

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "B", BANGALORE**

**BEFORE SHRI N.V.VASUDEVAN, VICE PRESIDENT
AND**

SHRI B.R.BASKARAN, ACCOUNTANT MEMBER

**ITA No.359(Bang)/2016
(Assessment Year : 2011-12)**

M/s Parametrics Technology Private Limited.,
4th Floor, Phoenix Towers,
No.16 & 16/1, Museum Road,
Bangalore-560 025
PANNo.AABCP2629J

Appellant

Vs

The Deputy Commissioner of Income
Circle-5(1)(2), 2nd Floor, BMTc Building,
Koramangala,
Bangalore

Respondent

**Appellant by : Dr. Rakesh Gupta, Advocate &
Shri Piyush Jain, CA
Revenue by : Shri Muzaffar Hussain, CIT**

**Date of hearing : 20-02-202
Date of pronouncement : 13-05-2020**

ORDER

PER B.R.BASKARAN, ACCOUNTANT MEMBER :

The appeal of the assessee is directed against the assessment order dated 22-12-2015 passed by the assessing officer u/s 143(3) r.w.s 144C of the Act for assessment year

2011-12 in pursuance of directions given by Ld Dispute Resolution Panel (DRP).

2. The assessee is aggrieved by the Transfer pricing adjustment made in respect of payment made to its AE towards Maintenance services relating to software licenses.

3. The assessee company is engaged in the business of marketing of software license of its AE, sales support service, maintenance of software, consulting and training activities. During the year under consideration, the assessee has purchased software licences from its AE named PTC, USA for resale in India. It has also entered into maintenance services with its customers who purchased the software licenses. The assessee has remitted 40% of the sales realisation to its AE towards the cost of purchase of software. It has also remitted 40% of the maintenance charges collected from its customers towards maintenance of software to its AE. The dispute here is related to the amount remitted by the assessee to its AE towards maintenance charges.

4. The assessee submitted that the maintenance services are closely linked to sale or distribution of software licenses. Accordingly the assessee bench marked the entire transactions by aggregating them under TNMM method. The TPO accepted the TNMM method for sale of software licenses and held that the payment made by the assessee towards purchase of software licenses is at arms length. With regard to maintenance services, the TPO took the view that the same is in the nature of providing technical services. Accordingly, the TPO took the view that the

same should be benchmarked separately. He also re-characterised the transactions as in the nature of provision of technical services. After examining the functions performed by the assessee and its AE in respect of maintenance activities, the TPO took the view that the payment of 40% of maintenance charges is excessive. The TPO analysed the explanations given by the assessee and tabulated the same as under along with his remark:-

Sl.	Function	Remarks	Remarks of TPO
1	Signing annual maintenance agreement with customer	Assessee approaches the customer who has purchased software for renewing maintenance contract. Renewal is done by assessee.	Taxpayer pursues the customer, redresses grievances etc. So as to retain the customer. 5% weightage is given to it.
2	First level remote support service	Telephonic support, web based online support by application engineers and support engineers done by taxpayer. No function of AE.	Taxpayer provides this support from 8m to 5pm from Monday to Friday. It as to maintain a running call centre, which is the core activity in maintenance service provision. Call centre. Employees and support engineers are maintained by taxpayer. 60% of total maintenance service fees received is for this function.
3	Site visit to resolve defects/errors	Personnel of taxpayer visit customer to rectify errors when remote support service does not work. They also visit to provide general maintenance services. No function of taxpayer.	Taxpayer's application engineers also visit the premise of customers to debug any problems. Taxpayer has to maintain such engineers and send them, at its expense, to various sites in

			different metro cities of India for site visit. 25% weightage is given to this function.
4	Third level support when application engineers cannot resolve errors	Taxpayer acts as facilitator/coordinator between customer and AE. AE receives requests when taxpayer's personnel cannot resolve the error and resolves it.	The AE performs valuable function of giving advice to taxpayer when the error is due to very technical reason. Usually such error is due to problems in basic architecture/ algorithm of the software. So the matter is referred to those engineers who had developed the software. It is a rarity in relation to all errors complaints received by taxpayer. It also benefits the AE since such serious defect act as feedback; so that the AE can modify the defects by a 'service patch' or new version. 10% weightage is given to this function.

Accordingly, the TPO took the view that the revenue from maintenance services should be allocated between the assessee and its AE in the ratio of 90 : 10. Accordingly he determined the ALP of payment of maintenance services at 10% of the revenue realisation and accordingly made Transfer pricing adjustment of Rs.5,09,90,962/-.

5. The Ld DRP upheld the same with the following observations:-

“4.2 The Profit split method (PSM) is used where the income arising out of any particular transaction or class of transactions is to be split between the parties to the transaction. Since in the transaction relating to maintenance services the assessee and AE were involved, PSM is the most appropriate method to find out the ratio in which the income needs to be split between the two. The TPO has rightly divided the maintenance services into different tasks or functions and also determined the nature of responsibility or functions performed by each party. Maximum weight was given to the core activity and then revenue was split between parties on the basis of these tasks. So there doesn't appear to be any infirmity in the order of the TPO....”

Even though the assessee has countered the observations made by the TPO with regard to the services rendered by the assessee and its AE, yet the Ld DRP took the view that the assessee has first time made the fresh claim before it that the major services are rendered by its AE. Accordingly, the Ld DRP rejected the explanations of the assessee and confirmed the Transfer pricing adjustment.

6. Before us, the Ld A.R submitted that the maintenance services are closely linked with the distribution of software licences, which are owned by its AE. He submitted that in the trade circles, it is understood that the distribution activity is combined with maintenance services also. Hence the core technical problems could be resolved only by its AE. He

submitted that the TPO has accepted payment of 40% of sales realisation on sale of software licenses to be at arms length. Hence, he was not justified in segregating the maintenance services, re-characterising it as technical services and benchmarking the same under Profit Split Method. He submitted that the Ld DRP was not justified in not considering the explanations of the assessee in an objective manner.

7. The Ld A.R further submitted that the assessee has been consistently benchmarking the transactions in all the years under TNMM method by combining both sale of software licenses and maintenance services. The assessee's method has been accepted by the TPO in the immediately preceding year and in the succeeding year. Hence there is no reason for the tax authorities to take a different view in this year alone. By placing reliance on the decision rendered by Hon'ble Supreme Court in the case of Radhaswomy Satsangh (193 ITR 321), the Ld A.R submitted that the Principle of Consistency should have been followed by the tax authorities.

8. The Ld D.R submitted that the TPO has found that the maintenance services are separate functions. The Transfer Pricing Officer has further analysed the nature of services performed by the assessee and its AE and accordingly arrived at the conclusion that payment of 10% of the maintenance charges collected by the assessee would be at arms length as per functions performed by each of them. He submitted that the assessee has, however, given different kind of explanation before Ld DRP and hence the Ld DRP has rejected the same.

9. We heard the parties and perused the record. The assessee is engaged in the business of distribution of software licences of its AE. The assessee has submitted that the software licenses are distributed along with one year free maintenance services. After completion of one year period, the customer is free to enter into a separate contract for maintenance services on payment of agreed fees. The amount so collected is shared between the assessee and its AE. The assessee has retained 60% and the balance 40% was paid to its Associated Enterprise. The TPO has restricted the payment made to AE to 10% by holding that 10% shall be the ALP of the transactions. The same was upheld by Ld DRP.

10. It is the submission of the Ld A.R that the assessee has been consistently making payment of 40% of amount realised towards maintenance services to its AE year after year. The Ld A.R also took us to the orders passed by TPO in AY 2010-11, its TP study for that year in support of his submissions. The Ld A.R further submitted that the TPO has accepted the payment of 40% of maintenance services by the assessee to its AE in AY 2012-13 also. Accordingly he has contended that there was no reason to take a different view in this year alone.

11. The assessee herein is the distributor of software licenses of its AE. Hence there should not be any dispute that core technical problems could only be resolved by its AE. Unless proper and appropriate maintenance services are provided to its customers, it would be difficult to market the software licences. Hence there is merit in the contentions of the assessee that the

distribution of software licenses and their maintenance are inter-linked. Accordingly, we are inclined to agree with the contentions of the assessee. Hence we are of the view that the TPO was not justified in viewing maintenance services as separate from the distribution activity. We notice that the assessee and its AE have agreed that the assessee shall make payment of 40% of the revenue realised on sale of software licenses and on entering into maintenance contracts. The Ld A.R has further pointed out that the above method of sharing the revenue has been accepted to be at Arms length under TNMM method in the immediately preceding year and succeeding year. Hence we agree with the contentions of the assessee that there is no reason to take a different view in this year alone by re-characterising the payment relating to maintenance services alone. Accordingly, we set aside the order passed by the AO/TPO in this regard. Accordingly we direct them to determine ALP of transaction under TNMM method by aggregating them.

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

Order pronounced in the open court on 13/05/2020.

Sd/-

(N.V.VASUDEVAN)
VICE PRESIDENT
Dated: 13/05/2020.

**am/Desai S Murthy*

Sd/-

(B.R.BASKARAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

Asstt.Registrar