

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-1": NEW DELHI  
BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 4191/Del/2018  
(Assessment Year: 2014-15)

Agilent Technologies (International) Pvt. Ltd, Plot No. CP-11, Sector-8, IMT Manesar, Gurgaon, PAN: AADCA4115C	Vs.	ACIT, Circle-I(I), Gurgaon
(Appellant)		(Respondent)

Assessee by :	Shri Kamal Sahini, Adv Shri Anshul Sharma, CA
Revenue by:	Shri Sandeep Kr. Mishra, Sr. DR
Date of Hearing	12/02/2019
Date of pronouncement	06/05/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by Agilent (International) Private Limited (Assessee, Appellant) against the order of The Asst Commissioner of Income Tax, Circle –I (1), Gurgaon [ the ld AO ] dated 26/4/2018 passed u/s 143 (3) read with section 144C of The Income Tax Act (The Act) in pursuance of the directions of Dispute Resolution Panel – 1, New Delhi (The Learned DRP ) u/s 144C (5) of the act dated 16/3/2018 on objections filed by the assessee in draft assessment order dated 26/12/2017 wherein vide order under section 92CA (3) of the Act dated 23/10/2017 The Deputy Commissioner Of Income Tax, Transfer Pricing – 1 (3) (1), New Delhi (the learned TPO) proposed an adjustment on account of determination of arm's-length price ( ALP) of the international transactions (IT) of provision of software development services, provision of ITeS and interest on receivable of INR 103068942/- was incorporated. The returned income of the assessee of INR 403452480/- was assessed at INR 506521422/-
2. The assessee has raised the following grounds of appeal:-

- “1. That the Ld. AO erred in proposing to assess the income of the Assessee at INR 50,65,21,420 as against the returned income declared by the Assessee at INR 40,34,52,480 by making an addition of INR 10,30.68,942 by holding that the Assessee’s international transaction does not satisfy the arm’s length principle envisaged under the Act.*
  
- 2. That the Ld. AO/ Learned Deputy Commissioner of Income Tax, Transfer Pricing Officer 1 (3)( 1) (“Ld. TPO”) erred on facts and in law in enhancing the income of the Assessee by INR 1,70,08,093/- pertaining to provision of Contract Software Development (“IT”) services and INR 8,60,59,465 pertaining to provision of Information Technologies Enabled Services (“ITES”) to its Associated Enterprises (“AEs”) that do not satisfy the arm’s length principle envisaged under the Act and in doing so, have grossly erred in:*
  - 2.1. erroneously rejecting the ALP as determined by the Assessee in the Transfer Pricing (“TP”) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (“Rules”);*
  
  - 2.2. disregarding multiple year/ prior years’ data as used by the Assessee in the TP documentation and holding that current year [i.e. Financial Year (“FY”) 2013-14] data for comparable companies should be used despite the fact that the same was not necessarily available to the Assessee at the time of preparing its TP documentation;*
  
  - 2.3. conducting a fresh comparability analysis based on the application of erroneous additional/ revised filters in determining the ALP for the Assessee and rejecting the filters applied by the Assessee in its TP documentation;*
  
  - 2.4. committing factual/ computational errors while calculating the operating margins of companies selected as comparable in the DRP directions;*

- 2.5. *excluding certain comparable companies on arbitrary/ frivolous grounds;*
  - 2.6. *erroneously including certain functionally dissimilar companies that are full-fledged risk taking entrepreneurs and high profit making companies;*
  - 2.7. *disregarding comparability adjustments (i.e. risk adjustment) in determining the arm's length profit margin; and*
  - 2.8. *disregarding judicial pronouncements in India while undertaking the TP adjustment.*
3. *The Ld. AO/ Ld. TPO erred in enhancing the income of the Assessee by INR 1,384/- by imputing notional interest on outstanding receivables from the AEs on an ad hoc basis. In doing so, the Ld. AO/ Ld. TPO has grossly erred in:*
    - 3.1. *selecting an ad hoc credit period and interest rate while computing the addition;*
    - 3.2. *re-characterization of overdue receivable amount as a deemed loan and treating it as a separate international transaction;*
    - 3.3. *arm's length price determination for outstanding receivables is subsumed within the arm's length price determination of the principal international transaction itself; and*
    - 3.4. *completely disregarding the detailed submissions explaining that such adjustments are not mandated under the facts and circumstances of the case.*
  4. *The Ld. AO erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act. The above grounds are without prejudice to each other.”*
3. Brief facts shows that the assessee filed its return of income on 26/11/2014 declaring an income of INR 403452480/-. The learned assessing officer

noted that the assessee has entered into 7 different international transactions as under.

Serial number	nature of transactions	amount
1	Provision of ITeS	2084634357
2	Provision of software development services	424154453
3	Purchase of fixed assets	4470279
4	Cost of reimbursement paid	24907654
5	Cost of reimbursement paid on account of repairs and maintenance	722944
6	Cost of reimbursement received receivable	58127705
7	Interest on loan	774141

4. Therefore, the learned assessing officer referred the matter to the learned transfer pricing officer for determination of arm's-length price of these transactions.
5. The provisions of software development services of INR 4 24154453/- was benchmarked by the assessee by adopting the transactional Net margin method [ TNMM] as the most appropriate method [ MAM] by selecting 8 comparable having mean of the profit level indicator [PLI] of operating profit/operating cost [OP/OC] was 13.35% and the PLI of the assessee company of the segment was arrived at 14.53 percent and therefore the assessee stated that the about transaction is at arm's-length.
6. With respect to the ITeS services the assessee benchmarked the international transaction by adopting Transactional Net Margin Method and selected 11 comparables whose arithmetic mean of profit level indicator of operating profit to total cost [OP/OC] was 9.42% whereas the appeal of the assessee was arrived at 13.59% and therefore it was stated that the provision of ITeS services is at arm's-length.
7. On examination of the benchmarking methodology adopted by the assessee of software development services, The learned transfer pricing officer stated

that transfer pricing study report of the assessee and stated that the search process of the assessee was flawed because of the inappropriate filters and therefore he conducted fresh search. He also adopted several filters, selected various comparable, computed their margin and after affording assessee and opportunity of hearing and objecting to the various aspects of the computation of the LP, finally selected 8 comparable companies whose profit level indicator of operating profit to operating cost was 21.30% and computed the ALP on the operational cost of 371818412/- by applying the above margin at INR 4 51015734 applying PLI of 21.30 percentage against prize received of 424154453/- and computed an adjustment of INR 2 6861281/-.

8. On examination of methodology of the provision of services under the ITeS segment, the learned transfer pricing officer noted that search process carried out by the assessee was flawed because of certain inappropriate filters and therefore he conducted a fresh search, selected new comparables, computed their margin, granted an opportunity of hearing and objecting to the various issues in computation of ALP and then finally selected 6 comparables whose profit level indicator of operating profit to operating cost was found to be 17.62 percentage. On the total operating cost of 1897250934/- .he computed by applying the above PLI the arm's-length price of rupees 2231546549 whereas the actual transaction value was 2129929626/- and computed the shortfall of INR 1 01616923/-.
9. There was other adjustment made by the learned transfer pricing officer on account of the interest adjustment on outstanding balances of the advance receivable from associated enterprise which has been confirmed by the DRP for a very small amount. Therefore that is in dispute in this appeal as per ground no 3.
10. An objection before the learned dispute resolution panel was filed by the assessee and the learned dispute resolution panel granted certain relief to the assessee and thereafter based on above the adjustment in provision of software development services adjustment was made of INR 17008093/-, in provision of ITeS services of INR 8 6059465/-. Consequently the assessment order u/s 143 (3) read with section 144C of the Act was passed incorporating the above two adjustment. Interest on overdue on receivable

of rupees 1384/- was made. Consequently 3 adjustment on account of arm's-length price of the international transaction was made which are contested before us.

11. Ground number 1 of the appeal is general in nature and in fact supports ground number 2 and therefore they are taken together for the disposal.
12. The ground number 2 relates to the transfer pricing adjustment made by the learned TPO on the basis of the direction of the Ld DRP in determination of arm's-length price by the TPO wherein an adjustment of INR 17008093 pertaining to the contract software development activities of the assessee and INR 86059465/- pertaining to the provision of information technologies enable services [ ITes] have been made.
13. Adverting to ground number 2 the learned authorised representative said stated that assessee is challenging only the inclusion of Infosys BPO Ltd and micro-genetic systems Ltd, comparable is in ITeS segment. In software development segment the assessee challenges inclusion of Infosys technologies Ltd, persistent systems Ltd.
14. We first come to the ITeS segment of the assessee. The undisputed functional profile reported by the assessee in the transfer pricing study report of the same is as under:-

“It is responsible for rendering ITeS according to predetermined terms and condition of Agilent technologies incorporation including maintenance of appropriate documentation relating to the same. The services include knowledge management for engineering design, design chain solutions, part information support, CAD design support, internal financial transaction processing including sales accounting processing and vendors payable processing and professional services for customizing and integrating solutions wireless customers, buying wireless network solutions business among other services. It is further responsible for ensuring that the requisite quality performance standards prescribed by the holding company are met with rendering services. The re work may have to be done by assessee in case of a failure. However such re work cost is also adds to a markup and recovered from the holding company. It

further undertakes recruitment, hiring and training process and is responsible for day-to-day supervision and control of its employees. In nutshell, these services include finance backup office support in the nature of internal financial transaction processing, sales accounting processing and vendor payable accounting. It also includes IT support and network management in the nature of providing knowledge management for engineering design, network management for wireless network solutions et cetera it has a team comprising of 1061 employees.”

15. Coming to the First comparable challenged by the assessee is Infosys BPO Ltd, the learned authorised representative submitted that learned TPO included the Infosys BPO Ltd as a comparable company as it satisfied all the filters, found functionally comparable. Before the learned transfer pricing officer, it was contested that the above comparable is a giant company with huge turnover and high brand building expenditure and therefore it is not a comparable company. Before us it was also contended that Infosys BPO Ltd is backed by the Infosys group which is one of the largest group in the IT segment. He further submitted that the turnover of the assessee is only INR 2,129,900,000 whereas the turnover of the Infosys BPO Ltd is 2323,00,00,000 and further there is no brand expenditure incurred by the assessee whereas the assessee that the Infosys BPO Ltd comparable company has incurred the brand expenditure of INR 50,000,000 and has a goodwill of 19,00,00,000 which is absent in the case of the assessee company. He therefore submitted that there is usually difference between the scale of the business of these two companies which is 10 times bigger on the basis of the turnover than the assessee company. He further referred to the several decisions of the coordinate benches as well as the honourable jurisdictional High Court in case of H & S software development and knowledge management centre private limited in ITA number 912 – 2017 wherein it has been held that Infosys BPO Ltd is the corporate entity having a significant brand presence for profits and large corporate size which could not be compared to the assessee's transactions. He further referred to the decision of the coordinate bench which also has

held that Infosys BPO Ltd is deriving leveraged from the client of Infosys technologies Ltd for cross selling the BPO services of the company. And further because of the size of comparable company compared with the size of that assessee .i.e. more than 20 times should be excluded. In the end the learned authorised representative also stated that assessee's transaction would be at arm's-length on the exclusion of the aforementioned comparable. Therefore his main contention was that that Infosys BPO Ltd deserves to be excluded on the issue of size and scale and the brand of Infosys which makes it functionally dissimilar to the assessee.

16. The learned departmental representative vehemently supported the order of the learned TPO/DRP. He referred to page number 31 of the order of the learned transfer pricing officer and stated that annual report of Infosys BPO does not mention anything regarding the brand driving its profitability. He further stated that brand can only drive the revenue but may not affect the profitability of a company. Even otherwise he submitted that the brand building and marketing expenses are only INR 70,000,000 which is only 0.28% of the total revenue of the comparable company and therefore same cannot be excluded. In view of this he submitted that Infosys BPO has rightly been included by the learned transfer pricing officer and confirmed by the learned dispute resolution panel.
17. We have carefully considered the rival contention and perused the orders of the lower authorities wherein the reasons given for inclusion of the above comparable company for the purpose of benchmarking of the arm's-length price of the international transaction of the ITeS segment of the assessee. The assessee has also placed before us the annual report of Infosys BPO Ltd for 2013 – 14. On looking at the annual report itself it is clear that the company has an imprint of Infosys brand all over it. In the companies overview at page number 4 of the annual accounts as mentioned that this company is the business process outsourcing subsidiary of Infosys and is engaged as outsourcing service provider. In the management discussion and analysis placed at page number 14 of the annual report, it is stated that Infosys BPO provides business process management services to organizations that outsource their business processes and Infosys BPO is majority owned and controlled subsidiary of Infosys Ltd. Rich industry

experience held the company to understand the evolving needs of the clients better and provided them with the ability to offer appropriate solution across different industry verticals and horizontals , quickly. Further in paragraph number 1 it is stated that the company is committed to providing best- in - class services to both horizontal and vertical focus areas. The horizontal solutions comprises of sourcing and procurement, customer services, finance and accounting, legal process outsourcing, sales and fulfillment, analytics, business platform, business transformation services, human resources outsourcing, technology solution optimization. While vertical solution included financial services and insurance, manufacturing, energy utilities, communication and services, retail, consumer packaged goods, logistics and life sciences. On looking at the horizontal services, which comparable company provides it is apparent that on this ground itself the same is not comparable with the assessee company. On looking at page number 64 of the annual accounts, it is apparent that comparable company has contributed INR 50,000,000 towards brand building and advertisement expenditure. Admittedly the company does not have any goodwill which can impact the profitability of the price of the business of its services because the goodwill is recorded on amalgamation in the nature of purchase only. This is mentioned at page number 51 in para number 1.5 of the annual report and corroborated by page number 58 of the fixed assets schedule in paragraph number 2.6 of the report. Based on the above analysis, it is apparent that Infosys BPO Ltd has a huge brand backing of the Infosys group behind it which can definitely impact the revenue as well as the profitability of the comparable company, therefore in absence of any such assets available to the assessee company, Infosys BPO Ltd is required to be excluded from the comparability analysis of ITeS segment. Accordingly we direct the learned TPO/AO to exclude the above comparable and then compute the arm's-length price of the ITeS segment of the assessee.

18. As assessee has submitted that if Infosys BPO Ltd is excluded from the comparability analysis, assessee's transaction of this segment would be at arm's length. Hence all other aspects of the computation of the arm's-length price of that segment are left open.

19. Now we come to the software development segment of the assessee. The undisputed functional profile reported by the assessee in the transfer pricing study report of the same is as under:-

“Assessee is also engaged in development of modules as well as part of modules for software being used by its overseas group entities in their products. It also undertakes testing of modules developed by it . It performs maintenance support services which includes bug fixing, carrying on maintenance and support services on software used on products developed by its group entities. The total team comprises of 121 employees that are mostly engineers. It is responsible for rendering services according to predetermined terms and conditions of the service receiver and does not undertake any marketing or business development functions. It performs software development services on behalf of the company to further develop and improve the products and intangible property developed by the group. Local software development team manages the day-to-day software development activities and follows business group strategy direction and decision. It does not own any intellectual property right associated with the software development efforts. It undertakes contract software development based on the framework provided by the receiver. This framework comprises of product portfolio objectives, target markets, target customers, competition, ideal solutions and technological partnerships. It undertakes recording and documentation function with respect to the software modules that it develops. It receives technical assistance from the holding company during the coating and documentation functions. The holding company supervisors and managers the coating and documentation function being performed by the assessee. It is responsible for day-to-day project management and deliverable of the model of the software being developed. It has to closely interact with its associated enterprises. The design and development function is undertaken by the assessee pertaining to a particular model

based on the specifications provided. It is responsible for the quality of the work undertaken by 8 and 6 to ensure that the work performed complies with the quality standards set by the group. It also undertakes unit testing on the software modules developed by it and prepares test reports which are reviewed by the receiver on a need basis it also perform system testing.”

20. The assessee has contested that two compatible companies included by the learned transfer pricing officer and requires to be excluded because of their peculiar functional and the said profile namely Infosys technologies Ltd and persistent systems Ltd.
21. The learned authorised representative submitted that the lower authorities have rejected the argument of the assessee that Infosys is not a comparable company as it is a huge company with very high turnover and it has brand associated with it which impacts the profitability of comparable company. He further stated that it is a product development company and incurs huge expenditure on marketing. He referred to the turnover of the Infosys Ltd of Rs. 4434 1,00,00,000 whereas the turnover of the assessee is only Rs. 42,41,00,000, the employee cost of the assessee is only INR 258,100,000 compared to the same of the comparable company of INR 2 4350 crores. He further stated that the brand expenditure of the assessee is nil where the Infosys Ltd has incurred a brand expenditure of INR 770,000,000. He further stated that in assessee’s own case for assessment year 2011 – 12 the Infosys technologies Ltd has been removed from the comparability analysis.
22. The learned authorised representative further referred to the several judicial precedents where the Infosys Ltd has been excluded on the issue of the brand owned by that comparable company.
23. The learned departmental representative vehemently supported the order of the learned assessing officer/TPO/DRP. However he could not distinguish that in assessee’s own case for assessment year 1112 when the same comparable has been excluded and when there is no change in the facts and circumstances of the case of the assessee or the functional profile of these 2 companies.

24. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also perused annual report of the Infosys for 2013 – 14 which has been furnished by the assessee before us. It is apparent that in the assessee's own case for assessment year 2011 – 12 in ITA number 477/del/2016 in para number 7.4 of the order of the coordinate bench wherein the Infosys technologies Ltd has been excluded from the comparability analysis following the decision of the honourable jurisdictional High Court. Therefore respectfully following the decision of the coordinate bench in assessee's own case we also direct the learned AO/transfer pricing officer to exclude Infosys technologies Ltd from the comparability analysis of software development segment.
25. The next comparable data challenge before us is the inclusion of persistent systems Ltd included by the learned transfer pricing officer for which which assessee prays for the exclusion. However the assessee has submitted that if the Infosys Ltd has been excluded from the final list of the comparability analysis the ground of the assessee for the exclusion of this comparable will become academic in nature in respect of software development segment. As we have already directed the learned AO/TPO to exclude the Infosys Ltd from the comparability analysis, we leave the ground of contest of the assessee for exclusion of persistent systems Ltd open.
26. Accordingly ground number 2 of the appeal of the assessee is allowed with above directions.
27. The ground number 3 of the appeal is with respect to the adjustment on account of the receivables. Originally the learned transfer pricing officer has made an adjustment of INR 3681330/- on account of the interest receivable from associated enterprise which has been reduced by the learned dispute resolution panel directing the learned TPO to consider that period of 60 days is to be considered as a reasonable outstanding. In absence of any agreement with the neither associated enterprises nor invoices stating the terms of the payment and the credit period could be adduced by the assessee. Consequently the learned transfer pricing officer proposed an adjustment of only rupees 1384/- on this account.
28. The learned authorised representative contested that working capital adjustment takes into account the impact of outstanding receivable on the

profitability and accordingly no separate adjustment is warranted on account of outstanding receivable. He further stated that working capital adjustment was allowed by the learned dispute resolution panel accordingly he stated that there cannot be any adjustment of the outstanding receivable.

29. The learned departmental representative vehemently contested the argument of the assessee and submitted that learned dispute resolution panel has granted the reasonable amount of the period and therefore beyond 60 days time if there is an outstanding with the associated enterprise, the interest cost should be computed.
30. We are carefully considered the rival contention and perused the orders of the lower authorities. It is a fact that the assessee has been granted a working capital adjustment by the DRP. When the working capital adjustment has been granted it definitely takes into account the impact of outstanding receivable on the profitability and therefore there is no separate adjustment is warranted on account of overdue outstanding advances. Accordingly we direct the learned transfer pricing officer to Rs. 1384/- on this account. Accordingly ground number 3 of the appeal of the assessee is allowed.
31. Accordingly appeal of the assessee is allowed.

Order pronounced in the open court on 06<sup>th</sup> May 2019

-Sd/-  
(H.S.SIDHU)  
JUDICIAL MEMBER

-Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 06/05/2019

Copy forwarded to

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

ASSISTANT REGISTRAR  
ITAT, New Delhi