economic scenario. Therefore, he held that such internal comparison is valid in all the methods. He further held that learned Transfer Pricing Officer has not given any reason that economic scenario of controlled and uncontrolled transactions were different. In view of this, he held that the attempt should always be made to determine the arm's-length price of controlled transaction by comparing the same with internal uncontrolled transactions undertaken in similar economic situations. With respect to the segment -wise result he stated that in para number 3.1 of the order of the learned Transfer Pricing Officer, he has given certain reasons for rejection of the segmental income and the marketing expenses, however he noted that TPO has given a finding that segmental accounts have been drawn in such a manner as to hide the entity level loss, whereas, the contention of the assessee was that the expenses were distributed mainly on the basis of actuals is and on the basis of turnover. The assessee also furnished statement of segmental profitability after considering the direct and indirect expenses attributable to every project and allocation was based

on actual expenses. After recording the finding that the business activity of the company was technical consultancy in a specialised field and the major customers are mostly government organisations and all the businesses were allotted on the basis of open tenders. For wide difference between the revenue earned with PE and with the non-AE companies, and the marketing expenditure he held that there may be no correlation between the revenue earned on the marketing expenditure in the initial few years of the development of the business cycle. He further approved the argument of the assessee that in order to procure business from the associated enterprise, the appellant did not incur any advertisement expenses however for the purpose of acquiring business with Non-AE assessee need to incur these expenditure. Therefore, they are properly allocated to the non-AE segment. He further held that as long as the services are similar, segmental results will have to be accepted. He further held that the learned TPO while rejecting the revised segmental figures, has accepted the original segmental figures and also used the margin over the cost as given by the assessee. Therefore he held that on both the counts, the segmental results of the associated segment are better than Non-AE segment, and internal benchmarking analysis under the segmental results prepared using the valid allocation key is justified. On careful analysis of the decision of the CIT(A) we find that he has given a valid reasons for accepting the segmental results. Further with respect to all the arguments raised by the learned departmental representative, there is an answer in the order of the learned CIT(A) which cannot be dislodged without having any factual infirmity in the same. Further, on reading the transfer pricing study report prepared by the assessee, it is mentioned that assessee incurred marketing expenses only for procuring business from Non AE customers without giving any finding that such is not the fact the factual statement cannot be ignored. Further, Id TPO also did not state what is the difference between the functions performed, assets deployed and risk

assumed by the assessee in its transactions with AE and Non-AE customers. The TP Study report of the assessee states that there is no such functional dissimilarity. Same is also the finding of Ld CIT(A) which is also not controverted before us. Regarding allocation keys adopted by assessee, Ld TPO has not stated that how same are incorrect. Therefore, there is no infirmity in the order of the learned CIT(A) we confirm the same. In view of this, we dismiss ground number 1 of the appeal of the AO.

11. Accordingly ITA No. 4710/Del/2012 for assessment year 2007-08 preferred by the learned assessing officer is dismissed.
12. Now we come to the appeal preferred by the learned assessing officer for assessment year 2008-09 in ITA No. 583/Del/2014 wherein following grounds of appeal have been raised:-

"(1) Ld. CIT(A) has erred in allowing the internal TNMM applied by the assessee which wasn't forming part of the Audit Financials and TP Report. Moreover, it also ignored that TP Report of the assessee has a set of 07 comparable companies with mean margin of 16.45% whereas assessee's margin were merely 3.66% (OP/OR).

Further, to add here that Assessee has come forward with a new search before the TPO with a set of 05 comparable with mean margin of 3.52%. Before the TPO assessee hasn't demonstrated how the TP Report prepared as per requirement of act and rules of Income Tax can be sidelined with new set of comparables so produced. Ld. CIT(A) is absolutely silent on the issue.

(2) Ld. CIT(A) also erred on allowing the plea of assessee, merely on the submission of the assessee that comparable companies selected by the TPO in its order without remanding back the matter to the TPO. The Ld. CIT(A) has accepted assessee's plea of rejecting a comparable having RPT of 15%. In this regard Judicial ITAT decision in the case of M/s Global Logic India P. Ltd. (2011 TTI-35-ITAT-Del-TP), M/s ADPP Limited (2001-TO-44-ITAT-Hry-TP) and ST Microelectronics (2011-TII-63-rTAT-Del-TP), where it is upheld that threshold limit of RPT should be 25%.

And in case of two other comparables, reasons given by the assessee that current year financials were not available which is factually incorrect. The annual reports of all the comparable companies were very much available on the public domain.

Thus, Ld. CIT(A) grossly erred in deletion of TP Adjustment made by the TPO which was scientific and accurate in all respect.

(3) *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred on facts and in law in deleting the addition of Rs.7,52,66,923/- made by the Assessing Officer on account of Arm's Length Price of International Transaction u/s 92CA(3) of the Act in view of findings of the TPO order dated 28.10.2011 and as per the provisions of section 92CA(4) of the I.T. Act."*

13. The assessee filed its return of income declaring income of Rs. 222615/- on 26/9/2008. The assessment u/s 143(3) read with section 144C of the act was completed at RS. 75489540/- on 26/12/2011 wherein the addition of Rs. 75266923/- was made. Against the order of the learned Assessing Officer, assessee preferred an appeal before the learned CIT(A), Faridabad who allowed the appeal and therefore revenue is in appeal before us. The only dispute is an addition of Rs. 75266923/- on account of arm's-length price of international transaction. The assessee entered into an international transaction with its associated enterprise of rendering of technical and consultancy services to the associated enterprise. The assessee selected the TNMM as the most appropriate method for benchmarking the international transaction after selecting 7 comparables whose arithmetic mean of the profit level indicator of operating profit/total cost was 16.45% and the assessee's margin was 13.92%. Accordingly, assessee submitted that it is international transactions are at arm's-length price. While deriving the margin, the assessee segregated the operating profit between the transaction of the associated enterprise and non-associated enterprise. The assessee showed PLI of 4.46% on transaction with associated enterprise and 1.15% with non-associated enterprise. Similarly in assessment year 2007-08, the assessee during the course of assessment proceedings before the learned transfer pricing officer abandoned its transfer pricing study report and came with the fresh set of comparables. The fresh set of comparables thrown by the assessee were 5 in number where the average PLI of operating profit/ total cost was 3.52%. The learned transfer pricing officer rejected the TP study of the assessee and passed an order u/s 92CA (3) of the act on 28/10/2011 proposing an adjustment

of Rs. 75266923/-. Assessee used Transactional Net Margin Method to justify the arm's-length price and filed segmental income declaring operating profit/operating cost at 4.46% in the case of a transaction and loss of 1.15% in case of non-AE transaction. The transfer pricing officer rejected the segmental results given by the assessee and also all the comparables and selected his own 5 comparables and determined the average PLI of 36.09% adopting operating profit/operating expenses as the profit level indicator. Accordingly, adjustment was proposed.

14. Both the parties agreed before us that the facts of the case are identical to the facts of the case for assessment year 2007-08, wherein on identical facts the learned assessing officer has preferred this appeal.
15. We have also carefully considered the orders of the lower authorities and find that the facts are identical to the facts of the assessment year 2007-08. We have already decided the appeal of the AO as per this order for assessment year 2007 - 08, wherein we have upheld the order of the learned CIT(A). For similar reasons, we also uphold order of the learned CIT - A for assessment year 2008 - 09 and dismiss the appeal of the learned assessing officer.
16. In the result ITA NO. 583/Del/2014 for assessment year 2008 - 09 filed by the learned assessing officer is dismissed.
17. Now we come to the appeal of the learned assessing officer for assessment year 2009 - 10 in ITA No. 2316/Del/2015. The learned assessing officer has raised the following grounds of appeal:-
 - "1. *The Id CIT(A) erred in accepting the assessee's contention that internal CUP can be used when margins are being compared. The use of CUP the comparison of actual and not margins.*
 2. *The Id CIT(A) erred in holding that since no adjustment was made in AE's case, no adjustment can be made in the assessee case. This is ignorance of section 92(3) of the IT Act, 1961.*
 3. *The Id CIT(A) erred in applying the decision of Intera Technologies, Hughs Sytique and Iumms Technology to reject the TPO's stand of rejecting Inter TNMM. These decisions are related to the threshold of related party transaction and not to the use of Internal TNMM.*

4. *The Id CIT(A) erred in rejecting comparables used by the TPO based on the earlier years order. The FAR analysis has to be done separately for each year and only then can be decision on comparability to arrived at."*
18. For this year the assessee filed its return of income on 30/9/2009 declaring income of Rs. 9901133/-. The assessment u/s 143 (3) of the act was passed wherein the total addition of Rs. 36332947/- was made. The total income was determined at Rs. 46234080/-. The addition on account of the arm's-length price of the international transaction was Rs. 30773768/-. The only dispute in this appeal is the above adjustment made by the learned transfer pricing officer which was deleted by the learned CIT - A and therefore the learned AO is in appeal before us.
19. Both the parties confirmed that the facts of the present case are identical to the facts of the case for assessment year 2007 - 08. The submitted that their arguments also remains the same.
20. We have carefully considered the rival contentions and perused the orders of lower authorities. It is found that the assessee has entered into an international transaction of provision of technical services to its associated enterprise and the assessee benchmarked with the cost plus methods and substantiated it with transactional net margin method. The learned transfer pricing officer found that the assessee has shown the margin of operating profit/operating cost of 10.36% in its transaction with the associated enterprise and profit of 2.10% on its transactions with non-associated enterprises. The learned transfer pricing officer also rejected the internal transactional net margin method employed by the assessee in his TP study report. On careful perusal of the orders of the lower authorities it is apparent that facts are identical to the case involved in the appeal for assessment year 2007 - 08 filed by the learned assessing officer. By this order we have already dismissed appeal of the learned assessing officer upholding the order of the learned CIT(A) and therefore, for similar reasons, we also dismiss the appeal of the learned assessing officer for this year also. Accordingly ITA No. 2316/Del/2015

filed by the Assessing Officer for assessment year 2009-10 is also dismissed.

21. Now we come to the appeal of the learned assessing officer wherein he has raised the following grounds of appeal in ITA No. 6152/Del/2015 for the Assessment Year 2010-11:-

- “1. *Whether on the facts and in the circumstances of the case, the Id CIT(A) is correct in accepting the assessee’s contention that CUP can be used when margins are being compared. The use of CIP require the comparison of actual price and not margins.*
2. *Whether op the facts and in the circumstances of the case, the Id CIT(A) is correct in applying the decision of Intera Technologies, Hughes Systique and Lummns Technology to reject the TPO’s stand of rejecting internal TNMM. These decisions are related to the threshold of related party transaction and not the use of internal TNMM?*
3. *Whether on the facts and circumstances of the case, the Id CIT(A) is correct on the facts and in law in non adjudating the grounds raised by the assessee on the issue of comparable.”*

22. Facts for this year show that the assessee has filed its return of income on 7/10/2010 declaring total income of Rs. 56485470/- which was revised on 10/1/2012 at RS. 77189930/-. The assessment u/s 143 (3) of the act was passed on 18/3/2014 wherein the total income of the assessee was determined at Rs. 134994381/- where the addition of Rs. 57804451/- was made. The only addition in dispute was the determination of the arm’s-length price of the international transaction of Rs. 55072979/-. The learned CIT(A), on appeal by the assessee, deleted the above addition following his own decision for assessment year 2009 – 10. Therefore, the assessing officer is in appeal before us.

23. Both the parties confirmed that the facts in the present appeal are identical to the facts in the case of the assessee for earlier years and their arguments also remained the same.

24. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that the identical issue has been decided by us in case of the assessee for assessment year 2007 – 08 to 2009 – 10 wherein we dismissed the appeal of the learned assessing officer

following our detailed reasons given in appeal of the learned AO for assessment year 2007 – 08. Therefore, for the similar reasons given by us in the earlier years, we also dismiss the appeal of the learned assessing officer for this year. Accordingly all the 4 grounds raised by the learned assessing officer with respect to the adjustment of the arm's-length price of the international transactions are dismissed.

25. In the result appeal filed by the learned assessing officer for assessment year 2010 – 11 in ITA No. 6152/Del/2015 is dismissed.
26. Accordingly all the 4 appeals filed by the learned assessing officer in case of this assessee are dismissed.

Order pronounced in the open court on 22/04/2019.

-Sd/-
(H.S.SIDHU)
Judicial Member

-Sd/-
(PRASHANT MAHARISHI)
Accountant member

Dated: 22/04/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi