

आयकर अपीलीय अधिकरण दिल्ली न्यायपीठ "आई-1" दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'I-1': NEW DELHI)**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री बी आर आर कुमार, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER &
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं / ITA No:- 583/Del/2017
निर्धारण वर्ष / Assessment Year: 2006-07

Alcatel Lucent India Ltd.
(‘ALIL’) 202-206, Tolstoy House,
Tolstoy Marg, New Delhi
PAN-AACCA8667N

.....अपीलार्थी / Appellant

vs

Addl CIT, Special Range-1,
Room No. 159A, C.R. Building,
I.P. Estate, New Delhi-110001

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by :Sh. Himanshu Sinha, Adv,
Ms. Vrinda Tulshan, Adv &
Sh. Bhuvan Dhoopar, Adv

प्रत्यर्थी की ओर से / Respondent by :Sh. Himanshu Aggarwal, C.A.

सुनवाई की तारीख / Date of Hearing : 25.09.2019	घोषणा की तारीख / Date of Pronouncement: 16.10.2019
---	---

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The present appeal filed by assessee is against order of AO passed under 144C r.w.s. 143(3) relating to assessment year 2006-07 of the Income Tax Act, 1961 (in short ‘the Act’).

2. The assessee has raised the following grounds of appeal which read as under:-

1. *The reference made by the Ld. AO suffers from jurisdictional error as he had not recorded any reason in the original draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Learned Assistant Commissioner of Income Tax, Transfer Pricing Officer- I(1)(1), New Delhi ('Ld. TPO') for computation of the Arm's Length Price (ALP), as is required under section 92CA(1) of the Act.*
2. *The order passed by the Ld. TPO for giving effect to the specific and stated directions issued by the Honourable Income Tax Appellate Tribunal (Hon'ble ITAT) is non-speaking in nature as it does not contain any observation on the specific contentions raised by the Appellant before the Ld. TPO with respect to rejection of Infosys Technologies Limited and mPhasis BFL Limited, in accordance with the directions issued by the Hon'ble ITAT.*
3. *The order passed by the Ld. TPO for giving effect to the directions issued by the Hon'ble ITAT contains observations made by the Ld. TPO on a matter which was neither restored back to the file of the Ld. TPO by the Hon'ble ITAT nor was contended by the Appellant before the Ld. TPO.*
4. *Without prejudice to the other grounds of objections, the Appellant objects to the proposed enhancement of the income of the Appellant by Rs. 218,850,219/- by the Ld. AO/Ld. TPO by holding that the international transaction of the Appellant pertaining to provision of software development and support service do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred by:*

4.1. disregarding the Arm's Length Price as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');

4.2. disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year [i.e. Financial Year ('FY') 2005-06] data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation, and in doing so have grossly erred in;

4.3 holding that at the time of creating/ maintaining the TP documentation, the Appellant could have procured current/ single year data (i.e. FY 2005-06 data) from sources other than the electronic databases, when infact practically no such other sources were available in case of most companies;

4.4. rejecting certain comparables on ground of significant related party transactions ('RPT') and accordingly, disregarding the fact that RPT data was not available at the time of preparation of TP documentation;

4.5. *by resorting to arbitrary rejection of low-profit/ loss making companies (forming part of the final set of companies selected by the Appellant as comparables) based on erroneous and inconsistent reasons, and thereby retaining only high-profit making companies, thus deriving an incorrect/ unrepresentative industry set for benchmarking the operating profit margin earned by the Appellant, and further, thus demonstrating an intention to arrive at a pre-formulated opinion without complete and adequate application of mind with the single-minded intention of making an addition to the returned income of the Appellant;*

4.6. *by arbitrarily applying a wages/ sales filter and thereby rejecting comparable companies having wages/ sales ratio less than 20 percent or greater than 60 percent;*

4.7. *violating the principles of natural justice by not providing the Appellant, the basis of determining the said wages/ sales ratio filter range of 20 to 60 percent, and thereby denying the Appellant a reasonable opportunity to study/ examine the said basis and provide its comments/ objections thereto;*

4.8. *arbitrarily excluding certain companies on the ground that they are functionally not comparable without providing sound reasons for such rejection; and*

4.9. *ignoring the business/commercial reality that since the Appellant is remunerated on an arm's length cost plus basis, i.e. it is compensated for all its costs plus a pre-agreed mark-up based on a benchmarking analysis, the Appellant undertakes minimal business risks as against comparable companies that are full fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact.*

5. *The Ld. AO has grossly erred in initiating penalty under section 271(1)(c) of the Act mechanically and without recording any satisfaction for its initiation.*

3. The only issue raised in the present appeal filed by the assessee is against the order of the AO/DRP/TPO in making transfer pricing adjustment of Rs. 21,88,50,219/-.

4. The ld. AR for the assessee at the outset pointed out that this is the second round of litigation before Tribunal. He further referred to the earlier order of the Tribunal and pointed out that while applying the TNMM method, for benchmarking the international transaction

undertaken by the assessee, the issue was set aside to the file of TPO with regard to the selection of two concerns i.e. Infosys Technologies Limited and mPhasis BFL Limited (hereinafter referred to as the mPhasis). The assessee is aggrieved by the order of AO/TPO in including the two concerns in the final set of comparables.

5. Briefly in the facts of the case, the assessee was providing Software Development & Support Services to Lucent Inc on behalf of its group companies, who catered to the telecom industries. The assessee had applied TNMM method to benchmark the international transaction by applying PLI of OP/OC. The AO made reference to the TPO under section 92CA(1) of the Act, who in turn passed order under section 92CA(3) of the Act. In final analysis eight concerns were selected as functionally comparable to the assessee. The mean margins of the said companies worked out to 23.56% as against the margin of the assessee at 14.89% and hence the upward adjustment made in the hands of the assessee. After the proceedings of the DRP, the finally selected concerns total led to seven, and the mean margins worked to 22.62%. The assessee in its appeal before the Tribunal was aggrieved by the inclusion of two concerns i.e. Infosys Technologies Limited and mPhasis BFL Limited. The Tribunal vide its order dated 23.4.2014 remitted the matter back to the file of AO/TPO. However, the TPO included both the concerns in the second round of

proceeding, and the assessee is aggrieved by the order of the AO/DRP/TPO in this regard. Hence the present appeal before us.

6. We have heard the rival contentions and perused the record. The first concern with which the assessee is aggrieved is Infosys Technologies Limited. The case of the assessee is before us is that not only the said concern had very high turnover as compared to the turnover of the assessee at 230 Crore, but there were difference in functional and risk profile of the assessee viz a viz Infosys Technologies Limited. In this regard, the assessee had filed a tabulator chart before the authorities below and even before the Tribunal in the first round. The ld. AR for the assessee further pointed out that the Tribunal in assessee's own case in ITA Nos. 2297 & 2298/Del/2008 with Cross Appeal Nos. 2244 & 2245/Del/2008 relating to Assessment Years 2003-04 & 2004-05, vide consolidated order dated 9.9.2015, had held that the concern Infosys Technologies Limited is functionally different from assessee, on account of the diversified functions and also on account of ownership of branded / proprietary products.

7. The ld. DR for the Revenue however strongly opposed the submissions put in by the ld. AR for the assessee and the pointed out that the Revenue earned from the proprietary products, by Infosys Technologies Limited, was negligible.

8. We find merit in the plea of the assessee that Infosys Technologies Limited is not to be included in the final list of comparables, firstly on account that the Tribunal in assessee's own case in Assessment Years 2003-04 and 2004-05 vide order dated 9.9.2015 has directed its exclusion. Further, we also find that the Infosys was engaged in diversified fields and it performed various functions as against the profile of the assessee wherein it was only providing Software Development Services to the group companies of Lucent Inc. Another aspect which needs to be kept in mind is the ownership of the branded / proprietary products by Infosys Technologies Limited, as against the facts that the assessee owns no intangible product company, even if it had meagre income cannot be compared with a non product company. Such is the proposition laid down by the Hon'ble Delhi High Court in *Rampgreen Solutions Pvt. Ltd. vs. Commissioner Of Income Tax, 377 ITR 533 (Delhi)*. Accordingly, we direct the AO to exclude the concern Infosys Technology Limited from the final list of the comparables.

9. Now coming to the next concern which is in dispute i.e. mPhasis BFL Limited. The plea of the ld. AR of the assessee before is that the said concern was functionally different and on this aspect the assessee had filed detailed submissions before the TPO which have not been considered by the TPO. Our attention was drawn to page 12 of the order of the TPO and the final analysis at page 34 of the order

of the TPO. The ld. AR for the assessee further drew our attention to the annual report of the said concern and referred to the business profile of the group which was engaged in different fields. He further pointed out that mPhasis BFL Limited also was a product company and it owned various product and such a concern could not be compared with the assessee. Another aspect which was pointed out by the learned AR for the assessee was the cost of Revenue totaling 260 Crores included Software Development charges of 161 Crores approximately, which in turn was an expenditure in foreign currency. In other words, it was a concern which was providing onsite services to the third party; whereas the assessee was working on offside module. The Learned AR for the assessee fairly admitted that the segmentals of the said concern were available and the TPO picked up the segment of the provision of I.T. Services but (a) the functional profile being different, could not apply and (b) the segmental were faulty as large as unallocable expenditure was booked.

10. The learned DR for the Revenue stressed that once the segmentals were available, which have been applied by the TPO then the order of the TPO / AO needs to be upheld in entirety.

11. On the perusal of record and after hearing both the authorized representatives, the issue which arises is with regard to the inclusion/exclusion of the concern mPhasis, while benchmarking the

international transactions undertaken by the assessee. Under the TP provisions what has to be seen whether the concern which is picked up is engaged in similar line of business i.e. it is functionally similar to the business module of the assessee and then the margins of the said concerns are to be compared with the margins of the assessee in order to determine whether the margins earned by the assessee are at arm's length or not. The first step is to see whether the concern is functionally similar or not. The case of the assessee before us is that mPhasis is not functionally similar to the assessee as the activities conducted by the said concern were diversified, wherein it offers business process operations, application development and maintenance, product engineering and customer support services, provides brokerage services such as trade execution, account opening and order processing to clients. It also provided financial services. As against this, the assessee was only engaged in providing contract Software Development Services to the group companies of Lucent inc. The perusal of the annual report of the said concern reflects the Business activities at page 7 & 8 that Application Development & Integration; Application Management; Testing Services; Usability Engineering; Quality Consulting and Advisory Services. At page 13 of the Annual Report it is also provided that 'Mframe' is Mphasis cross channel application integration framework, which helps customers rapidly develop a new generation of world-class solutions for sales and

service business processes in a measurably cost effective manner. Mframe is of proven methodology, a well-defined integration architecture framework, using Service Oriented Architecture (SOA), which leverages an experienced development team with offshore economics. Further the said concern also owned other products namely M-tech & Technology Rental Lab which were used by mPhasis for providing services to its AE's. In other words the said concern owns product, as against the assessee not owning any product. At this juncture, we hold that the said concern is not functionally comparable to the assessee. Further, we also note the fact pointed out by the learned AR for the assessee that the business model of mPhasis was different wherein it was providing onsite services to its third parties, wherein out of Software charges of Rs. 161 Crores debited to cost of Revenue, sum of Rs. 157 Crores had been incurred in foreign currency. Such fact also makes the said concern as functionally not comparable to the assessee. Though segmental details are available but the segmental are at fault as large part of expenses have been booked as an unallocable expenditure. In such facts and circumstances, we are of the view that the concern mPhasis is not functionally comparable to the assessee, hence the same is not to be included in the final list of said comparables, while benchmarking the international transactions undertaken by the assessee. In final analysis, we direct the AO to exclude both the

concerns Infosys Technologies Limited & mPhasis BFL Limited from the final list of comparables. The learned AR for the assessee fairly pointed out that in case the two concerns are excluded from the final list of comparables, then the margins of the assessee would be at arm's length. Thus we allow the grounds of appeal raised by the assessee.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 16th day of October, 2019.

Sd/-
(B.R.R. KUMAR)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली / दिनांक Dated : 16th October, 2019.

SH

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार,
आयकर अपीलीय अधिकरण ,दिल्ली
/ ITAT, Delhi

Draft dictated	25.09.2019
Draft placed before author	
Approved Draft comes to the Sr.PS/PS	
Order signed and pronounced on	
File sent to the Bench Clerk	17.10.2019
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	
Date of uploading on the website	16.10.2019