

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: 'I-2', NEW DELHI

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER  
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 6763/Del/2015  
AY: 2011-12

IDP Education India Pvt. Ltd. Suite No.610-616, 6 <sup>th</sup> Floor International Trade Tower Nehru Place New Delhi 110 019  PAN: AABC16253M	vs.	DCIT, Circle 12(1) New Delhi
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(Appellant)

(Respondent)

Assessee by : Sh. Vishal Kalra, Adv. &  
Sh. Ankit Shahni, Adv.

Department by : Sh. Robin Rawal, Sr.D.R.

Date of Hearing : 22/04/2019

Date of Pronouncement: 03/06/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present appeal has been filed by assessee against final assessment order dated 28/10/2015 passed by Ld.DCIT, Circle 12 (1), New Delhi under section 143(3) read with section 144C of the Income Tax Act, 1961 (the Act) on following grounds of appeal:

*"1. That on the fact and in the circumstances of the case and in law, the order passed by the Ld.AO is bad in law.*

*2 The Ld.AO/Ld.TPO erred on facts and in law in making an adjustment to the appellant's international transactions which resulted in an enhancement of returned income of the appellant by Rs.10,99,12,960/-.*

*3. That the reference made by Id.AO suffers from jurisdictional error as the Ld.AO has not recorded any reasons in assessment order based on which he reached a conclusion that it was expedient and necessary to refer the matter to Id.TPO for computation of arm's length price as is required u/s 92CA(1) of the Act.*

*4. That on the fact and in the circumstances of the case and in law, Ld.AO/Ld.TPO/Hon'ble DRP erred in making adjustment to appellant's international transactions, relating to (a) provision of student recruitment and office services; and b)payment of IELTS test fee and enquiry on result EOR fee in following manner:*

*4.1. Not demonstrating the basis for concluding that the comparability analysis conducted in the TP documentation of appellant is inappropriate and inadequate,*

*4.2. Rejecting the applicability of comparable uncontrolled price (CUP) as most appropriate method for (a) provision of student recruitment and office services, and (b) payment of IELTS test fees and EOR fees;*

*4.3. Rejecting the additional evidences submitted by appellant which supported application of CUP as MAM for a)provision of student recruitment and office services, and (b) payment of IELTS test fees and EOR fees.*

4.4. *Rejecting the transaction-by-transaction approach by aggregating student recruitment services and IELTS testing services segment, thereby disregarding the fact that both these segments are functionally different for purpose of application of TNMM.*

4.5. *Proposing an overall transfer pricing adjustment Rs.10,99,12,960/- which is greater than the amount retained by IELTS Australia i.e. Rs.6,93,20,774/-;*

4.6. *Disregarding economic adjustments claimed by appellant;*

4.7. *Selecting current year (i.e. financial year 2010-11) data for comparability purposes (while applying TNMM) despite fact that at time of comparison done by appellant, complete data for f.y. 2010-11 was not available in public domain; and*

4.8. *Considering inappropriate company /companies as comparables, which are functionally not similar.*

5. *That on the facts and in the circumstances of the case and in law, Ld.AO erred in allowing depreciation @ 60% (the rate as specified as per IT Rules, 1962) on the software purchased and put to use during year under consideration.*

6. *That on the facts and in the circumstances of the case and in law, Ld.AO erred in initiating penalty proceedings u/s 274 r.w.s.271(1)(c) of Act without recording any adequate satisfaction for such initiation.*

*That appellant craves leave to add, alter, amend or withdraw any ground of appeal either before or at time of hearing of this appeal as they may be advised.*

*That, the above grounds are independent and without prejudice to each other."*

**2. Brief facts of the case are as under:**

Assessee filed its return of income on 24/09/11 declaring total loss of Rs.15,05,10,397/-. The case was selected for scrutiny and notice under section 143(2) was issued along with notices under section 143(2) and 142(1) of the Income Tax Act, 1961 (the Act) by a questionnaire dated 07/10/14. Subsequently representatives of assessee attended proceedings from time to time and furnished details as called for.

**2.1.** During year under consideration assessee was engaged in business of consultancy and advisers on all matters relating to education and training including diagnostic language testing and to advise and counsel on admission procedures, processes and students exchange programs in forums, schools and colleges, anywhere in the world. Books of accounts were produced before Ld. AO which was examined on test check basis. Ld.AO observed that assessee had entered into international transaction, for which reference was made to the Ld.TPO. Ld.TPO upon receipt of reference under section 92CA(1), called upon assessee for determination of arm's length price of international transaction undertaken by assessee during year under consideration.

**2.2.** Ld.TPO observed that international transaction reported by assessee in Form 3 CEB, was as under:

Sl. No.	Nature of transaction	Method	Amount (INR in Millions)
1.	Provision of student recruitment services	CUP	3,43,13,797
2.	Provision of office services		2,63,38,850
3.	Payment of royalty	TNMM	17,32,413
4.	Provision of technical	TNMM	1,54,930

	inspection analysis and certification		
5.	Provision of IS Services Desk	TNMM	26,29,879
6.	Payment of IELTS test fee	CUP	13,04,31,600
7.	Payment of EOR fee		10,22,442
8.	Payment towards training services	TNMM	1,14,50,302
9.	Reimbursement of expenses received/receivable	No Benchmark	1,96,89,975

Ld.TPO observed that assessee is a subsidiary of IDP Education Ltd, formerly known as IDP Education Pty. Ltd and was primarily engaged in counselling and guidance services to students desirous of pursuing education in Australia. It is observed that during year under consideration assessee entered into agreement with IELTS Australia Pty. Ltd, pursuant to which it started organising International English Language Testing System (IELTS) tests in India for candidates seeking to study in, work in or migrate to English-speaking countries.

**2.3.** Ld.TPO observed that international transaction of assessee being provision of student recruitment service to its AE was benchmarked by using CUP, as method and later on Ld.TPO further observed that assessee entered into another international transaction of payment of International English Language Testing System fee to its AE, which was also benchmarked by using CUP as the method. Ld.TPO, accordingly issued show cause notice in connection with international transaction. Ld.TPO called upon assessee to establish as to why TNMM should not be used as most appropriate method and to establish why aggregating student

recruitment services and IELTS Testing Services should not be made.

**2.4.** Assessee filed its reply vide letter dated 24/12/14 by submitting that CUP must be used as most appropriate method to benchmark international transaction of recruitment services and payment of IELTS/EOR fees and that these 2 segments cannot be aggregated since functions performed by assessee are different in both. It was submitted that agreement entered into under these 2 segments are with different parties and are not linked with each other.

**2.5.** Ld.TPO however rejected benchmarking carried out by assessee and selected TNMM as most appropriate method for benchmarking international transactions pertaining to provision of student recruitment and office services (hereinafter referred to as student recruitment service segment) and IELTS Test Fee and EOR fee (hereinafter referred to as IELTS Testing Segment). Ld.TPO also aggregated arm's length margin of these 2 segments by using OP/OI as PLI, thereby determined in margin of assessee at 5.12% vis-a-vis -30.96% computed by assessee by using following comparable:

Name of the comparable company	OP/OI
Career Launcher (I) Ltd.	12.67%
EDCIL (India) Ltd.	1.53%
Overseas Development & Employment Promotion Consultants Ltd.	(10.29%)
Seed Infotech Pvt.Ltd.	16.60%
<b>Arithmetic mean (OP/OI)</b>	<b>5.12%</b>

**2.6.** Ld.TPO thus proposed an adjustment of Rs.11,63,28,198/-.

3. Aggrieved by adjustment proposed by Ld.TPO, assessee raised objections before DRP. DRP upheld approach adopted by Ld.TPO however directed for granting working capital adjustment as claimed by assessee. Thus pursuant to directions of DRP Ld.AO passed final assessment order by making a transfer pricing adjustment to Rs.10,99,12,960/-.

3.1. Aggrieved by addition made by Ld.AO, assessee is in appeal before us now.

4. At the outset Ld.AR submitted that **Grounds 1, 2, 3** are general in nature and therefore do not require any adjudication.

**5. Ground No. 4:** Ld.Counsel submitted that in **Ground No. 4.4** assessee objects aggregation of 'Student Recruitment Service Segment' and 'IELTS Testing Service Segment', and application of TNMM as most appropriate method. He submitted that this ground subsumes other sub-grounds in ground No. 4.

5.1. Ld.Counsel submitted that assessee applied CUP, for benchmarking international transactions of-

- provision of student recruitment service segment (which includes office service segment); and
- payment of IELTS test fee segment (which includes EOR fee)

Referring to pages 416-147 of paper book, Ld.Counsel took us through functions performed by assessee under each of these.

**(A) Provision of student recruitment service segment:**

From the TP study at page 416 of paper book functional analysis of the segment, risk assumed and asset used by assessee and its AE

in the transaction has been listed. Functions performed by assessee are as under:

The major functions performed by IDP India in relation to student recruitment services are:

- i. Student Counselling: The potential student approaches IDP India to know about the various courses offered by the Australian Universities.

This function performed under counseling services can be detailed into further parts:

- Information and recommendation of educational institutions,
  - Information on Australian cities and locations.
  - Information on and assistance with education institution application processing.
  - Forwarding the offer letter to the student.
  - Lodging the student visa electronically and helping the student with travel arrangements.
- ii. Updating the central database: A Central data base of students is maintained by IDP Australia. IDP India updates this data base with the information relating to India students going to various Australian Universities. This data base is a part of MIS which in turn supports the invoicing of client institutions by IDP Australia.
  - iii. Collection of Tuition Fees: IDP India procures and in-turn forwards the demand draft of tuition fee to secure enrolment for the institution selected by the Indian student.

- iv. Office services: In addition to the provision of student recruitment services, IDP India also provides general administrative and ancillary office services to alliance education providers on IDP Australia's behalf office services are ancillary to the student recruitment services provided by IDP India as they primarily lead to increase in the awareness about the foreign education institutions in India amongst the Indian students. These services include:
- a) Securing venue hire for various functions such as examinations, graduation ceremonies, conferences and seminars;
  - b) Providing event management services by structuring the process of examinations, graduation ceremonies, single institution seminars,
  - c) Identifying appropriate advertisement placement opportunities,
  - d) Providing translation and interpreter services; and
  - e) Undertaking commissioned research in specific markets and segments as requested by the education providers.

Prior to undertaking any office services, IDP India is required to provide IDP Australia with a 'schedule of fees' which must be agreed to by education providers. This schedule of fees is an estimation of cost, which the education provider needs to incur in case it opts to undertake road shows etc. in India through IDP Australia. During year under consideration, office services rendered by IDP India only comprised of conducting road shows.

Further it is observed that AE enters into client business agreements with Australian education providers that set out scope of services to be provided by the IDP group, remuneration structure for student placements and detailed course related information and support to be provided by education providers. AE also compiles and manages a database in relation to various courses provided by education providers which is updated on a regular basis and content is essential to ensure that accurate advise is provided to students by assessee in India.

**(B) Assets:**

Assessee possesses only furniture, fixtures, fittings, computer equipment, office equipment and software developed by AE. However assessee do not own or develop intangible assets during course of provision of such services.

**(C) Risks assumed:**

Assessee bears manpower risk, foreign exchange risk, contracts performance risk and operational risk in India.

Assessee can therefore be characterised as a service provider to IDP Australia who is remunerated on basis of No. of students placed/number of road shows held.

It is observed that assessee has entered into an agreement with IDP education Pty Ltd which is effective from 1<sup>st</sup> day of April 2009. The said agreement is placed at page 589 of paper book. As per agreement services rendered by assessee has been tabulated in clause 1.2 at page 590 which is as under:

## Clause 1.2. Services

- (a) IDP India shall provide services to the Client with regard to student recruitment related activities in India, including without limitation, providing information and guidance on courses that may be undertaken in Client Education Institutions, qualification requirements, counselling, training, enrolment services and other necessary services with regard to the same (**"Recruitment Services"**);
- (b) Notwithstanding anything contained in sub-clause (a) above, the Client shall remain the ultimate authority for finalisation of the admission process for students approaching IDP India for further studies and education to be undertaken at Client Education Institutions;
- (c) Further, IDP India shall preserve necessary documents/ records regarding the application process undertaken by IDP India on behalf of the Client,
- (d) IDP India may also provide administrative and ancillary office services : Client Education institutions at their request for a fee (**"Office Services Fee"**) and upon prior written approval of the Client, including but not to: venue hire, event organisation (including examinations, and graduation ceremonies), and the conduct of single institution seminars, advertisement placement, translation, commissioned research, secretarial, interpreter, and others (**"Office Services"**),  
(collectively referred to as the " Support **Services"**)

For the aforestated referred services, assessee is remunerated by its AE as per clause 1.3 which is reproduced hereunder:

Clause 1.3:

*Service Fees*

*(a) The Client will pay IDP India:*

- (i) A fee equivalent to a maximum of 70% of the application processing, fee received by the Client from Client Education Institutions for each student placed at Client Education Institutions by IDP India ('Recruitment fee').*
- (ii) A fee equivalent to a maximum of 90% of the Office Services Fee received by the Client from Client Education Institutions for each Office Service.*

*(collectively referred to as the 'fees') in the manner set forth in Clause 5.*

*(b) IDP India will make available to Client Education Institutions a schedule of fees for Office Services. This Schedule must be approved in writing by the Client prior to distribution to Client Education Institutions and implementation by IDP India.*

It has been submitted that the payment bifurcations as mentioned hereinabove has been regularly followed by assessee and its AE. He also submitted that similar agreements has been entered into by AE with other countries like Bangladesh, Shri Lanka and Bahrain.

**5.2. Payment of IELTS fee/EOR fee:**

It has been submitted by Ld.Counsel that this is the 1<sup>st</sup> year during which assessee has benchmarked international transaction. He

submitted that functions performed by assessee under this segment, assets owned and risks assumed has been considered at page 423-425 of paper book.

**Functions:**

It has been submitted that assessee administers IELTS test conducted in India for which following functions has to be undertaken:

**5.3. IELTS Testing**

**53.1. Functional Analysis**

Functions performed by IDP India

IELTS tests conducted in India are administered by IDP India. The functions performed by IDP India in this regard are detailed below:

- i. Collection of IELTS fee: IDP India is responsible for the collection of IELTS fee from a candidate. IDP India collects the full examination fees from the candidates sitting the IELTS exam and then/emits monthly the portion of that fee, as agreed, to IELTS Australia.
- ii. Obtaining the test material: IDP India is responsible for ordering and obtaining IELTS test materials directly from UCLES. UCLES provides IELTS materials to individual test centres (IDP India being one of the test centre).
- iii. Administration and conduct of IELTS: IDP India is the local test centre for IELTS in India; hence, it is responsible for the administration and conduct of IELTS within the Indian Territory. Inter-alia, this includes local administration of the IELTS and supervision of the exam centres.
- iv. Marking of IELTS test papers: The IELTS examiners who mark the exam are appointed by IDP India. These examiners are fully qualified and follow IELTS standardised assessment regulations. The IELTS test has a quality-controlled system of recruitment, training, benchmarking,

certification and monitoring of examiners, which IDP India is required to follow. IELTS markers are regularly monitored and tested every two years to retain their certification.

Functions performed by IELTS Australia

The functions performed by IELTS Australia with respect to the IELTS are described below.

- i. Formulation/updating of IELTS test papers: The IELTS exam is formulated and regularly updated by international teams of writers who add to the test materials. There is also on-going investment in research to ensure that the IELTS exam remains fair and unbiased to anyone who sits the test. Each joint venture participant i.e. UCLES, BC and IELTS Australia has joint responsibility in ensuring a high level of quality assurance is maintained throughout all aspects of the IELTS exam.
- ii. Certification and training of examiners: IELTS Australia is responsible for regularly monitoring and certifying the IELTS examiners appointed by IDP India. IELTS Australia is also responsible for imparting requisite training to the IELTS examiners appointed by IDP India.

#### **5.4. Assets:**

Assessee possesses only furniture fixtures fittings, computer equipment office equipment and software developed by AE. However assessee do not own or develop intangible assets during the course of provision of such services.

#### **5.5. Risks assumed:**

Assessee bears manpower risk, foreign exchange risk, contracts performance risk and operational risk in India.

6. Assessee can thus be characterised as performing role of an enterprise and assumes majority of risk. It is also submitted by

assessee in the trans-appraising study that assessee utilises the intangible assets owned and developed by IEL TS Australia.

In the paper book at page 608, IELTS centre agreement entered into by assessee with IELTS Australia Pty Ltd has been placed. Perusal of said agreement it is observed that said agreement commences from 09/09/10. The agreement has been entered into by assessee with IELTS Australia Pty. Ltd., for conducting IELTS testing from locations agreed by AE from time to time under assessee. Conditions under which license has been granted by AE to assessee has been enumerated in Clause 3 which reads as under:

**6.1. Clause 3: Grant of Licence and Relationship**

***3 Grant of Licence and Relationship***

***Grant***

3.1 IA grants to the IELTS Centre a non-transferable, nonexclusive licence to use the Licensed IP, including without limitation:

- (a) the IELTS Test Materials;
- (b) IELTS Manuals of Procedure;
- (c) Confidential Information, know-how and other such rights in IELTS,

for the purpose of the IELTS Centre administering and delivering IELTS in India in accordance with the terms of this agreement.

3.2 The IELTS Centre shall conduct IELTS testing from locations agreed with IA from time to time under the name described in Part C of the Details Section ("**Test Centres**").

**Relationship of parties**

3.3 The parties acknowledge that they are independent contractors and no other legal relationship (including employment, agency, partnership or joint venturer) exists between them.

3.4 Each party agrees:

- (a) not to hold itself out as having authority to enter into agreements with others on behalf of the other party and

(b) without limiting (a) above, to demonstrate that they are independent from the other party in their own marketing and business materials.

### **IA business operations**

3.5 The IELTS Centre acknowledges that IA:

- (a) provides a variety of services to a broad range of clients;
- (b) may sometimes compete with its clients for business opportunities in a variety of markets; and
- (c) is a joint owner of IELTS and this product (and related products, whether solely or jointly owned) is advertised.

**6.2.** It is observed that agreement is valid for a period of 5 years which may be renewed. Clause 5 enumerates requirements to be fulfilled by IELTS Centre (which is assessee in present case) it has also been agreed by assessee that, it would be responsible for bearing all costs associated with test centres. As per Clause 12, assessee is to deposit amounts payable to AE, after deducting tax at source.

**6.3.** It has been submitted by Ld.Counsel that these 2 services rendered by assessee are to different AE, and functions performed by assessee under these 2 agreements are separate. He emphasised that these 2 services are independent with each other.

He thus objected for aggregation of these 2 services as done by Ld.TPO. Ld.Counsel submitted that similar kind of agreement has been entered into by AE with other countries like Bangladesh, Sri Lanka, Pakistan (Islamabad), Pakistan (Karachi) and Pakistan (Lahore) with identical mode of payment and services to be rendered by the IELTS centres.

Ld.Counsel thus submitted that as per rule 10 B (a) of Income Tax Rules 1963, CUP is the most appropriate method for determining arm's length price of these transaction vis-a-vis TNMM as applied by Ld. TPO aggregating two separate transactions.

**6.4.** Ld.CIT-DR placing reliance upon orders passed by authorities below submitted that no fault can be found with benchmarking carried out by Ld.TPO as these are interconnected services. Referring to para 10.2 of DRP order Ld.CIT,DR submitted that TNMM as preferred method for its proficiency, convenience and reliability. He submitted that under CUP of high degree of comparability of products and functions such as quality, contractual terms, geographic market, embedded intangibles and foreign currency risk etc has to be met strictly.

**7.** We have perused submissions advanced by both sides in light of records placed before us.

**8.** It is pertinent to note that assessee provides student recruitment service to AE in exchange for an application process fee which is determined by way of a split of fee received from education provider being 70:30 between assessee and AE respectively. Further in respect of IELTS service segment, assessee paid AE @ Rs.3600 per candidate, opting to appear for IELTS exams.

He submitted that both AE had entered into similar agreements with identical conditions and terms with 3<sup>rd</sup> parties in Sri Lanka, Bangladesh and Pakistan.

It is also observed that international transactions entered into by assessee with the AE cannot be aggregated as they do not satisfy

criteria laid down by *Hon'ble Delhi High Court* in case of *Knorr Bremse India Pvt. Ltd., vs ACIT* reported in *286 taxman 318*. It is observed that there is no package deal and international transaction in question has been separately valued. Further it also cannot be established that pricing depends upon assessee accepting all of them together. Ld.TPO has failed to establish inextricable connection between the 2 transactions and therefore we are not inclined to accept aggregation of 2 segments.

**8.1.** The internal comparables selected by assessee under CUP has been used by Ld.TPO in TNMM. At this juncture we also appreciate that for kind of services rendered by assessee CUP is most appropriate method to be applied to determine ALP of international transaction because it seeks to compare price charged or paid for services rendered provided proper comparables are available. It is under this method alone that price charged or paid is directly compared with the price charged or paid in an uncontrolled comparable transaction. Further CUP method is transaction specific method thereby lending more credibility to Lof transaction. We therefore agree with assessee in applying CUP as most appropriate method provided comparables selected by assessee are proper.

It is observed that Ld.TPO applied TNMM and made an adjustment. Under such circumstances we are inclined to set aside the matter back to Ld.AO/TPO for fresh determination of ALP of international transaction independently under CUP method. However in case Ld.TPO finds that CUP method cannot be applied either due to non-

availability of relevant data, or for some other genuine reason, he may apply any other method for fresh determination of ALP of international transaction of the 2 segments independently.

**8.2. Accordingly we allow ground No. 4.4 for statistical purposes.**

**9. Ground No. 4.5 is** corresponding to ground No. 4.4, 4.8 and therefore do not require a separate adjudication.

**10. Ground No. 4.7** has been not pressed by Ld.Counsel and therefore this ground is dismissed as 'not pressed'.

**11.** Nothing has been argued by Ld.Counsel in respect of ground No. 5 due to smallness of the issue.

**Accordingly we dismiss this ground.**

**12. Ground No. 6** is premature and therefore do not require any adjudication.

**13.** In the result appeal filed by assessee stands allowed partly for statistical purposes.

Order pronounced in open court on ..../06/2019.

Sd/-

**(N.S. SAINI)  
ACCOUNTANT MEMBER**

Sd/-

**(BEENA A PILLAI)  
JUDICIAL MEMBER**

Dt. 03<sup>rd</sup> June, 2019

- gmv

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Respondent  
CIT  
CIT(A)  
DR, ITAT

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By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches

	Date
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