

IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH MUMBAI
BEFORE SHRI C.N.PRASAD, JUDICIAL MEMBER
&
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
IT(TP).A No.977/Mum/2017
(Assessment Year: 2012-13)

<p>Tech Mahindra Business Services Limited (Formerly known as Hutchison Global Services Limited)</p> <p>Spectrum Towers Mindspace Chincholi Bunder, Link Road Malad (West) Mumbai-400 064</p>	Vs.	<p>ACIT-13(3)(2) Room No.229 Aaykar Bhawan, M.K.Road Mumbai-400 020</p>
PAN/GIR No.AABCH8136L		
(Appellant)	..	(Respondent)

&

ITA No.4861/Mum/2017
(Assessment Year: 2013-14)

<p>Tech Mahindra Business Services Limited (Formerly known as Hutchison Global Services Limited)</p> <p>Spectrum Towers Mindspace Chincholi Bunder, Link Road Malad (West) Mumbai-400 064</p>	Vs.	<p>ACIT-13(3)(2) Room No.229 Aaykar Bhawan, M.K.Road Mumbai-400 020</p>
PAN/GIR No.AABCH8136L		
(Appellant)	..	(Respondent)

Revenue by	A.Mohan
Assessee by	J.D.Mistry
Date of Hearing	26/08/2019
Date of Pronouncement	22/11/2019

आदेश / ORDER

PER G.MANJUNATHA (A.M):

These two appeals filed by the assessee are directed against separate, but identical directions of DRP u/s 144 C(5) of the I.T.Act, 1961, in turn which is arisen out of assessment order passed by the AO u/s 143(3) r.w.s. 144C(1) of the I.T.Act, 1961 for the AY 2012-13 and 2013-14. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed-off by this consolidated order.

IT(TP)A.NO.977/Mum/2017:-

2. The assessee has more or less raised common grounds of appeal for both AY's. Therefore, for the sake of brevity, ground of appeal filed for AY 2012-13 are reproduced as under:-

1. Addition to total income of INR 83,52,94,173

On the facts and in the circumstances of the case and in law, the learned Assessing Officer ('AO') erred in making and the Hon'ble Dispute Resolution Panel ('DRP') further erred in confirming an addition of Rs. 83,52,94,173 to [he Appellant's total income computed under the provisions of the Income-tax Act, 1961 ('the Act').

2. Transfer Pricing (TP) Adjustment /Addition of INR 83,50,82,268 in Appellant's total income

On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer (TPO) and the teamed AO under the directions issued by the DRP erred in making a TP adjustment /addition of INR 83,50,82,268 to the Appellant's income, under the provisions of Chapter X of the Act.

3. TP adjustment of INR.83.06,70.260 in respect of voice based call centre services provided by the Appellant

3.1 Erroneous reference to the learned TPO, by the learned AO, without application of mind

On the facts and in the circumstances of the case and in law, the learned AO has erred in referring the matter to the learned TPO without specifying the reasons by which conditions specified under section 92C(3) of the Act have been satisfied.

3.2 Tax evasion motive not demonstrated

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the Hon'ble DRP further erred in upholding/confirming the action of the teamed TPO/ AO in failing to appreciate that the Appellant was claiming tax deduction under Section 10A of the Act and accordingly had no intention to shift profits outside India by manipulating the prices charged in its international transactions which is pre-requisite conditions to make any adjustment under the provision of Chapter X of the Act

3.3 Incorrect understanding of the appellant's business leading to wrong characterization of appellants business.

On the facts and in the circumstances of the case and in law, the learned TPO / AO and the DRP erred in concluding that the appellant undertakes activities of a higher functional significance than a mere BPO by placing reliance on adhoc searches conducted on third party websites and misinterpreting the details / documentary evidences submitted by the appellant.

The appellant prays that the aforesaid action being against the facts of the case and against the basic tenets of transfer pricing regulations be set aside.

3.4 Incorrect bifurcation of the appellants activities into front end and backend activities.

On the facts and in the circumstances of the case and in law, the learned TPO/AO and the Hon'ble DRP proceeded to incorrectly conclude that the appellant is engaged in two legs of activities viz. front end RPO activities involving responding to customer queries, handling their complaints, etc. and backend activities falling beyond the scope of a BPO involving analysis and reporting of data generated from front end activities.

3.5 Adjustment made to total income in respect of entire operations of the appellant instead of proportionate adjustment for the alleged high end activities carried out by the appellant

On the facts and in the circumstances of the case and in law, without prejudice to the appellant's stand that the learned TPO / AO and the Hon'ble DRP has erroneously bifurcated the appellants activities in two fogs of activities one BPO and another high end functions, the learned TPO / AO and the Hon'ble DRP erred in making an adjustment to the total income of the appellant instead of making an adjustment only to the relevant proportion of operations which are allegedly into high end operations as per the learned AO /TPO's contention.

3.6 Incorrect rejection of Appellant's benchmarking analysis and comparable companies

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding.' confirming the action of the learned TPO / AO of arbitrarily disregarding the comparable companies selected by the Appellant which were selected after carrying out a systematic and methodological search process and adopting an arbitrary approach by cherry picking comparable companies with a predetermined mind set of making an adjustment to total income of Appellant

3.7 incorrect selection of comparable companies by the learned TPO

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of me TPO of selection of companies which are functionally no comparable lo the Appellant's business.

The appellant prays that aforesaid action of the learned TPO/ AO and Hon'ble DRP is factually incongruent and against the principles of comparability enshrined in Rule 10B(2) of the Income-tax Rules, 1962 ('the Rules') and hence is liable lo be rejected or alternatively set aside.

3.8 Erroneous consideration of service-tax refund as, mm-operating income and consequent exclusion of the same from margin computation of the Appellant

On the facts and in the circumstances of the case and in law. the learned TPO ' AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO / AO of considering service-tax refund for service tax paid to third parties on all input services as non-operating and excluding the same from the margin computation of the Appellant, thereby erroneously reducing t he margin of the Appellant. The Appellant prays that the aforesaid action of the learned TPO/AO is incongruent is against the basic financial principles, therefore liable to be rejected.

3,9 Disregard of multiple year data contention

On the facts and in the circumstances of the. case and in law, the learned TPO . AO erred and the Hon'ble DRP further erred in upholding /confirming the action of the learned TPO / AO in rejecting the use of multiple year data for margin computation

On the facts and in the circumstances of the case and in law, the Learned TPO and Hon'ble DRP erred in erroneously rejecting the transfer pricing analysis undertaken by the Appellant under Section 92C of the Act

using 3 year average margin and determining the arm's length margin/ price using only data for Financial Year 2011-12, which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

3.10 Working capital adjustment disallowed

On the facts and in the circumstances of the case and in law the learned TPO / AO erred and the Hon'ble DRP further erred in upholding ' confirming the action of the learned TPO/ AO in not allowing working capital adjustment in accordance with the provisions of Rule 10B of the Rules to account for difference between international transactions and the comparable companies.

3.11 Risk adjustment disallowed

On the facts and in the circumstances of the case and in law. the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO/AO in not allowing risk adjustment in accordance with the provision of Rule 10B of the Rules to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned TPO / AO.

4. TP adjustment of INR 4412008 in respect of interest on outstanding amounts receivable by the appellant from the associated enterprises [AEs]

4.1 Erroneous imputation of interest on the outstanding amounts receivable from the AEs, by incorrectly re-characterizing the said amounts as interest free advance.

On the facts, and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO / AO of re-characterizing outstanding amounts receivable from the AEs as advances provided to AEs and imputing interest thereon, without appreciating the facts of the case. The very action of the learned TPO / AO and the Hon'ble DRP has resulted in secondary adjustment, which is not only against the express provisions of the Act but is also bad in law.

4.2 Erroneous cubicle ration of the credit period provided by the appellant to its AEs while determining the excess credit period for computing TP adjustment in respect of interest on outstanding amounts.

On the facts and circumstances of the case and in law, the learned TPO/ AO and the Hon'ble DRP erred in upholding the action of the learned TPO / AO of erroneously considering [the credit period of 30 days provided in the inter-company agreement instead of the actual average credit period of 38 days provided by the appellant to its AEs while determining the excess credit period.

4.3 Disregarding the credit period of TPO's own set of comparable companies while computing TP adjustment in respect of interest on outstanding amounts.

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in conveniently ignoring the credit period of TPO's own set of comparable companies which works out to around 47 days as against the actual average credit period of 38 days provided by the appellant to its AE thereby warranting a deletion of TP adjustment

4.4 Interest adjustment benefit not granted on amounts received before the expiry of the credit period

On the facts and in the circumstances of the case and in law, without prejudice to the appellant's stand that learned AO/TPO and the Hon'ble DRP has erroneously re-characterized outstanding Amounts receivable from the AEs advances and no interest should be imputed thereon, the learned AO / TPO and the Hon'ble DRP has erroneously not provided interest adjustment benefit to the appellant on amounts collected by the appellant from its AEs before the expiry of credit period*

5. Addition of interest income of Rs. 2,11,905 to the income of the appellant on the basis of the AIR data

On the facts and in the circumstances of the case and in law, the learned AO erred in and the Hon'ble DRP further erred in upholding' confirming the action of the learned AO of" making an addition of interest income of Rs. 2,11,905 to the income of the appellant without appreciating the fact that the said income was offered lo tax by the appellant in the subsequent assessment year on an accrual basis.

6. Addition of transfer pricing adjustment amounting to Rs. 83,50,82,268 to the book profit computed under section 115JB of the Act.

On the facts and in the circumstances of the case and in law, the learned AO erred m making an addition of the transfer pricing adjustments of Rs. 83,50,82,268 to the book profit computed under section of 15JB of the Act, without according any opportunity to the appellant and appreciating that the subject addition does not fall within any of the specified additions in explanation J to section 115JBof the Act

7. Initiation of Penalty Proceedings under section 271(1)(c) of the Act

On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271 (1)(c) of the Act.

The Appellant prays that the learned AO be directed to drop the penalty proceedings initialed under section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statement, documents and papers as may be considered necessary either at or before the appeal hearing.

3. The brief facts of case are that the assessee is a 100% subsidiary of HWP Investment Holding (India) Limited and provides voice based customer contact centre services (ITES) to Hutchison 3G UK Ltd, and Hutchison Australia Pty Ltd (AE). The ITES services rendered by the assessee are mainly in relation to handling services related queries, billing related queries, Mobile Number Portability related queries, Handset related queries, Network related queries and Price Plan related queries. Thus, assessee claimed that on the basis of the analysis of functions performed, assets employed and risks assumed by the assessee towards provision of ITES services, it is possible to characterize the assessee as a low risk service provider exposed to minimal risks associated with carrying out such activities.

4. During the year under consideration, the assessee has entered into following international transactions with Associated Enterprises (AE) as per Form No. 3CEB. The relevant details of international transactions are as follow:

Sl.No	Entity Name	List of international transactions	Amount Paid/ payable in Rs.	Method adopted
1	Vodafone Hutchison Australia Pty Limited (formerly known as Hutchinson 3G Australia Pty Limited)	Provision of voice e based customer contact centre services	29059,05,956/-	TNMM

2	Hutchison 3G UK Ltd Star House, 20 Grenfell Road, Maidenhead, SL 6 1 EH	Provision of voice based customer contact centre services	49181,00508/-	TNMM
3	Hutchison 3G Ireland Limited 3 rd Floor, 6-10 Suffolk Street, Dublin 2, Ireland	Provision of voice based customer contact centre services	36,4455,733/-	TNMM
4	Hutchison 3G Ireland Ltd	Reimbursement of employee cost	60,75,450/-	

5. The assessee has conducted Transfer Pricing Study of international transactions with Associated Enterprises (AE's) and adopted transactions net margin method as most appropriate method. The assessee has considered operating profit/total cost as profit level indicator. The assessee has computed OP/PC is at 14.09% and as against this, selected four comparables with a Arithmetic Mean Margin (AMM) of 11.27% and then, stated that international transactions with its AE are at Arm Length Price (ALP).

6. The assessee has filed its return of income for AY 2012-13 on 24/11/2012, declaring total income of Rs. 123,70,44,042/-. The case has been selected for scrutiny and the during the course of assessment proceedings, the Ld. AO noticed that the assessee has substantial international transactions exceeding Rs. 15 crores with its AE and therefore a reference was made u/s 92 CA(1) of the I.T.Act, 1961 to the TPO to determine ALP of international transactions of the assessee with AE's. During the TP proceedings, the Ld. TPO called upon the assessee to file necessary evidences to

justify to TP study conducted, in respect of international transactions and also, necessary details in respect of comparables selected to determine ALP of international transactions. The TPO, on the basis of information furnished by the assessee recomputed PLI of the assessee after excluding service tax refund from operating income and also after re-computing working capital adjustment has determined operating profit (OP/OC) of the assessee at 14.09%. Thereafter, the TPO has issued a show- cause notice and called upon the assessee to explain as to why certain comparables shall not be rejected/included to select final set of comparables to determine ALP of international transactions of the assessee with AE's. In response, the assessee has filed detailed written submissions and also, justified selection of comparables and computation of OP/OC. The TPO after considering relevant submissions of the assessee and also, taken note of various other parameters selected final set of three comparables with a operating profit margin of 25.66% and then, compared operating profit margin of the assessee, i.e 14.09% and suggested Transfer Pricing Adjustment(TPA) of Rs. 83,06,70,260/-, in respect of provision of ITES services. The relevant findings of the TPO are as under:-

13. Final Set of Comparables.

Therefore final set of comparables taking into consideration the above discussion are as under:

Comparables	OP/OC
<i>Jindal</i>	<i>1.58</i>
<i>Infosys BPO</i>	<i>33.92</i>
<i>Excel Infoways Limited (segmental)</i>	<i>41.48</i>
<i>Arithmetic mean</i>	25.66

Adjustment Calculation:

Thus it can be observed that the OP/OC of the comparables is 25.66% whereas that of the assessee is 14.09% Therefore the transaction is not at arm's length. Therefore the arm's length value is calculated as under:-

<i>Adjustment Calculation</i>		<i>Rs.cr</i>
<i>Operating revenue of the assesee</i>	<i>A</i>	<i>819.31</i>
<i>Operating Cost of the Assesee</i>	<i>B</i>	<i>718.11</i>
<i>Operating Profit of the Assesee</i>	<i>C=A-B</i>	<i>101.20</i>
<i>OP/OC of the assesee</i>	<i>D</i>	<i>14.09</i>
<i>OP?OC of the Comparables</i>	<i>E</i>	<i>25.66%</i>
<i>ALP Profit</i>	<i>F=E*B</i>	<i>184.267</i>
<i>ALP Revenue</i>	<i>G=B+F</i>	<i>902.377</i>
<i>Diff. in actual Revenue & Arms Length revenue</i>	<i>H=G-A</i>	<i>83.07</i>
<i>Transaction Value</i>	<i>I</i>	<i>819.31</i>
<i>5% of Transaction Value</i>	<i>J=5%*I</i>	<i>40.97</i>
<i>Proposed Adjustment</i>	<i>K</i>	<i>83.06070260</i>

7. Further, the TPO has also suggested TP Adjustment, being interest receivable in respect of receivable from AE's amounting to Rs 44,12,008/- on the ground that the opportunity cost of the fund is there, which could have yielded interest, in case the same had been invested elsewhere. Therefore, he has computed interest on delayed receivables beyond the credit period allowed in normal course of business to other than AE's and the rate of interest i.e charged is one applicable for relevant AE territory and the currency in which the receivable stands. Accordingly, the TPO has taken interest rate from Bloomberg Professional services data base and then computed interest receivable at Rs. 44,12,008/-.

8. Pursuant to TP adjustment as suggested by the TPO, the Ld. AO has passed draft assessment order u/s 143(3) r.w.s. 144(C)1) of the I.T.Act, 1961 on 08/03/2016 and made additions towards TP

Adjustment of Rs. 83,50,82,268/-, in respect of TP Adjustment as suggested by the AO towards international transactions of the assessee with its AE's and also, interest receivable on outstanding receivables from AE. The Ld. AO, further made additions towards discrepancy in respect of AIR information amounting to Rs. 2,11,905/-, on the ground that the assessee has failed to file reconciliation between financial transactions recorded in books of accounts and AIR data base of the Income tax department.

9. Aggrieved by the draft assessment order, the assessee has filed objections before the Ld.DRP-2, Mumbai and challenged additions made by the AO towards TP Adjustment in respect of international transactions of the assessee with AE's. The assessee has also challenged additions made by the AO towards difference in AIR reconciliation. The Ld.DRP, for the detailed reasons recorded in its directions issued u/s 144C(5) of the I.T.Act, 1961 rejected objections filed by the assessee and confirmed additions made by the AO towards TP adjustment as suggested by the TPO in respect of international transactions of the assessee with AE's. The DRP has also confirmed additions made by the AO towards difference in AIR information. Consequent to DRP directions, the AO has passed final assessment year u/s 143(3) r.w.s 144C (13) of the I.T.Act, 1961 on 12/01/2007 and made additions of Rs. 83,50,82,268/-, in respect of TP adjustment as suggested by the TPO on the basis of directions of Ld.DRP. The Ld. AO has also made additions towards difference in AIR information. aggrieved by the DRP directions, the assessee is in appeal before us.

10. The first issue that came up of our consideration from ground No.3 of assessee appeal is TP Adjustment of Rs. 83,06,70,260/- in respect of voice based call centre services provided by the assessee. The Id. AR for the assessee submitted that although, assessee has raised number of grounds, but the relevant ground is ground no. 3.7, which deals with incorrect selection of comparables companies by the Ld. TPO. The Ld. TPO has included two comparables to the final set of comparables of three companies and if Excel infoway Ltd. is excluded from the list of comparables, then the Arithmetic Mean Margin of comparables selected by the TPO workouts to 17.75%, which is within the range of (+) or(– 5%) and then, the TP Adjustment suggested by the TPO becomes 'Nil'. The Ld. AR for the assessee, further submitted that the assessee is an entity engaged in BPO services, but the comparables selected by the TPO is into high end ITES services, which is functionally not comparable to the assessee. The Ld. AR, further submitted that if you go through profile of Excel Infoway Ltd, the company engaged in providing IT/ BPO enabled services and development of infrastructure as against this , the assessee is engaged in providing merely voice based call centre services to its AE's. Further, it has earned net cost Margin of 41.48% from the segment of IT /BPO enabled services. Thus, Excel infoways Ltd. is an out layer whose margin is way beyond Assessee Company. Further, the company earning abnormal margin and hence, cannot be considered in Arm's Length scenario. The Ld. AR, further submitted that this company has been considered by various Tribunals and held that this is not a comparable for those companies, which are involved in providing low end BPO services. In this regard, he relied upon the decision of ITAT, Pune in the case of Emerson climate Technologies India Pvt.

Ltd. Vs DCIT in ITA No. 2847/Pune/2016. The Ld. AR for the assessee has also relied upon the decision of ITAT, Bangalore in the case of CGI Information systems and Management consultant Pvt Ltd vs ACIT (2018) 94 taxmann.com 97.

11. The Ld. DR on the other hand strongly supporting order of the TPO, as well as DRP submitted that the authorities have brought out clear facts to the effect that Excel infoways Ltd. is also engaged in similar business that of the assessee is providing its AE and hence, there is no reason to interfere in the findings of the Ld.DRP.

12. We have heard both the parties, perused material available on record and gone through orders of the authorities below. We find that the coordinate bench of ITAT, Pune, in the case of Emerson climate Technologies India Pvt.Ltd. Vs DCIT (supra) had considered M/s Excel Infoways Ltd., in the light of companies engaged in the business of providing low end BPO services and held that this company cannot be comparable to the companies, which are involved in providing low end BPO services to AE. We further noted that the Tribunal recorded categorically finding that this company showing fluctuating margins from year on year and also, it is in the process for closing down its ITES segment. Therefore, because of its different factors and also fluctuating margins, this company cannot be compared to the company, which is providing low end services to its AE. Similarly, the ITAT Bangalore in the case of CGI Information systems and Management consultant Pvt Ltd had considered M/s Excel Infoways Ltd. from the list of comparable selected by the TPO and by following, the decision of ITAT, Delhi in the case of Boxtor India Pvt.Ltd. vs and ACIT (2017) 85

taxmann.com 285 held that Excel Infoways Ltd cannot be compared, because of consistent diminishing revenue. In this case, on perusal of facts, we find that the assessee is engaged in providing low end BPO services to its AE's and if you compare the nature of services provided by Excel Infoways Ltd to the functions performed by the assessee, then certainly Excel Infoways Ltd cannot be compared to the profile of the assessee. Therefore, consistent with view taken by coordinate bench in the cases discussed hereinabove, we direct the AO to exclude M/s Excel Infoways Ltd from the final set of comparables.

13. The Id. AR for the assessee, at the time of hearing submitted that if Excel Infoways Ltd is excluded from final set of comparables, then the Arithmetic Mean Margin of comparables selected by the TPO is within (+ or -) 5% range, then the TP adjustment made by the AO becomes 'nil' and accordingly all other grounds relating to TP adjustment becomes infructuous. Therefore, we direct the AO to exclude Excel Infoways Ltd from the list of final set of comparables and then, determine Arithmetic Mean Margin of comparables to decide, whether any adjustment is required, in respect of international transactions of the assessee with its AE's. Insofar as, other grounds taken by the assessee in respect of TP Adjustment becomes infructuous and hence, all grounds are dismissed as not pressed.

14. The next issue that came up for our consideration from ground No. 4 of assessee appeal is TP Adjustment of Rs. 44,12,088/-, in respect of interest on outstanding amounts receivable by the assessee from the AE's. The Ld. AO has computed interest

receivable, on the ground that the assessee has allowed undue benefit to the AE by extending credit period, beyond the normal credit period allowed to other customers and hence, computed interest receivables from export receivables, wherever the receivables exceed the credit period. The Ld. AR for the assessee submitted that first of all there cannot be any adjustment in respect of interest receivable, because the assessee has not charged any interest on receivables from AE, as well as non AE. Further, the credit period allowed to AE is less than the credit period computed by the TPO in comparable cases. Therefore, there cannot be any adjustment in respect of interest receivables on receivables from AE's. In this regard, he relied upon the decision of Hon'ble Delhi High court in the case of PCIT vs Kusum Health Care (Pvt.Ltd.) 398 ITR 66.

15. The Ld. DR, on the other hand strongly supporting order of the TPO, as well as DRP submitted that the authorities brought out clear facts to the effect that the assessee has allowed extended credit period to the AE, thereby allowed undue benefit. Therefore, the opportunity cost relates to such extended credit period of receivables from AE shall be suitably bench marked and accordingly, there is no error in the findings of the Ld.TPO, as well as the Ld.DRP and their order should be upheld.

16. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the main arguments of the Id. AR for the assessee, in the light of average credit period computed by the TPO, in case of comparables that the average credit period allowed by the assessee to its AE is

less than the average credit period computed by the TPO in comparables cases and hence, there cannot be any adjustments in respect of interest on receivable from AE. We, further noted that the assessee has also taken support from the decision of Hon'ble Delhi High court in the case of Kusum Health Care Pvt.Ltd(supra) and argued that when ,the assessee has already factored the impact of the receivables on the working capital and thereby on its pricing / profitability vis-à-vis that of its comparables, any further adjustments only on the basis of the outstanding receivable would distort the picture and re-characterize the transactions and thus would be unjustified. We find that in this case, the facts with regard to factoring in impact of receivables on working capital vis-à-vis that of its comparables by the assessee is not coming out from the records. Further, the assessee has filed a chart of working of average credit period allowed to AE's, which is annexed as attachment in page no. 163 of paper book filed by the assessee. We find that although, in majority of the cases, the credit period is less than the average credit period worked out by the AO in comparable selected, but in some cases the credit period allowed to AE's is more than the average credit period computed by the AO. Therefore, we are of the considered view that the issue needs to be set aside to the file of the Ld.AO /TPO to determine the average credit period allowed by the assessee to AE and then, compare with average credit period of comparables to determine, whether any extended credit period is allowed to AE's or not. Further, while doing so, the Ld. AO shall take note of the decisions of Hon'ble Delhi High Court in the case of Kusum Health Care Pvt.Ltd (supra). Hence, we set aside the issue to the file of the AO for re-consideration of the issue, in light of the evidences filed by the assessee.

17. The next issue that came up of our consideration from ground no. 5 of assesee appeal is additions toward difference in AIR information amounting to Rs. 2,11,905/-. The Ld. AR for the assesee submitted that the AO was erred in making an addition of interest income of Rs. 2,11,905/- without appreciating the fact that the said income was offered to tax by the assesee in the subsequent AY on an accrual basis. The Ld. DR, on the other hand argued that the issue may be set aside to the AO to reconsider the arguments of the assesee that it has offered, the same for taxation in subsequent assessment years.

18. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We find that the AO has made additions toward difference in AIR information, in respect of interest income without considering the arguments of the assesee that the said income was subjected to tax in subsequent AY on an accrual basis. If at all, the said difference amount of interest income was subjected to tax in an earlier year or subsequent year, then there cannot be further additions towards the same during the year under consideration. Therefore, we set aside the issue to the file of the AO and direct him to verify the facts, in light of the claim of the assesee that the difference interest income was offered to tax in the subsequent assessment year on an accrual basis. In case, the Ld. AO finds that the said difference is subject to tax in subsequent years, then the additions made towards difference in interest income on the basis of AIR information should be deleted.

15. The next issue that came up of our consideration from ground No. 6 of assessee appeal is re-computation of book profit u/s 115JB, in respect of TP Adjustment amounting to Rs. 83,50,82,268/-. We find that we have directed the TPO to recompute TP Adjustment by excluding Excel Infoways Ltd from final set of comparables to determine any TP Adjustment is required, in respect of international transactions of the assessee with its AE's. It is the case of the assessee that if Excel Infoways Ltd is excluded from final set of comparables, then Arithmetic Mean Margin of comparables selected by the TPO is within + or – 5% range and consequently, no TP Adjustment is required, in respect of international transactions with AE's. Therefore, we set aside this issue to the file of the AO to decide the issue after determining the TP Adjustment in accordance with our directions given hereinabove in earlier paragraph.

19. In the result, appeal filed by the assessee for AY 2012-13 is treated as partly allowed for statistical purposes.

ITA No. 4861/Mum/2017

20. The assessee has raised the following grounds of appeal

1. ***Transfer Pricing (TP) Adjustment /Addition of INR 5229198 to Appellant's total income.***

On the facts and in the circumstances of the case and in law the learned Transfer Pricing officer (TPO) and the learned Assessing Officer (AO) under the directions issued by the Hon'ble Dispute Resolution Panel (DRP) erred in making a TP adjustment / addition of INR 52,29,92,198 to the Appellant's income, under the provisions of Chapter X of the Income-tax Act, 1961 ('the Act')

2. **TP adjustment of INR 52,0761,900 in respect of voice based call centre services provided by the Appellant**

2.1 erroneous reference to the learned TPO, by the learned AO, without application of mind

On the facts and in the circumstances of the case and in law the learned AO has erred in referring the matter to the learned TPO without specifying the reasons by which conditions specified under section 92C (3) of the Act have been satisfied.

2.2 Erroneous reliance by the Learned TPO on approach adopted in AY 2012-13, with a pre-determined mindset to make adjustment.

The learned AO/TPO erred in mechanically relying on the observations/conclusions made by the learned TPO in AY 2012-13 and not evaluating the same afresh. The learned AO/TPO's action of concluding the assessment by setting the appellant's position in AY 2013-14 remains almost the same as in AY 2012-13, without examining the facts himself afresh in AY 2013-14 demonstrates the learned AO/TPO's pre-determined mindset to make an adjustment.

Further, the learned AO/TPO erred in failing to appreciate that the principles of res judicata are not applicable to tax proceedings and hence the matter should be looked at afresh in AY 2013-14.

Further, Hon'ble DRP erred in upholding the above action of the Learned AO/TPO of placing complete reliance on AY 2012-13 observations and not undertaking a fresh examination of facts in AY 2013-14.

2.3 Incorrect understanding of the appellant's business leading to wrong characterization of appellants business.

On the facts and in the circumstances of the case and in law the Learned TPO/AO and the Hon'ble DRP erred in concluding that the appellant undertakes activities of a higher functional significance than a mere BPO by placing reliance on the adhoc searches conducted on third party websites during TP assessment for AY 2012-13, misinterpreting the details/documentary evidences submitted by the appellant during the TP assessment for AY 2012-13

2.4 Incorrect bifurcation of the appellants activities into front end and backend activities.

On the facts and in the circumstances of the case and in law, the learned TPO/AO and the Hon'ble DRP have erroneously concluded that the appellant is engaged in two legs of activities viz. front end RPO activities involving responding to customer queries, handling their complaints, etc. and backend activities which involve analysis and reporting of data generated from front end activities, on the basis of the observations and conclusions recorded in TP assessment for AY 2012-13.

The Ld. AO/TPO have erred and the Hon'ble DRP has further erred in failing to appreciate that the appellant is engaged in only providing voice based call centre services and the activities of report generation and analysis of data are undertaken only for efficient operation of the business.

2.5 Adjustment made to total income in respect of entire operations of the appellant instead of proportionate adjustment for the alleged high end activities carried out by the appellant

On the facts and in the circumstances of the case and in law, without prejudice to the appellant's stand that the (earned TPO / AO and the Hon'ble DRP has erroneously bifurcated the appellants activities in two legs of activities one BPO and another high end functions, the learned TPO / AO and the Hon'ble DRP erred in making an adjustment to the total income of the appellant instead of making an adjustment only to the relevant proportion of operations which are allegedly into high end operations as per the learned AO /TPO's contention.

2.6 Incorrect rejection of Appellant's benchmarking analysis and comparable companies

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding.' confirming the action of the learned TPO / AO of arbitrarily disregarding the comparable companies selected b> [he Appellant which were selected after carrying out a systematic and methodological search process and adopting an arbitrary approach by cherry picking comparable companies with a predetermined mind set of making an adjustment to total income of Appellant

2.7 incorrect selection of comparable companies by the learned TPO

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of me TPO of selection of companies on the basis of the observations recorded by the TPO's office in AY 2012-13. The comparables selected by the TPO were high end ITES companies which are lacked congruence vis-à-vis the functional profile of the appellant.

The appellant prays that aforesaid action of the learned TPO/ AO and Hon'ble DRP is factually incongruent and against the principles of comparability enshrined in Rule 10B(2) of the Income-tax Rules, 1962 ('the Rules') and hence is liable to be rejected or alternatively set aside.

2.8 Erroneous consideration of service-tax refund as, non-operating income and consequent exclusion of the same from margin computation of the Appellant

On the facts and in the circumstances of the case and in law. the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO / AO of considering service-tax refund for service tax paid to third parties on all input services as non-operating and excluding the same from the margin computation of the Appellant, thereby erroneously reducing the margin of the Appellant.

The Appellant prays that the aforesaid action of the learned TPO/AO is incongruent is against the basic financial principles, therefore liable to be rejected.

2.9 Disregard of multiple year data contention

On the facts and in the circumstances of the. case and in law, the learned TPO . AO erred and the Hon'ble DRP further erred in upholding /confirming the action of the learned TPO / AO in rejecting the use of multiple year data for margin computation

On the facts and in the circumstances of the case and in law, the Learned TPO and Hon'ble DRP erred in erroneously rejecting the transfer pricing analysis undertaken by the Appellant under Section 92C of the Act using 3 year average margin and determining the arm's length margin/ price using only data for Financial Year 2012-13, which was not available to the Appellant at the time of complying with the transfer pricing documentation requirements.

3. TP adjustment of INR 22,30,298 in respect of interest on outstanding amounts receivable by the appellant from the associated enterprises [AEs]

3.1 Erroneous imputation of interest on the outstanding amounts receivable from the AEs, by incorrectly re-characterizing the said amounts as interest free advance.

On the facts, and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO / AO of re-characterizing outstanding amounts receivable from the AEs as advances provided to AEs and imputing interest thereon, without appreciating the facts of the case. The very action of the learned TPO / AO and the Hon'ble DRP has resulted in secondary adjustment, which is not only against the express provisions of the Act but is also bad in law.

3.2 Erroneous computation of excess credit period for computing TP adjustment in respect of interest on outstanding amounts.

On the facts and circumstances of the case and in law, the learned TPO/AO and the Hon'ble DRP erred in upholding the action of the learned TPO / AO of erroneously considering [he credit period of 30 days

provided in the inter-company agreement instead of the actual average credit period of 43 days provided by the appellant to its AEs while determining the excess credit period.

3.3 Disregarding the credit period of TPO's own set of comparable companies while computing TP adjustment in respect of interest on outstanding amounts.

On the facts and in the circumstances of the case and in law, the learned TPO / AO erred and the Hon'ble DRP further erred in conveniently ignoring the credit period of TPO's own set of comparable companies which works out to around 58 days as against the actual average credit period of 43 days provided by the appellant to its AE thereby warranting a deletion of TP adjustment

3.4 Interest adjustment benefit not granted on amounts received before the expiry of the credit period

On the facts and in the circumstances of the case and in law, without prejudice to the appellant's* stand that learned AO/TPO and the Hon'ble DRP has erroneously re-characterized outstanding Amounts receivable from the AEs advances and no interest should be imputed thereon, the learned AO / TPO and the Hon'ble DRP has erroneously not provided interest adjustment benefit to the appellant on amounts collected by the appellant from its AEs before the expiry of credit period

3. Computation of Interest under section 234D of the Act

On the facts and in the circumstances of the case, and in law, the learned AO erred in computing interest under section 234D of the Act at Rs. 2,60,10,303/-

5. Initiation of Penalty Proceedings under section 271(1)(c) of the Act

On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 27(1)(c) of the Act.

The Appellant prays that the learned AO be directed to drop the penalty proceedings initiated under section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, amend or withdraw all or any of the Grounds of Appeal herein and to submit such statement, documents and papers as may be considered necessary either at or before the appeal hearing.

21. The first issue that came up of our consideration from ground No. 2.7 of assesee appeal is incorrect selection of comparables for the year under consideration. The TPO has selected M/s Excel

Infoways Ltd in the final set of comparables. We find that for the earlier year, the Tribunal has directed the AO to exclude M/s Excel Infoways Ltd from the final set of comparables to determine ALP of international transactions of the assessee with AE's. The reasons given by us in preceding paragraph for AY 2012-13 shall mutatis mutandis apply to this appeal also. Therefore, for similar reasons, we direct the AO to exclude M/s Excel Infoways Ltd from the final set of comparables and then, compare ALP of international transactions of the assessee with its AE's.

22. The next issue that came up of our consideration from ground no. 3 of assessee appeal is TP Adjustment of Rs. 22,30,298/-, in respect of interest on outstanding receivables from the AE. We find that a similar issue has been considered by us in preceding paragraph in ITA IT(TP)A No. 977/Mum/2017 for AY 2012-13. The reasons given by us in preceding paragraphs shall mutatis mutandis apply to this appeal also. Therefore, for details reasons recorded in preceding paragraph for AY 2012-13, we direct the AO to recompute interest receivables on receivables from AE, in light of our finding given for the AY 2012-13.

23. The next issue that came up of our consideration from ground No.4 of assessee appeal is computation of interest u/s 234D of the I.T.Act, 1961. Interest u/s 234D is consequential and mandatory in nature and it depends upon total income and tax payable or refundable determined by the AO. Therefore, we direct the AO to recompute interest payable, if any u/s 234D after computing total income as per the law.

24. In the result, appeal filed by the assessee is partly allowed for statistical purpose.

25. As a result, both appeals filed by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on this 22 /11/2019

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 22/11/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai