

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

IT(TP)A No.130/Bang/2019
Assessment years : 2014-15

M/s. Ocwen Financial Solutions Pvt. Ltd., Pritech Park, Block 12, Unit 2, 5B and 6A Floors, Bellandur Village, Sarjapur Marathahalli Ring Road, Bengaluru – 560 103. PAN : AAACO 7914 J	Vs.	Joint Commissioner of Income-tax, Special Range-5, Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Chavali Narayan, CA
Revenue by	:	Shri. K. Devarathna Kumar, Jt.CIT

Date of hearing	:	13.06.2019
Date of Pronouncement	:	07.08.2019

ORDER

Per Jason P Boaz, Accountant Member:

This appeal by the assessee is directed against the final order of assessment dated 27.11.2018 for Assessment Year 2014-15 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short ‘the Act’); pursuant to the directions issued by the Dispute Resolution Panel – 3, Mumbai under section 144C(5) of the Act on 30.07.2018.

2. Briefly stated, the facts of the case are as under:-

2.1 The assessee is an Indian company engaged in the provision of ITES / BPO; like back office support services, voice operations like customer care, query resolutions, data operations, etc., to its Associated Enterprises (AEs). For Assessment Year 2014-15, the assessee filed its return of income on 27.11.2014 declaring total income of Rs.14,88,12,640/-. The case was selected for scrutiny for this Assessment Year and the Assessing Officer (AO) made a reference under section 92CA(1) of the Act to the Transfer Pricing Officer (TPO) for determination of the arms length price (ALP) of the international transaction entered into by the assessee with its AEs. The TPO vide order under section 92CA(3) of the Act dated 20.10.2017 proposed a TP adjustment of Rs.10,55,28,658/- in respect of the assessee's international transactions in the ITES segment. Thereafter, the AO concluded the draft order of assessment under section 143(3) r.w.s. 144C(1) of the Act vide order dated 20.11.2017, wherein the assessee's income was determined at Rs.25,43,41,300/-; which included the TP adjustment of Rs.10,55,28,658/-.

2.2 Aggrieved, the assessee filed its objections thereto before the DRP and the DRP issued its directions thereon under section 144C(5) of the Act on 30.07.2018. Pursuant thereto, the AO passed the final order of assessment under section 143(3) r.w.s. 144C(13) of the Act vide order dated 27.11.2018 wherein the assessee's income was determined at Rs.25,43,41,298/- which included the addition on account of TP adjustment amounting to Rs.10,55,28,658/-. We find that subsequently the AO vide order under section 154 of the Act dated 09.01.2019 has determined the assessee's income at Rs.21,53,77,786/- on account of the TP adjustment of Rs.10,55,658/- being reduced to Rs.3,89,63,512/- in view of the relief granted by the DRP which was not incorporated by the AO / TPO in the impugned final order of assessment dated 27.11.2018.

3. Aggrieved by the final order of assessment dated 27.11.2018 for Assessment Year 2014-15, the assessee has preferred this appeal before the Tribunal wherein it has raised the following grounds:-

General Ground

1. The order of the learned AO is bad in law and facts and is liable to be quashed.

Grounds relating to validity of assessment order

2. The final assessment order passed by the learned AO is bad in law as the final assessment order prima facie has been passed beyond the statutory time line prescribed by Section 144C(13) of the Act and accordingly the final assessment order is liable to be quashed.

Grounds relating to transfer pricing matters:

3. The learned AO / Transfer Pricing Officer ("TPO") / DRP erred in making an addition of INR 6,65,65,146 to the total income of the Appellant on account of adjustment in the arm's length price for transactions entered by the Appellant with its associated enterprise.
4. The learned AO / TPO / DRP erred, in law and in facts, by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Rules, and conducting a fresh economic analysis for the determination of the ALP in connection with the impugned international transaction and holding that the Appellant's international transactions are not at arm's length.
5. The learned AO / TPO / DRP erred in law and in facts, in rejecting comparable companies by applying export earnings filter at less than 75 percent of total revenue instead of 25 percent.
6. The learned AO / TPO / DRP erred in law and in facts, by applying 10 times more and 10 times less turnover filter for rejection of comparable companies.
7. The learned AO / TPO / DRP erred in law and in facts, by rejecting Caliber Point Business Solutions Limited (Segmental) as comparable company identified by the

Appellant for having different accounting year / financial year (i.e. companies having accounting year / financial year other than March 31).

8. The learned AO / TPO / DRP erred in law and in facts, by rejecting the following companies based on unreasonable comparable criteria:
 - a) *ACE BPO Services Private Limited*
 - b) *Allsec Technologies Limited*
 - c) *Caliber Point Business Solutions Limited – (Segmental)*

d) *Informed Technologies India Private Limited*

9. The learned AO / TPO / DRP erred in law and in facts, by selecting MPS Limited as comparable company though the same is functionally dissimilar.
10. The learned AO / TPO / DRP erred in law and in facts, in treating foreign exchange gain/(loss), provision no longer required written back and miscellaneous income as non-operating in nature and erred in considering franchise tax as operating in nature while computing operating margin of the tested party.
11. The learned AO / TPO / DRP erred in law and in facts, by determining the arm's length margin / price using only single year data (i.e FY 2013-14) which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements and rejecting the data used by the assessee which was available to it at the relevant time and proceeded to use the non-contemporaneous data.
12. The learned AO / TPO / DRP erred in law and in facts, by comparing full-fledged risk bearing entities with assessee's captive operations without making suitable adjustments to account for differences in functional and risk profile of the Appellant vis-à-vis the comparables.

Consequential grounds:

13. The learned AO erred in law and in facts, in levying interest under sections 234B and 234C of the Act respectively.
14. The learned AO erred in law and in facts, by initiating penalty proceedings under section 274 read with section 271(1)(c) of the Act.

4. Ground Nos. 1 to 8, 11 and 12 on Transfer Pricing Issues

Ground No.2 on Validity of Assessment

4.1 At the outset of the hearing, the learned AR for the assessee submitted that the assessee is not pressing the following grounds in this appeal:-

1. Ground No.1 – General ground

2. Ground No.2 – Relating to Validity of Assessment order

3. Ground Nos. 3 to 8 and 11 and 12 – Relating to Transfer Pricing Issues

In View of the assessee not pressing the aforesaid ground Nos.1 to 8 and 11 and 12 (supra), the same are rendered infructuous and accordingly dismissed as not pressed.

5. Transfer Pricing Issues

5.1 Before proceeding to deal with the remaining ground Nos.9 and 10 (supra), brief facts in respect of Transfer Pricing issues are summarized hereunder.

5.2 The assessee, an Indian Company, is engaged in the provision of IT Enabled Services (ITES) to its AEs; which are essentially in the nature of back office support services that comprise voice operations; such as customer care, customer query resolution, etc., and data operations to support various departments of the AEs; such as default, loan and collateral administration, investor services and claims and final settlement, etc. For the year under consideration, the assessee has reported the following international transactions:-

International Transactions	Amount (Rs.)
Rendering IT enabled services	92,74,19,614/-

5.3 The financial results of the assessee during the year under consideration as worked out by the TPO are as under:-

Particulars	Amount (Rs.)
Income	92,74,19,614/-
Expenses	82,90,11,476/-
Operating Profit	98,40,813/-
OP/OC	11.87%

5.4 As per its TP study / Report, the assessee conducted a study adopting TNMM as the most appropriate method (MAM) based on which it selected the

following set of 10 companies as comparable with three years margin of 10.93% (PLI – being taken at OP/OC):-

Sr. No.	Name of the company	Weighted average of operating profits on operating cost (%)
1	ACE BPO Services Private Limited	6.93
2	Allsec Technologies Limited	- 4.75
3	Caliber Point Business Solutions Limited (Segmental)	5.86
4	Cosmic Global Limited	32.34
5	Datamatics Financial Services Limited	9.15
6	Informed Technologies India Limited	5.75
7	Jindal Intellicom Private Limited	1.60
8	Microgenetics Systems Limited	18.37
9	MPS Limited	24.17
10	R Systems International Limited (Segmental)	9.86
	Arithmetic Mean	10.93%

5.5 The TPO rejected the assessee's TP study for the reasons mentioned in his order and after carrying out a fresh comparability analysis by applying 9 filters listed at para 5.5 of his order proceeded to select the following 3 companies as the final set of comparables:-

Sl. No.	Name of the Company	OP / OC %
1.	Microland Ltd., (segmental)	9.54
2.	MPS Ltd.,	49.96
3.	Ninestar Information Technologies Ltd.,	14.31
	Average	24.60%

5.6 Based on the above, the TPO computed the ALP of the ITES segment of the assessee as under:-

Particulars	Amount (Rs.)
Price charged (Operating Revenue of assessee)	92,74,19,614/-
Operating Cost (OC)	82,92,11,476/-
Arms Length Mean Margin of comparables	24.60%
ALP of the International Transactions	1,03,29,48,299/-
103% of International Transactions (OR)	95,52,42,202/-
Shortfall being the TP adjustment under section 92CA	10,55,22,658/-

5.7 Subsequently, the AO included the TP adjustment of Rs.10,55,22,658/- in the draft order of assessment. The assessee filed its objections thereto before the DRP which issued its directions thereon under section 144C(5) of the Act allowing the assessee partial relief, whereby the TP adjustment was finally re-worked by the TPO at Rs.3,89,63,512/- which has finally been incorporated by the AO in order under section 154 of the Act dated 09.01.2019; after failing to do so in the impugned final order of assessment dated 27.11.2018 for Assessment Year 2014-15 against which the assessee is before us in this appeal. It is relevant to mention here that the DRP, while upholding the 3 comparables selected by the TPO, included one new company, M/s. Jindal Intellicom Pvt. Ltd., as a comparable. The final set of comparables as drawn up by the DRP are as under:-

Sl. No.	Name of the Company	OP / OC %
1.	Microland Ltd., (segmental)	9.54
2.	MPS Ltd.,	49.96
3.	Ninestar Information Technologies Ltd.,	14.31
4.	Jindal Intellicom Private Ltd.,	13.41

6. Ground No.9 – Assessee’s plea for exclusion of MPS Ltd., from the list of comparables

6.1.1 In this ground (supra), the assessee contends that the TPO / DRP erred in selecting this company, MPS Ltd., as a comparable though it is functionally dissimilar to the assessee and has had an exceptional year of operations in the year under consideration. According to the learned AR, before the TPO, the assessee had requested for the exclusion of MPS Ltd., from the set of comparables on the ground that it was functionally not comparable to the assessee; has a different business model; has had an exceptional year of operations; has earned supernormal profits, etc., and that the TPO himself for Assessment Year 2013-14, had rejected MPS Ltd., as a comparable on grounds of it being functionally different from the assessee (copy of TP order for Assessment Year 2013-14, the immediately preceding year placed at pages 1033 to 1086 of Paper Book).

6.1.2 The learned AR submitted that the type of functions / services engaged in by this company, MPS Ltd., i.e., the business of providing publishing solutions, providing type setting and digitalization services for overseas publishers through every stage from author to reader publishing process; this digital focus spans across STM / academic, higher education, trade and various Markets. In this regard, the learned AR contends it is quite evident that the assessee's functions / activities of providing back office support services, like voice operations in customer care and customer query resolutions to its AEs are quite different from those provided by MPS Ltd.

6.1.3 The learned A contends that though the assessee has put forth elaborate submissions for exclusion of MPS Ltd., from the final set of comparables before the TPO and the DRP (copies placed at pages 138 to 146 respectively), the TPO rejected the assessee's contentions without rendering any specific findings as to how and why MPS Ltd., is to be considered comparable to the assessee. It is further contended that a perusal of the DRP's order at page 17

thereof evidences that the DRP merely relied on the TPO's contentions and brushed aside the assessee's contentions without rendering any specific finding for its decision.

6.1.4 The learned AR submits that the assessee selected MPS Ltd., as a comparable company based on multiple year average margins. However, on becoming aware that this company is functionally dissimilar, the assessee in the case on hand pleads for exclusion of MPS Ltd. In this regard, the assessee placed reliance on the decision of the Special Bench of the ITAT, Chandigarh, in the case of DCIT Vs. Quark Systems (Pvt.) Ltd., (2010) 4 ITR (T) 606 (Chandigarh) and the decision of the Co-ordinate Bench of this Tribunal in the case of Akamai Technologies India Pvt. Ltd., Vs. DCIT in IT(TP)A No.1227/Bang/2010 dated 11.08.2016; in support of the proposition that even if the company has been selected in the assessee's TP study, the assessee cannot be precluded from raising an objection against these companies which are found to be functionally not comparable. It is prayed that in view of the above, MPS Ltd., be excluded from the final set of comparables in the case on hand.

6.2 Per contra, the learned DR supported the orders of the authorities below.

6.3.1 We have considered the rival contentions and perused the material on record. From an appraisal of the records before us, it is seen that this company 'MPS Ltd.,' was chosen by the assessee as a comparable in its TP study, wherein its profit level indicator (PLI) / Profit margin was taken at 21.17% by the assessee. So it is not the case of the assessee as alleged in the grounds of appeal (supra), that the TPO / DRP erred in law and facts in selecting MPS Ltd., as a comparable company though it is functionally dissimilar. This company, MPS Ltd., was chosen as a functionally comparable company by the assessee and accepted as such by the TPO. In our view, the objections of the assessee to the

exclusion of MPS Ltd., in the final set of comparables on grounds of functional dissimilarity has been triggered by the TPO's action in re-working of the PLI of MPS Ltd., at 51.09% as against 21.17% taken by the assessee.

6.3.2 The basic thrust of the assessee's arguments for excluding MPS Ltd., from the list of comparables is twofold. Firstly the assessee contends that MPS Ltd., should be excluded from the list of comparables as it has had an excellent year of operations due to assets of Element LLC being acquired by its AE, MPS North America LLC. This contention of the assessee was rejected by the TPO for the reason that the acquisition by its AE has not had any effect on the working of the PLI of the assessee as its profits have been arrived at on stand-alone financial statement and not on consolidated group basis. We find that except for raising this contention before the DRP and before us, the assessee has not been able to controvert the finding rendered by the TPO in the matter and we, therefore, reject this contention raised by the assessee.

6.3.3 The second and main contention of the assessee is that the company MPS Ltd., is to be excluded from the final set of comparables as it is not functionally comparable to the assessee since it has a different business model and has abnormal margins. In the case on hand, the fact of the matter is that the company; MPS Ltd., was chosen by the assessee itself as a functionally comparable company. As mentioned earlier in this order, the assessee's objections to the inclusion of MPS Ltd., have been triggered off by the action of the TPO in re-working the PLI of MPS Ltd., at 51.09%, when accepting it as a good comparable, as against PLI of 21.17% taken by the assessee in its study. We observe from the orders before us that both the assessee and the TPO have not clearly justified their respective contentions. In his findings on the comparability of MPS Ltd., the TPO in his order, while rejecting the assessee's plea for excluding this company, *inter alia*, on the ground that MPS Ltd., is

functionally different as it operates in a single segment of outsourced publishing services, has not dealt with this issue when he held this company comparable to the assessee at para 1.1.9 of his order. The assessee also, we find, after having suo moto chosen MPS Ltd., as a comparable, has not been able to establish with any clarity that it is not functionally comparable to the assessee, as both appear to be operating in providing back office support services / ITES to its AEs / clients. The DRP, it appears, has merely upheld the TPO's order mechanically without addressing the issues raised before it by way of a reasoned / speaking order. In this factual matrix of the matter, as discussed above, we are of the considered opinion that the issue of functional comparability of this company, MPS Ltd., vis-à-vis., the assessee is required to be examined thoroughly and therefore remand the same to the file of the TPO for fresh examination and decision thereon after addressing all the issues raised by the assessee and keeping in mind our observations in the matter. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details / submissions required which shall be duly considered before deciding the issue. We hold and direct accordingly. Consequently, ground No.9 of the assessee's appeal is allowed for statistical purposes.

7. Ground No.10 – Foreign Exchange Gain / Loss

7.1 In respect of this ground (supra), the assessee contends that the authorities below have erred in treating foreign exchange gain / loss as non-operating in nature while computing the margins for both the assessee as well as for the comparable companies.

7.2.1 After hearing the rival contentions and perusing the material on record, we find that the similar issue had come up for consideration before the Pune Bench of the ITAT in the assessee's own case for Assessment Year

2012-13 and the Tribunal in its order in ITA No.2669/PUN/2016 dated 21.01.2019, at para 16 thereof directed the TPO to treat foreign exchange gain / loss as part of operating income of the assessee holding as under:-

“16. We have perused the case record and considered the judicial pronouncement placed before us. The similar issue had come up for consideration before the Pune Bench of the Tribunal in ITA No. 590/PUN/2015 (supra.). The relevant part of the order of the Tribunal is as under:

"14. In ground No. 4 of the appeal, assessee has assailed assessment order in treating foreign exchange gain/ loss as non-operating in nature. The DRP has formed such opinion on the basis of Section IOTA of Safe Harbour Rules. As has been pointed earlier, 'Safe Harbour Rules' came into existence from September, 2013. They do not apply retrospectively and hence, have no application in the assessment year 2010-11. In the case of Approva System Pvt. Ltd Vs. CTT(A)-IT/ TP (supra.), the Co-ordinate Bench of Tribunal has held that foreign exchange gain/ loss is part of operating income. The relevant extract of findings of the Tribunal on this issue is as under:

"22. We have considered the rival arguments made by both the sides. As reproduced above in para 20 in the arguments advanced by the Ld. Counsel for the assessee, we find the Delhi Bench of the Tribunal in the case of Westfalia Separatator India Pvt. Ltd., (Supra) following various decisions has held that foreign exchange loss/gain is a part of the operating revenue/ cost. In the following decisions also (filed in the paper book by the assessee), it has been held that foreign exchange fluctuation cannot be excluded from the computation of the operating margin of the assessee company:

1. *SAP Labs India P. Ltd. Vs. ACIT - 44 SOT 156 (Bang)*
2. *Prakash I Shah reported in (2008) 115 ITD 167 (Mum) (SB)*
3. *Smt. Sujata Grover Vs. Dy. CIT (2002) 74 TTJ (Del) 347*
4. *M/ s. S. Narendra Vs. Addl.CIT - ITA No.6839/ Mum/ 2012 -Mumbai Tribunal*
5. *M/ s. Mercedes Benz Research & development India Pvt. Ltd. Vs. DCIT (IT/ TP A.No.1222/ Bang/ 2011 - Bangalore Tribunal*
6. *M/ s. Trilogy E-Business Software India Private Ltd., Vs. DCIT, ITA No.1054/ Bang/ 2011 - Bangalore Tribunal*
7. *Sumit Diamond (India) Pvt. Ltd. Vs. ACIT - ITA No. 7148/ Mum/ 2012 - Mumbai Tribunal*

8. *M/ s. Foursoft Ltd. Vs. The Dy.CIT - ITA No.1495/Hyd/ 2010*
9. *Techbooks International Pvt. Ltd. Vs. ACIT - ITA No. 722 Delhi Tribunal*
10. *M/ s. CISCO Systems (India) Private Ltd. Vs. The Dy.CIT-IT/ TP A.No.271/ Bang/ 2014 - Bangalore Tribunal*
11. *M/ s. Midteck (India) Ltd. Vs. The Dy.CIT-IT(TP) A. No. 70/ Bang/ 2014 - Bangalore Tribunal*
12. *M/ s. Petro Araldite Put. Ltd. The Dy.CIT - ITA No.1538/ Mum/ 2014 - Mumbai Tribunal*
13. *ACIT Vs. NGC Network India Put. Ltd. - ITA No, 5307/M/2008*

22.1 Respectfully following the decisions of the different Benches of the Tribunal, we set aside the order of the CIT(A) on this issue and direct the Assessing Officer to consider foreign exchange fluctuation gain as part of the operating income of the assessee."

*Respectfully following the same, we direct the Assessing Officer to treat foreign exchange gain/ loss as part of operating income of the assessee. Accordingly, **ground No. 4 raised in appeal by assessee is allowed.**"*

7.2.2 Respectfully following the decision of the Pune Bench of the ITAT in the assessee's own case for Assessment Year 2012-13 (supra), we direct the AO / TPO to treat foreign exchange gain / loss as part of the operating income of the assessee.

7.2.3 Since the other issues raised in the ground, like treatment of provision is no longer required written back, miscellaneous income and franchise tax as operating / non-operating, has not been urged before us, the same are rendered infructuous and accordingly dismissed.

8. Ground No.13 – Charging of interest under section 234C of the Act

8.1 In this ground (supra), the assessee denies itself liable to be charged interest u/s 234C of the Act. The charging of interest is consequential and

mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and we, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234C of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234C of the Act, if any, while giving effect of this order.

9. **In ground No.14 (supra)**, the assessee challenges the action of the AO in initiation of penalty proceedings under section 271(1)(C) of the Act. This ground being premature is dismissed as non-maintainable.

10. In the result, the assessee's appeal for Assessment Year 2014-15 is partly allowed.

Order pronounced in the open court on this 7th day of August, 2019.

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 7th August, 2019.

/NS/*

Copy to:

- | | | |
|---------------|---------------|-----------|
| 1. Appellants | 2. Respondent | 3. CIT |
| 5. DR | 6. Guard file | 4. CIT(A) |

By order

Assistant Registrar,
ITAT, Bangalore.