

**आयकर अपीलिय अधिकरण “J” न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI**

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री शमीम याहया लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI SHAMIM YAHYA, AM**

आयकर अपील सं/ ITA No. 114/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

Ness Technologies (India) Private Limited  
Unit No. 2, Building No. 5 and 6, Screne  
Properties SEZ Mindspace, Thane Belapur Road,  
Airoli, Navi Mumbai

..... Appellant  
/ अपीलार्थी

स्थायी लेखा सं / PAN – AAACA9649L

v/s

The Dy. Commissioner of Income Tax,  
Central Circle 6(1), Room No. 1905, 19<sup>th</sup> Floor,  
Air India Building, Nariman Point,  
Mumbai-400 021

.....Respondent  
/ प्रत्यर्थी

अपीलार्थी की ओर से / Appellant by	:	Shri Nitesh Joshi, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Rajesh Yadav, DR

सुनवाई की तारीख / Date of hearing:	19.09.2019
घोषणा की तारीख / Date of pronouncement :	19.09.2019

**आदेश / ORDER**

**महावीर सिंह, न्यायिक सदस्य/  
PER MAHAVIR SINGH, JM:**

This appeal of assessee is arising out of the order of Dispute Resolution Panel-45, Mumbai [in short 'DRP'], in objection No. 45, vide direction dated 28.09.2018. The Assessment was framed by the Dy. Commissioner of Income



Tax, Circle 6(1), Mumbai (in short 'DCIT/AO') for the AY 2014-15 vide order dated 22.11.2018 under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961(hereinafter 'the Act).

2. At the outset, the learned Counsel for the assessee stated that only comparable i.e. Thirdware Solutions Limited is to be adjudicated and in case this comparable is excluded, the assessee will be within the range of  $\pm 3\%$  for computing ALP on international transaction. For this, he referred the ground No 12 which read as under: -

*"Additional comparables introduced by the learned Transfer Pricing Officer*

*Erred in considering Thirdware Solutions Limited as a comparable without appreciating that it is not comparable due to difference in the function, asset and risk profile of the company vis-à-vis the Appellant and also the company is engaged in sale of software products and provision of IT support in connection with the product sold by it for which no segmental information is available;"*

3. The learned Counsel for the assessee stated that this company i.e. Thirdware Solutions Limited is engaged in the sale of software products and profession of IT support services in connection with the products sold by it. No segmental information is available to determine the profitability from sale

of products and profession of services respectively. According to assessee, in the absence of segmental data, Thirdware solutions Limited cannot be considered as comparable and hence, this should not be included while computing the assessee's margin of ALP. The learned Counsel for the assessee stated that the Transfer Pricing Officer included this as comparable and DRP also confirmed the action of the AO by observing in Para 24.1.3 as under: -

*"We have examined the submissions of the assessee. It is seen that the Transfer Pricing Officer has considered the company as a comparable on the basis of the revenue recognition policy which states that the company has earned income from provision of software development services.*

*We have gone through the revenue recognition policy of the company and it is seen that the license sold by the company are for software application. Software applications are nothing but end product of software development."*

4. In view of the above, the learned Counsel for the assessee stated that this issue is covered by the Tribunal's decision in assessee's own case in ITA No. 4722/Hyd/2011 for AY 2005-06 wherein, this was considered vide para 5 as under: -

"5. *Thirdware Solutions Ltd.: Ld. Counsel submitted that this company is functionally different for the following reasons: • As per reply to notice issued u/s 133(6), the company informed that it is engaged in implementation and customer services which include training, customized development and help desk services for ERP software and distribution of products of Quad Inc. and Hyperion Solutions Corporation*

*Various news articles available on the internet*

*<http://www.hinduonnet.com/2001/07/11/stories/0611000h.htm> stated that the company is a distributor of products; • As per the company's website [www.thirdware.net/ourcapabilities.htm](http://www.thirdware.net/ourcapabilities.htm).*

*has stated the company has partnered with QAD Inc to deliver the entire business cycle of MGF/PRO, a product of QAD Inc. from Presales, sales, training, consulting, implementation and support to application management services. • The following rulings have analysed and rejected this company as it is into trading of software licenses: - In toto Software*

*India Pvt. Ltd. (ITA No. 1196/Hyd/2010) - ITO Vs. Colt Technology Services India Pvt. Ltd. (ITA No. 609/Del/2011) - ACIT Vs. Sonata Software (ITA No. 3514/Mum/2010)-E-Gain Communications (P) Ltd. Vs. ITO, 23 SOT 385."*

And Tribunal finally directed the AO to exclude the same vide Para 9 as under:

*"9. Similarly, the other cases, Bodhtree consulting Ltd, Four Soft Ltd, Infosys,, Sankhya Infotech Ltd., Thirdware Solutions Ltd, Tata Elexi (seg) etc, are also to be excluded as they are considered and analysed in various cases relied on about functionality and why the same are not comparable to the companies like assessee. Bodhtree consulting Ltd also fails RPT filter as contended. In view of this, we are not discussing above comparables in detail, but, suffice to say that assessee's submissions are valid. The AO is directed to exclude the above comparables and re-work out the arm's length margin accordingly. The ground No.8 and additional ground raised by Assessee are considered as allowed."*

5. After hearing both the sides and going through the facts and circumstances of the case, we are noted that this issue is squarely covered by Tribunal's decision in assessee's own case as cited (supra), hence, we direct the Transfer Pricing Officer to exclude this as comparable being Thirdware Solutions Limited. The learned Counsel for the assessee also filed the details of ALP which are as under: -

Sr. N.	Name of the Company	DRP order	Rejecting thirdware
1.	Maveric System Limited	7.64%	7.64%
2.	Sasken Communication technologies Limited	10.28%	
3.	Zylog system limited	-13.49%	
4.	Personal System Limited	35.10%	
5.	RS Software (India) Limited	24.23%	
6.	Thirdware Solutions Ltd.	44.68%	
7.	Tata Elxsi Limited	18.43%	
8.	Average	18.12%	
9.	Nees India's margin	11.58%	
10.	Range (+3%)	11.58%	
11.	If at arm's length		ALP

6. From the above chart, it is clear that in case Thirdware Solutions Ltd is excluded, assessee goes within the range of  $\pm 3\%$  for computing ALP as detailed in the above chart. Hence, this issue of assessee's appeal is allowed. We also find that the assessee has raised various grounds on the issue i.e. raising from Ground 1 to 19 as under: -

"1. *General Ground*

*erred in assessing the total income of the Appellant at INR 49,50,52,230 against INR 31,83,30,750 as computed by the Appellant in its return of income:*

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*Transfer Pricing Grounds*

2. erred in making a transfer pricing adjustment of INR 17,67,21,477 to the total income of the Appellant on the premise that the international transactions entered by the Appellant with its associated enterprises ('AE') were not at arm's length;

*Reference made to the Transfer Pricing Officer*

3. erred in referring the Appellant's case to the Learned Transfer Pricing Officer ('TRO') under Section 92CA( I) of the act, without satisfying the conditions specified therein;

*Rejection of economic analysis undertaken In tile Appellant and using single Near data*

4. erred in rejecting the transfer pricing analysis undertaken by the Appellant under Section 92C of the Act using 3 year weighted average data of comparables and determining the arm's length margin/ price using data only for financial year ('FY') 2013-14;

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*Selection/ Rejection of comparables*

5. *erred in applying certain rejection criteria/ filters, in an arbitrary, subjective and erroneous manner for the purpose of selection of comparable companies;*

6. *erred in rejecting certain comparables selected by the Appellant by arbitrarily applying an upper turnover filter often times the Appellant's turnover and lower turnover filter of one tenth of the Appellant's turnover*

7. *erred in applying a filter of rejecting companies following a financial year other than April t March;*

8. *erred in revising the threshold of the export turnover filter applied by the Appellant from 25 to 75% of the revenue for selection of comparables;*

*Appellant's comparable company rejected by the learned TPO/ Hon'ble DRP*

9. *erred in rejecting Akshay Software Technologies Limited. Cat Technologies Limited. CG VAK Software and Exports Limited and Lucid Software Limited on the basis that the companies fail the*

*minimum turnover filter applied by the learned IPO without appreciating that the companies are functionally comparable to the Appellant:*

*10. erred in rejecting Caliber Point Business Solutions Limited on the basis that the company follows a financial year other than April-March:*

*11. erred in rejecting Goldstone Technologies limited as a comparable company on the basis that the said company fails the export turnover filter:*

*Additional comparables introduced by the learned TPO*

*12. Erred in considering Thirdware Solutions Limited as a comparable without appreciating that it is not comparable due to difference in the function, asset and risk profile of the company vis-a-vis the Appellant and also the company is engaged in sale of software products and provision of IT support in connection with the product sold by it for which no segmental information is available:*

13. erred in considering Tata Elxsi as a comparable without appreciating that it is not comparable due to difference in function, asset and risk profile of the company vis-à-vis the Appellant and also in the software development' segment considered by the TPOIDRP as comparable, the company provides various other services such as product design, engineering design and visual computing lab services which are not comparable to Appellant who is only into provision of software development services:

14. erred in considering Persistent Systems limited as a comparable without appreciating it is not comparable due to difference in function, asset and risk profile of the company vis-à-vis the Appellant and also the company is engaged in sale of software products and provision of software services for which no separate segmental information is available and hence not comparable to the Appellant;

15. erred in considering RS Software India Limited as a comparable without

*appreciating it is not comparable due to difference in Function, asset and risk profile of the company vis-à-vis the Appellant and also the company is mainly engaged in providing onsite activities which would be different from a company like the Appellant which is mainly engaged into providing services from India:*

*16. Erroneous margin computation erred in computing the operating margin of Zylog Systems Limited at (-)13.49% instead of (-)25.20% by considering expense on account of had debt written off as non-operating in nature;*

*Working Capital adjustment*

*17. erred in not granting the benefit of working capital adjustment to the Appellant while determining the margins of comparable companies in terms of Rule 1C(2)(e) of the Rules;*

*Risk Adjustment*

*18. erred in not granting the Appellant the benefit of risk adjustments which is required to be undertaken to account for the differences in level of risks assumed*

*between the comparable companies and the Appellant iii terms of Rule I OC(2Xe) of the Rules;*

*Benefit of +/- 3%*

*19. Benefit of +/-3% under proviso to Section 92C(2) of the Act be granted to the Appellant if the adjustment under transfer pricing falls within the range specified therein;"*

7. The learned Counsel for the assessee fairly conceded that in case, this comparable Thirdwaer Solutions Limited is excluded, all other grounds have become academic. Since, we have excluded this comparable for computing ALP as above, the other grounds have become academic and not adjudicated.

8. The second issue in this appeal of assessee is against the order of DRP confirming the action of the AO / Transfer Pricing Officer in making adjustment to international transactions of reimbursement of expenses by AE to the assessee. For this assessee drew our attention to the ground No. 22 and 23 which read as under: -

*"22. Erred in levying a mark-up of 11.08%, by selecting companies which are not engaged in providing the alleged services and hence not comparable to the Appellant;*

*23. Without prejudice to the above, erred in considering ICRA Management Consulting Services Limited, MCI Management (India) Limited, Kestone Management Services Private Limited, Inmacs Management Services Limited and Axis Integrated Systems Limited as a comparable without appreciating that these companies are not comparable to the alleged services provided by the Appellant.”*

9. The learned Counsel for the assessee has drawn our attention to ground No. 20 and 21 also, which are only the facts of the case, hence, the learned Counsel for the assessee stated that the only ground No. 22 and 23 is to be adjudicated. Briefly stated facts are that the assessee has recovered certain expenses on cost to cost basis from its AE. These expenses relate to cost of transfer, accommodation, visa, per diem and other day to day expenses incurred by employees of the assessee in the course of providing software services to its AE. These expenses were initially incurred by the assessee only for administrative convenience and there was no service element involved in the same. It was claimed that in view of these facts, there was no mark-up charged while recovering such expenses from AE. It was further explained that even AE recovers these expenses from the end clients on a cost to cost basis and does not charged any margin on it. The assessee also claimed that

recovery of such transfer and related expenses on a cost to cost basis is standard practice in the nature of industry. The assessee filed sample copies of debit notes raised by assessee on its AE along with the copies of correspondence, corresponding debit notes raised by AE on its end clients before Transfer Pricing Officer, which evidence the one to one correlation between such cost recharged. It was also explained by the assessee that this is as per inter-company agreement as well as agreement entered into between the AE and the end client wherein it is clearly agreed that the parties of such travel and related expenses shall be separately charged on a cost to cost basis. Neither Transfer Pricing Officer nor DRP accepted the contention of the assessee. Before DRP, it was also explained that similar adjustments have been made in AYs 2011-12, 2012-13 and 2013-14, which was deleted by ITAT in assessee's favour. Hence, it was contended that for current assessment year 2014-15, the facts are exactly identical but the DRP has not accepted the contentions and after reproducing the earlier years order of DRP i.e. 2013-14 confirmed the action of the Transfer Pricing Officer by observing in Para 36.2 as under: -

*"36.2 The facts remain same as AY 2013-14. The total amount of service charges for AY 2014-15 is ₹ 1,06,79,756/-. The Transfer Pricing Officer has rightly levied the 10% of the service charge on this amount and accordingly his contention is upheld."*

10. Now, before us, the learned Counsel for the assessee relied on the Tribunal's order in assessee's own case for AY 2013-14 in ITA No. 6099/Mum/2017 vide order dated 17.10.2017 has considered this issue vide Para 2.1 and decided the issue in favour of the assessee by following the earlier year's order is as under: -

*"2.1.Effective Ground of appeal (GOA) is about making transfer pricing adjustment of Rs.1.19 crores to the total income of the assessee.The TPO/AO held that IT.s of reimbursement of expenses paid by the AE to the assessee were not at arm's length. Representatives of both the sides agreed that identical issue has been deliberated upon and decided by the Tribunal in two AY.s (ITA No.696/Mum/2016 AY.2011-12 dtd. 11/11/2016 and ITA No.872/Mum/2017 dtd.25/5/2017,AY.2012-13). We would like to reproduce the relevant portion of the order of the Tribunal dtd 25/5/2017 (supra).*

*"2. Even though assessee has taken 11 grounds, the relevant grounds which were pressed during the course of hearing are ground No.4 to 8 which pertains to reimbursement*

*of expenses given by AE to the assessee and the adjustment made by AO while passing the order u/s.92CA(1) of the IT Act. 3. It was argued by learned AR that TPO erred in making a transfer pricing adjustment of Rs.2,43,29,305 in relation to the international transaction of reimbursement of expenses received by the assessee from the AE disregarding the fact that the expenses were primarily the liability of the AE and were incurred initially by the assessee only for administrative convenience. 4. Learned AR placed on record the order of the Tribunal in assessee's own case for the immediate preceding AY 2011-12 in ITA No.696 & 1006/Mum/2016 dated 11/11/2016 wherein exactly similar issue was dealt by the Tribunal and the addition so made was deleted. The precise observation of the Tribunal was as under:- 13. Now we may consider Grounds of appeal No. 22 & 23 in the appeal of the assessee, which relate to an addition of*

*Rs.2,19,51,284/- made by the Assessing Officer on account of transfer pricing adjustment in relation to the international transactions of reimbursement of expenses received by the assessee from its Associated Enterprises. In brief, the relevant facts in order to appreciate the said controversy can be summarized as follows. During the year under consideration, assessee had incurred certain expenses on behalf of its associated enterprises, which was subsequently recovered from the associated enterprises on cost to cost basis without any mark-up. Such reimbursements, which totalled to Rs.31,95,12,842/- , were in the nature of cost of travel, accommodation, visa expenses, per diem and other day to day expenses. On being show caused by the Transfer Pricing Officer as to why such recoveries be not subject to service charge of 10%, assessee explained that it was a standard practice to recover certain out of*

*pocket expenses incurred during the course of rendering services to the clients on a cost to cost basis and that it was only for administrative convenience that the payments towards such expenses were initially made by the assessee and later on recovered. The Transfer Pricing Officer was not satisfied with the explanation furnished by the assessee. The Transfer Pricing Officer observed that there was an element of service in such an arrangement and further noted that such expenses were recovered by the assessee from its associated enterprises after a certain time lag, during which period it had to bear the financial costs. For the aforesaid reasons, the Transfer Pricing Officer added 10% mark-up as means to compensate the assessee which came to Rs.3,19,51,284/- and such amount was determined as income in the hands of the assessee. 13.1 Before us, the Ld. Representative for the assessee vehemently pointed out that the lower authorities have*

*not appreciated the facts in their proper perspective. It has been explained that the impugned expenses relate to cost of travel, accommodation, visa expenses, per diem and other day to day expenses, which were incurred by the assessee's employees in the course of rendering services or other such expenses incurred on the specific request of the associated enterprises. Since the associated enterprises were responsible for such costs, assessee initially incurred the expenditure but later on recovered it from the associated enterprise and that there was no service element involved so as to justify earning of any service charge. Before us, Ld. Representative for the assessee also referred to voluminous material placed in the Paper Book, which was also available to the lower authorities, to point out that there was no profit-element in such arrangement of recovery of out of pocket expenses.. 13.2 On the other*

hand, Ld. Departmental Representative appearing for the Revenue emphasised that there was a considerable time lag between the incurring of such expenditure by the assessee company and its ultimate recovery from the associated enterprises and, therefore, it reflected incurrance of financial cost by the assessee, which ought to have been compensated by the associated enterprises, and, therefore, the transfer pricing adjustment in this regard made by the TPO/Assessing Officer is justified. 13.3 We have considered the rival submissions. At the outset, in our considered opinion, it would be appropriate to cull out appropriate facts which are relevant to decide the controversy. Notably, assessee is rendering services to its associated enterprises abroad for which it is to be compensated on a cost plus mark-up basis and such transactions have been separately bench-marked. In the course of rendering such services, assessee

*also incurred certain costs relating to travel, accommodation, visa, per diem and other day-to-day expenses, which were expended by its personnel. Further, assessee also incurred certain out of pocket expenses on the specific request of its associated enterprises. The responsibility for the aforesaid type of expenses was of the associated enterprises but the payment towards these costs were initially made by the assessee and thereafter, recoveries were made from the associated enterprises. Before the DRP, assessee also pointed out that such expenses, which are recovered by it from its associated enterprises, are in-turn recovered by the associated enterprises from the ultimate clients on a cost to cost basis. In this context, assessee furnished sample copies of debit notes raised by it on its associated enterprises alongwith copies of the corresponding debit notes raised by the associated enterprises on the ultimate clients. The aforesaid was*

*canvassed by the assessee to substantiate that there was one to one correlation and that the entire exercise did not involve any element of profit or mark-up in the hands of the associated enterprises. The aforesaid material is placed at pages 518 to 612 of the Paper Book and which was also before the lower authorities. At the time of hearing, the Ld. Representative for the assessee had also referred to page 613 to 645 of the Paper Book, wherein are placed copies of assessee's arrangement with the associated enterprises and also the sample agreements between the associated enterprises and the ultimate clients, which prescribe that all impugned travel and related expenses are separately chargeable on a cost to cost basis. All this material clearly brings out a pertinent feature that in the entire transaction involving payment of expenditure by the assessee, its recovery from the associated enterprises, which-in turn recovers it*

from the end clients, there is no involvement of any profit-element in the hands of the associated enterprises. Therefore, it would be wrong on the part of the income tax authorities to take a position and infer notionally about recovery of mark-up or profit element in the hands of assessee. It has also been brought out that it is a standard practice in the I.T. Industry to recover out of pocket expenses incurred during the course of providing services for the clients on a cost to cost basis. Under these circumstances, in our view, the Transfer Pricing Officer erred in proceeding to infer a non-existent understanding between assessee and its associated enterprises so as to impute income qua the instant transaction in terms of section 92(1) of the Act. Another pertinent fact which has not been rebutted by the Revenue before us is to the effect that in similar situation, from assessment year 2004-05 to 2010-11, no transfer pricing adjustment

*has been made by the Assessing Officer in relation to the International Transactions on recovery of expenses.*

*5. We had carefully gone through the order of the Tribunal in assessee's own case for the A.Y.2011-12 and found that exactly similar issue was dealt by the Tribunal and addition made on transfer pricing adjustment was deleted by observing that it was simply reimbursement of expenses.*

*6. Learned DR did not raise any objection with regard to issue being covered by the order of the Tribunal. Respectfully following the order of the Tribunal, we direct the AO to delete the addition so made on account reimbursement of expenses of Rs.2,43,21,305/-. In the result, appeal of the assessee is allowed in part in terms indicated hereinabove. Respectfully following the same, we decide the first effective Ground of Appeal (Grounds 1- 8) in favour of the assessee."*

11. On the other hand, the Departmental Representative heavily relied on the order of AO / Transfer Pricing Officer.



12. As the issue is squarely covered respectfully following the Tribunals order in assessee's own case for AY 2013-14 in ITA No. 6099/Mum/2017 vide order dated 17.10.2017, this issue of assessee's appeal is allowed.

**13. In the Result, the appeal of assessee is allowed.**

Order pronounced in the open court on 19.09.2019.

Sd/-

(शमीम याह्या / SHAMIM YAHYA)

(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 19.09.2019

सुदीप सरकार, व. निजी सचिव / Sudip Sarkar, Sr.PS

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai