

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.5839/Del/2015
(Assessment Year: 2011-12)

Open Solutions Software Services Pvt. Ltd, 30, Annexe Bldg, First Floor, Nizamuddin East, New Delhi PAN: AAC07542G	Vs.	ITO, Ward-19(2), New Delhi
(Appellant)		(Respondent)

ITA No.6397/Del/2015
(Assessment Year: 2011-12)

ITO, Ward-19(2), New Delhi	Vs.	Open Solutions Software Services Pvt. Ltd, 30, Annexe Bldg, First Floor, Nizamuddin East, New Delhi PAN: AAC07542G
(Appellant)		(Respondent)

Assessee by :	Shri Sachit Jolly, Adv Shri Aakash Bhatia, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR Ms. Nimita Pandey, Sr. DR
Date of Hearing	27/03/2019
Date of pronouncement	14/06/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the ITO, Ward-19(2), New Delhi and the assessee (Open Solutions Software Services Pvt. Ltd) for the Assessment Year 2011-12 against the order of ld AO passed u/s 143(3) read with section 144C(13) of the Act dated 13.10.2015, wherein, the assessment was made of Rs. 38507810/- against the return of income of the assessee of Rs. 47391/-. The following two adjustment/ additions were made:-
 - a. Addition on account of transfer pricing adjustment of Rs. 38427207/- and
 - b. Disallowance of sale of fixed assets of Rs. 33208/-.

2. The assessee and the revenue have challenged the above orders respectively as per following grounds.
3. The assessee has raised the following grounds of appeal:-
 1. *That on facts and circumstances of the case and in law, final assessment order dated 13.10.2015 passed by the Assessing Officer ("AO") is in complete disregard of the provisions of Section 144C(13) of the Income tax Act, 1961 (the "Act") inasmuch that the AO failed to pass the said Order in conformity with the binding and mandatory directions issued by the Dispute Resolution Panel ("DRP") and consequently the Order is non-est, illegal and bad in law.*
 - 1.1 *That the AO, in gross violation of the provisions of Section 144C(13) of the Act, erred in finalizing the assessment without giving effect to the binding directions of the DRP in respect of exclusion of three comparables viz., E-Infochips Ltd., Infosys Ltd. and Thirdware Software and Solutions Ltd. that were directed to be excluded by the DRP.*
 - 1.2 *That the AO erred in passing the final assessment Order on 13.10.2015 in undue haste without appreciating that the Transfer Pricing Officer ("TPO") had initiated proceedings to give effect to the Order of the DRP vide notice dated 15.09.2015, which were duly attended by the Appellant, that the TPO vide Order dated 16.10.2015 has determined NIL adjustment pursuant to the directions of the DRP and in any case the limitation for passing the final assessment order was not expiring till 31.10.2015.*
 2. *That on facts and circumstances of the case and in law, the AO erred in assessing the total income of the Appellant at Rs.3,85,07,810/- (rounded off) as against income of Rs.47,391/- returned by the Appellant after making transfer pricing addition of Rs.3,84,27,207/- in respect of international transaction of software development research and other services rendered by the Appellant to its parent company, viz., Open Solutions Inc., USA.*
 3. *That on facts and in circumstances of the case and in law, the AO erred in making a reference to the TPO under Section 92CA of the Act without recording reasons on the basis which the AO considered it "necessary or expedient" to refer the international transaction entered into by the Appellant with its associated enterprise ("AE").*
 4. *That on facts and in circumstances of the case and in law, the AO and DRP erred in partly confirming the action of the TPO in making an addition of Rs. 3,84,27,207/- to the income of the Appellant without appreciating that the Appellant had computed arm's length price in respect of international transaction entered into by the Appellant with its AE using the most appropriate method (i.e. the Transactional Net Margin Method), maintained all the information and documentation required under section 92D of the Act, used information/ data available in the database (Prowess database and Capitaline database) at the time of filing the income tax return on a bonafide belief that the data in the database is reliable and correct and had furnished the Transfer Pricing Study ("TP Study").*

5. *That the AO and DRP erred in confirming the action of the TPO in rejecting the Transfer Pricing Study of the Appellant and in conducting a fresh benchmarking analysis on the basis of conjectures and surmises.*
6. *That the Ld. AO and DRP erred in confirming the order passed by the TPO without appreciating that the TPO erred in rejecting the functional filters applied by the Appellant in its TP Study.*
7. *That on facts and circumstances of the case and in law, the AO and DRP erred in confirming the action of the TPO in applying the following filters:*
 - a) *Use of only current year (i.e. financial year 2010-11) data for comparability despite the fact that at the time of comparison done by the Appellant, the complete data for the FY 2010-11 was not available in the public domain;*
 - b) *Rejecting companies with turnover below Rs. 5 crore without applying an upper filter of Rs. 200 crores; The TPO/DRP ought to have either applied an upper turnover filter or not applied any turnover filter, at all.*
 - c) *Rejecting companies whose ratio of service income to total income is less than 75%;*
 - d) *Rejecting companies whose export revenues are less than 75% of the operating revenues without appreciating that the said filter has no effect on comparability analysis;*
 - e) *Rejecting companies where related party transactions exceeds 25% of sales without appreciating that companies with any related party transactions should have been excluded or else companies with RPT of more than 10-15% to sales should have been excluded;*
 - f) *Rejecting companies with employee cost of less than 25% of total cost for the period under consideration;*
 - g) *Rejecting companies with peculiar circumstances, e.g., diminishing revenue/ persistent losses in complete contradiction of the filter of single year data applied by the TPO himself;*
 - h) *Rejecting companies with different financial year ending without appreciating that the said filter would produce defective comparables.*
8. *That the Ld. AO and DRP erred in confirming the incorrect computation of margins of the comparable companies selected by the TPO.*
9. *That the Ld. AO and DRP erred in confirming the action of the TPO in rejecting the comparable companies selected by the Appellant without providing any cogent and sufficient reasoning.*
10. *That the Ld. AO and DRP erred in confirming the action of the TPO in benchmarking the transaction of rendition of captive services undertaken by the Appellant with companies operating as entrepreneur companies without appreciating the true nature of services provided by the Appellant and other material facts related to the functional and risk profile of the Appellant.*

11. *That the Ld. AO and DRP erred in confirming the action of the TPO in selecting the following companies which were not functionally comparable to the Appellant for the purposes of benchmarking the international transaction entered into by the Appellant:*
 - a) *Persistent Systems Ltd.*
 - b) *Sasken Communication Technologies Ltd.*
 - c) *Wipro Technology Services Ltd.*
12. *That the Ld. AO and DRP erred in confirming the action of the TPO in selecting the following companies whose turnover exceeded Rs. 200 crores:*
 - a) *Persistent Systems Ltd.*
 - b) *Sasken Communication Technologies Ltd.*
 - c) *Wipro Technology Services Ltd.*
 - d) *Cat Technologies Ltd.*
13. *That the AO and DRP erred in confirming the action of the TPO in not excluding Wipro Technology Services Ltd. from the list of comparable without appreciating that the said company benefitted from an extraordinary event during the year, i.e., awarding of a fixed contract in lieu of acquisition by Wipro Ltd. and had significant RPT during the year under consideration.*
14. *That the AO and DRP erred in excluding Thinksoft Global Services Ltd. as a comparable from the final list of comparables even though the said comparable formed part of the show-cause notice issued by the TPO.*
15. *That the DRP erred in not itself adjudicating the ground of appeal raised by the Appellant assailing the incorrect computation of margins by the TPO in complete disregard of the provisions of Section 144C of the Act.*
16. *That the AO and DRP erred in confirming the action of the TPO in not allowing risk adjustment claimed by Appellant in terms of Rule 10B(l)(e) read with Rule 10B(3) of the Income tax Rules, 1962.*
17. *Without prejudice, the Ld. AO/TPO erred in denying the claim of benefit of standard deduction of +/- 5% contained in the proviso to Section 92C(2) of the Act to the Appellant.*
18. *That the TPO/AO/DRP erred in making an adjustment to the arm's length price computed by the Appellant without appreciating that since the Appellant was eligible to claim deduction under Section 10A of the Act in respect of income from the international transaction entered into between the Appellant and its AR, there was no motive to shift profits outside India by manipulating the prices charged in international transactions, which is a pre-requisite to make any adjustment under the provisions of Chapter X of the Act.*
19. *That the AO/DRP erred in disallowing deduction for a sum of Rs.33,208/- on the ground that the same represented loss on sale of 'fixed' assets and, therefore, capital in nature.*

20. *The Ld. AO erred on facts and circumstances of the case and in law in charging interest under Sections 2340 and 234C of the Act.*
21. *That the Ld. AO erred on facts and in law in mechanically initiating penalty proceeding under Section 271(l)(c) of the Act without recording any adequate satisfaction for such initiation.*
4. The revenue has raised the following grounds of appeal:-
- “1. *On the facts and circumstances of the case, the Hon’ble DRP-II has erred in accepting assessee’s comparables resultant to deletion of addition of Rs. 38427207/- on account of Transfer Pricing Adjustment made earlier by the TPO/ AO.*
2. *On the facts and circumstances of the case, the Hon’ble DRP has erred in deleting the addition of Rs. 51004/- made by the AO on account of interest on late deposit.”*
5. The brief facts of the case show that the assessee is a company, which renders software and development research and other services to its parent company and is engaged in development of computers software and provisions of related services. It filed its return of income on 28.09.2011 for Rs. 47391/-. As the assessee entered into international transactions the ld AO referred the matter to the Additional Director of Income Tax (TPO) u/s 92CA of the Act to determine the arm’s length price of the same. The ld TPO passed as order on 16.01.2015 proposing the adjustment of Rs. 38427207/- which was incorporated in the draft assessment order passed on 25.02.2015. Other additions were also made being disallowance of sale of fixed assets, disallowance of interest accrued. The other disallowance was interest on late deposit of tax at source amounting to Rs. 51004/-. Consequently, the total income was determined of Rs. 38602960/-. The assessee being aggrieved with the draft order filed objections before the ld DRP-II, New Delhi and the direction were passed on 08.09.2015.
6. The learned DRP passed the direction u/s 144C (5) of the income tax act on 8/9/2015 wherein effectively while deciding objection number 4.4 – 4.10 has held that
- a. E Infochips Ltd was held to be not comparable based on the order of the preceding assessment year under similar factual matrix.
 - b. Infosys Ltd was also held to be not comparable with the assessee following the decision of the honourable Delhi High Court in case of Agnity

- c. Third ware solutions Ltd was also rejected as comparable as inclusion of this comparable was not confronted to the assessee
 - d. Think soft global services Ltd was found on perusal of annual report that the company is engaged in software validation and verification services to banking and financial services industry and therefore the functional profile was not comparable with the assessee hence it was also rejected.
 - e. Many of the observations of the learned transfer-pricing officer were upheld.
 - f. Interest paid on late deposit of tax deduction at source is compensatory in nature and hence deductible as an expenditure
7. Based on the direction of the learned dispute resolution panel the order u/s 143 (3) read with section 144C (13) of the income tax act 1961 was passed by the learned assessing officer on 13/10/2015 wherein the upward adjustment on the arm's-length price of the international transaction of INR 3 8427207/- was added. Consequently the income of the assessee was assessed at INR 3 8507810/- against the income declared by the assessee of INR 4 7391/-. Therefore agreed with the order of the learned AO assessee is in appeal before us. Further, against the order of the learned dispute resolution panel's directions, the assessing officer is in appeal before us.
8. Coming to the appeal of the learned assessing officer, the first ground challenges the deletion of certain comparables from the comparability analysis.
9. We have heard the parties on this issue. The learned dispute resolution panel has deleted E Infochpis Ltd holding that the dispute resolution panel has deleted this company as comparable for preceding assessment year under similar factual metrics and therefore the same is rejected for this year. The assessee's contention was that this company is functionally the similar as it is engaged in manufacturing and trading of printed circuit electronic boards and product design services. We do not find any infirmity in the order of the learned dispute resolution panel in deleting the above company from the comparability analysis. The Infosys Ltd was directed to be excluded by the learned dispute resolution panel following the decision of

the honourable jurisdictional Delhi High Court in Agnity. Therefore, against such rejection of the comparable no infirmity can be found. Third ware solutions Ltd was rejected, as it was not confronted to the assessee. The above comparable is been excluded by the learned dispute resolution panel on the grounds of the principles of natural justice which cannot be found fault with. Think soft Global services Ltd was excluded when it was found that that companies engaged in software validation and verification services to banking and financial services industries that is dissimilar to the functions performed by the assessee cannot be said that the exclusion is for the unreasonable reasons. In view of this ground number 1 of the appeal of the learned assessing officer is dismissed.

10. The 2nd ground of appeal is with respect to the finding of the learned dispute resolution panel that the interest paid by the assessee on late deposit of tax deduction at source of INR 5 1004/- holding that same is compensatory in nature. We find that for non-deduction on late deduction of tax there are specific penalties provided under the income tax act. Therefore, we do not find any reason to hold that interest paid by the assessee on late deposit of tax deduction at source is not the compensatory in nature. Accordingly, we do not find any infirmity in the order of the learned dispute resolution panel while deciding objection number 7 of the assessee. Accordingly, ground number 2 of the appeal of the learned assessing officer is dismissed.
11. Accordingly, appeal of the learned assessing officer is dismissed.
12. Now we come to the appeal of the assessee wherein assessee has raised 21 grounds of appeal. The ground number 17 is with respect to the denying the claim of benefit of standard deduction of 5% contained in the proviso to section 92C (2) of the act to the appellant. The learned authorised representative submitted that the learned income tax officer has passed an order u/s 154 of the income tax act on 5/11/2015 based on the order of the learned transfer pricing officer passed u/s 144C (13) dated 13/10/2015 wherein the transfer pricing adjustment made in order u/s 144C (13) as per the transfer pricing officer's report dated 16/10/2015 of INR 3 84277207/- is deleted. Accordingly, it was submitted that the appeal of the assessee now becomes academic on other grounds of appeal. The learned departmental representative also agreed on this issue that assessee has

been granted the benefit of the standard deduction and therefore the addition of INR 3 8427207/- is deleted. In view of the above fact, various grounds raised by the assessee in appeal of the assessee now become infructuous as it is now only academic in view of our decision in the appeal of the learned assessing officer wherein we have upheld the order of the learned dispute resolution panel. Accordingly, as the assessee has been granted full relief by the learned assessing officer himself the ground number 1 – 18 and ground number 20 and 21 of appeal of the assessee are dismissed.

13. This leaves us with the ground number 19 of the appeal of the assessee where the disallowance has been made of rupees 33208/- representing the loss on sale of fixed assets being capital in nature. The learned assessing officer as per para number 3.4 of the order noted that the profit and loss account shows and sum of rupees 33208/- has been debited by the assessee is a loss on sale of fixed assets which is capital expenditure and hence not allowable as assessee did not submit any explanation before him. The learned dispute resolution panel also noted) number 10.2 that it is item of capital and the assessee could not explain that how it is admissible as an item of revenue nature. We have also read objection number 5 raised by the assessee before the learned dispute resolution panel while it was only contended that no opportunity was given to explain the nature of expenses incurred by the assessee which are purely revenue in nature. Therefore, the contention of the assessee is also that it is revenue in nature, which we do not agree with. Accordingly, ground number 19 of the appeal is dismissed.

14. In the result appeal of the AO as well as of the assessee are dismissed.

Order pronounced in the open court on 14/06/2019.

-Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 14/06/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT

4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi