

IN THE INCOME-TAX APPELLATE TRIBUNAL “K” BENCH MUMBAI  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
SHRI M. BALAGANESH ACCOUNTANT MEMBER AND  
*Virtual Court No. IV*

ITA No.1560/Mum/2015 (Assessment Year 2010-11)

DCIT, Circle 1(3)1, Aayakar Bhavan, M.K. Road, Mumbai-400020	Vs.	.M/s. Teleperformance Global Services Private Limited, (Earlier Known as “Intel Global Services Private Limited”), Teleperformance Towers, Plot CST No. 1406-A/28, Mindspace, Malad, (West) Mumbai-400090  <b>PAN: AABCV2572L</b>
---	-----	---

Appellant

Respondent

ITA No.1664/Mum/2015 (Assessment Year 2010-11)

ITA No.5828/Mum/2015 (Assessment Year 2011-12)

M/s. Teleperformance Global Services Private Limited, (Earlier Known as “Intel Global Services Private Limited”), Teleperformance Towers, Plot CST No. 1406-A/28, Mindspace, Malad, (West) Mumbai-400090  <b>PAN: AABCV2572L</b>	Vs.	DCIT, Circle 1(3)1, Aayakar Bhavan, M.K. Road, Mumbai-400020.
---	-----	--

Appellant

Respondent

Appellant by

: Shri J.D. Mistry Sr Advocate  
a/w Sh. Madhur Agarwal Advocate

Revenue by

: Sh. Anand Mohan CIT-DR  
And Sh. Ahktar Hussain Sr DR

Date of Hearing : 17.08.2020

Date of Pronouncement : 17.08.2020

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. This set of three appeals, out of which two Cross appeal for AY 2010-11 and appeal by assessee for AY 2011-12 are directed against the assessment order under section 143(3) read with section 144C(13) dated 15.01.2015 and 29.10.2015 respectively, passed in pursuance of directions of Dispute Resolution Panel (DRP). In both the years the assessee has raised certain common grounds of appeal, therefore, all the appeals were clubbed heard together and are decided by common order. The revenue in its appeal for AY 2010-11 in ITA No. 1560/Mum/2015 has raised following grounds of appeal;

1. Whether on facts and circumstances of the case and in Law, the Hon'ble DRP is justified in deleting the adjustment made on account of adjustment of notional interest on the difference in price at which investment was made in equity shares of Associated Enterprise and price arrived on application of NAV method following the decision of Bombay High Court in the case of Vodafone India Services Pvt. Ltd. in Writ Petition No. 871 of 2014?

2. The assessee in its cross appeal for AY 2010-11 in ITA No. 1664/Mum/2015 has raised following grounds of appeal;—

1.0 Re: Adjustment of Rs. 2,70,65,250/- as regards provision of guarantee:

1.1 The learned Assessing Officer/Dispute Resolution Panel/ Transfer Pricing Officer have erred in making an upward adjustment of Rs. 2,70,65,250/- to the total income of the Appellant by holding that transaction of provision of guarantee by the Appellant to its Associated Enterprise ("AE") is not at arm's length.

1.2. The learned Assessing Officer/Dispute Resolution Panel/Transfer Pricing Officer erred in not appreciating that, considering the facts and circumstances of its case, provision of corporate guarantee and the performance guarantee cannot be considered as an "international transaction" which can be benchmarked.

1.3. Without prejudice to the above, the learned Assessing Officer / Dispute Resolution Panel/ Transfer Pricing Officer has erred in alleging that guarantees extended by the Appellant should be compensated by way of guarantee commission and thereby alleging a guarantee fee @ 1.25% for provision for corporate guarantee and 1.50% for provision of performance guarantee by simply relying on the DRP directions of the prior year i.e. AY 2009-10.

1.4. The Appellant submits that the Assessing Officer be directed to delete the upward adjustment of Rs. 2,70,65,250/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

2.0 Re: Adjustment of Rs. 22,60,391/- as regards provision of loans:

2.1. The learned Assessing Officer/Dispute Resolution Panel/Transfer Pricing Officer have erred in making an upward adjustment of Rs. 22,60,391/- to the total income of the Appellant by holding that international transaction relating to interest received on loans granted by the Appellant to its AEs is not at arm's length.

2.2. The learned Assessing Officer/the Dispute Resolution Panel/ the Transfer Pricing Officer erred in appreciating that under the given facts and circumstances of its case and the various judicial precedents and law prevailing on the subject, the interest received by it from its AEs on the loans granted by it is at arm's length and hence no adjustment in respect thereof was called for.

2.3. The Appellant submits that the Assessing Officer be directed to delete the upward adjustment of Rs. 22,60,391/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

3.0 Short Credit of TDS has been allowed to the extent of Rs. 16,801,746/-

3.1. The learned Assessing Officer has erred in allowing TDS Credit of Rs. 43,458,009/- instead of Rs.60,259,755/- while computing the total tax payable under Minimum Alternate Tax (MAT).

3.2. The Appellant submits that, it has got in its possession the TDS certificates to support its claim that the total TDS for the AY 2010-11 is worth Rs. 60,259,755/-. The Appellant further submits that opportunity of being heard was not given to produce the TDS certificates during the assessment proceedings.

3.3. The Appellant submits that the Assessing Officer be directed to allow the TDS credit of Rs.60,259,755/- and to re-compute its tax liability accordingly.

4.0 Error in computing the tax payable under Minimum Alternate Tax (MAT) to the extent of Rs.39,930,634/-

4.1 The learned Assessing Officer has erred in computing the tax payable at 18% instead of 15% on the book profit under Minimum Alternate Tax (MAT).

4.2 The Appellant submits that the Assessing Officer be directed to re-compute the tax payable at 15% instead of 18% on the book profit computed under section 115JB of the Act.

3. Brief facts of the case are that the assessee-company is engaged in Business of providing web enabled customer care services, business process outsources services, and information technology enabled services (ITes). The assessee-company filed its return of income for Assessment Year 2010-11 on 05.10.2010 declaring total income at Rs. Nill after claiming deduction under section 10A. Along with the return of income, the assessee furnished report under Form 3CEB, reporting certain international transaction with its

associated enterprises (AEs). The case was selected for scrutiny. The assessing officer consequent on reporting international transaction made reference to the transfer pricing officer (TPO) for computation of arms length price (ALP) of international transaction. The TPO on receipt of reference and after considering the submissions of the assessee suggested following adjustment in its order dated 23.01.2014;

	Particulars of adjustments	Amount Rs.
1	Interest on loans to AEs	22,60,391/-
2	Corporate guarantee	240,72,000/-
3	Performance guarantee	29,93,250/-
4	Investment in shares in Itelnet Global Philippines	40,34,245

4. On receipt of report of TPO, the AO made adjustment/ additions in the draft assessment order passed under section 143(3) read with section 144C. The assessee was served with the copy of the draft assessment order. The assessee exercised its option to file objection before Dispute Resolution Panel (DRP). The Id. DRP upheld the adjustments on item No. 1 to 3 (shown in table above), however, on account of adjustment for investments in shares in AE, was deleted by following the order of Bombay High Court in Vodafone India Services Pvt Ltd (2014) 368 ITR 1. The DRP while upholding the adjustments on item No. 1 to 3 followed the directions of their predecessor in

AY 2008-09 and 2009-10. Further aggrieved both the parties have filed their respective appeal.

5. We have heard the submissions of Sh. J.D. Mistry learned Senior Advocate (Id. AR) for the assessee and Sh. Anand Mohan learned Commissioner of Income Tax/ departmental representative ( CIT- DR) for the revenue and perused the record carefully. At the outset the Id. Senior Counsel (Id. AR) for the assessee submits that the appeal filed by the revenue is liable to be dismissed as the tax effect is less than the monetary limit of Rs. 50 lakhs. The Id. DR for the revenue accepted that the monetary limit of tax effect in the appeal of revenue is below the monetary limit of tax effect. Considering the submission of the parties that the adjustment deleted by the Id DRP was only of Rs. 40,34,245/-, which is admittedly below the prescribed limit of Rs. 50 lakhs fixed by CBDT in its Circular for filing appeal by the revenue before the Tribunal. Thus, the appeal filed by the revenue is dismissed due to low tax effect.
6. Now, turning the various grounds of appeal raised by the assessee, the ground No. 1 relates to adjustment on account of corporate and performance guarantee. The Id. AR for the assessee submits that provision of corporate guarantee does not lead to any income generation for the assessee and does not fall within the ambit of section 92C of the Act. The determination of

guarantee fee of 1.25% p.a. is arbitrary and incorrect. The Tribunal in various decision held that guarantee is not an international transaction.

7. In alternative submissions the Id. AR for the assessee submits that the DRP confirmed the action of TPO by following the order of their predecessor for AY 2008-09 and 2009-10. In appeal for AY 2008-09 & 2009-10 the Tribunal in ITA No. 483/Mum/2013 and 1808/Mum/2014 dated 16<sup>th</sup> June 2020, by following the decision of Bombay High Court in Everest Kento Cylinders Ltd [2015] 58 taxmann.com 254 (Bombay), restricted the guarantee commission fee @0.5%. Thus, the ground of appeal raised by the assessee is covered by the decision of Tribunal for AY 2008-09 & 2009-10.
8. So far as performance guarantee is concerned the Id. AR for the assessee submits that in AY 2008-09 & 2009-10, the assessee has not argued against charging the performance guarantee due to smallness of the amount. The Id. AR for the assessee further submits that the performance of the contract against which said performance guarantee was extended, was executed by the assessee itself. The TPO and the DRP has not appreciated the fact that entire revenue from the performance of the contract flows to the assessee. There was no risk as regard the performance guarantee and it is the assessee who guaranteed for its own performance. Thus, there is no question of determination of arm's length price. The Id. AR for the assessee submits that

the copy of the letter of guarantee issued by HSBC Bank dated 21 July 2009 and its extension of validity dated 30.09.2009 is placed on record. In without prejudice submission the ld. AR for the assessee submits that by following the order of AY 2008-09 & 2009-10, the TPO may be directed to adopt the rate of 0.5% for the purpose of determining the arms' length price of guarantee.

9. On the other hand the ld. DR for the revenue supported the order of TPO/DRP. The ld. DR further submits that he has no issue if the order of Tribunal for AY 2008-09 & 2009-10 is followed in deciding this ground of appeal.

10. We have considered the rival submissions of the parties and have gone through the orders of the lower tax authorities. We have noted that on identical grounds of appeal, the coordinate bench of the Tribunal in appeal for AY 2008-09 & 2010-11(authored by JM) passed the following order;

“16. We have considered the submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by the assessee. The ld. AR for the assessee vehemently submitted that mere extending corporate and performance guarantee does not lead to any income generation for the assessee and hence, does not fall within the ambit of section 92 of the Act and relied on the decisions of coordinate bench (supra). However, the Hon'ble Jurisdictional High Court in the case of Everest Kento Cylinders Ltd. Vs DCIT (supra), while considering a similar situation, where in the matter of guarantee commission fee the adjustment made by the income-tax authorities was

based on instances of commercial banks providing guarantees. The Hon'ble High Court has explained that instances of commercial banks providing guarantees could not be compared to instances of issuance of corporate guarantee. As per Bombay High Court, when commercial banks issue bank guarantees, the same is quite distinct in character than the situation where a corporate issues guarantee to the effect that, if a subsidiary associated enterprise does not repay a loan, the same would be made good by such corporate. Keeping the aforesaid ratio of the Bombay High Court, it is quite clear that the manner in which the Transfer Pricing Officer has proceeded to determine the arm's length rate based on the probable rate being charged by the commercial banks is not justified. In this view of the matter, three per cent rate of guarantee commission fee determined as arm's length rate by the income-tax authorities cannot be approved, though the Id. DRP in its direction has already restricted it to 1.5%. In the alternative, the addition that is required to be sustained is the position canvassed by the assessee before the Transfer Pricing Officer *i.e.* adoption of 0.50 per cent as arm's length rate for the purpose of determining the arm's length income on account of guarantee commission fee in the instant case. Considering the entirety of facts and circumstances of the case and on the basis of the material available on record, the rate of 0.50 per cent is to be upheld for the purpose of determining the arm's length rate of the guarantee commission fee. In the result this ground of appeal is partly allowed.”

11. Considering the order of the Tribunal for earlier years, we direct the AO/TPO to compute the corporate guarantee @0.5%. So far as charging the performance guarantee is concerned, the Id. AR for the assessee vehemently submitted that the lower authorities have not appreciated the fact that entire revenue from the performance of the contract flows to the assessee guaranteed for its own performance and there was no risk as regard the

performance guarantee and it is the assessee who guaranteed for its own performance. We have seen that the assessee in its statement of facts before Id DRP has specifically pleaded that in case of performance guarantee extended by the assessee, the contract entered by the Itelnet UK Ltd (on behalf of which the assessee has provided performance guarantee) with third party customers, it was actually the assessee who is undertaken they were as Itelnet UK Ltd subcontracts the work back to the assessee. The assessee is not exposed to any default risk on account of performance guarantee as it is the assessee itself who performs the work for the customer. Thus, the provision of performance guarantee by assessee with third party on behalf of its AE, Itelnet UK Ltd, has benefited the assessee itself since the actual service to be provided to third party was outsourced by the assessee by its AE. It is further pleaded that entire compensation received from the customer back to the assessee. We have noted that there is no finding of TPO on these facts. The TPO while making adjustment simply follows the adjustment made in earlier years. Similarly, this aspect is not considered by the learned DRP. Considering the aforesaid factual aspects this part of ground of appeal related with performance guarantee is restored to the file of assessing officer/TPO to examine the effect and pass the order a fresh in accordance with law.

12. In the result this part of grounds of appeal related with performance guarantee is allowed for statistical purpose.

13. Ground No. 2 relates to adjustment of interest received from loans to AEs.

The ld. AR for the assessee submits that the assessee provided loans to its four AEs. The TPO made adjustment of Rs. 22,60,391/- based on domestic cost of borrowing i.e. State bank of India (SBI) rate + 3% markup resulting in to a total rate of 9% for all the loans. While making adjustment the TPO followed the order of DRP for AY 2008-09 and 2009-10. The DRP affirmed the action by following the order of their predecessor for AY 2008-09 and 2009-10. The ld. AR for the assessee submits that the assessee had correctly charged and benchmarked interest received on loans advanced to AEs at LIBOR plus 2%. The ld AR for the assessee submits that rate of interest on loans advanced to foreign company should be computed based on the market determined interest rate applicable to currency and the country in which loan is to be repaid and hence rate of SBI fixed deposit rate cannot be applied for the purpose of benchmarking. The ld AR for the assessee also relied on the following case laws;

- CIT Vs Cotton Naturals (P) Ltd [2015] 55 taxmann.com 523 (Delhi),
- Ion Exchange (I) Ltd (ITA No. 5109/Mum/2013)
- Hinduja Global Solution Ltd (2013) taxmann.com 348 (Mum Tri),
- Aurinpro Solution Ltd [2013] 33taxmann.com 187(Mum Trib),

➤ Tata Autocomp System Ltd ( ITA No. 7354/Mum/2011)

14. On the other hand the ld. DR for the revenue supported the order of the TPO/DRP.

15. We have considered the rival submissions of the parties and have gone through the orders of the lower tax authorities. We have noted that on identical grounds of appeal, the coordinate bench of the Tribunal in appeal for AY 2008-09 & 2010-11(authored by JM) passed the following order;

“19. We have considered the submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by the assessee. The TPO made adjustment on account of loan based on third party domestic rate i.e. Crisil taking the rate @ 14.39%. The DRP after considering the submissions on the objections of the assessee and directed to made adjustment based on domestic cost of borrowing + 3% markup. The ld. AR for the assessee vehemently submitted that direction of ld. DRP resulted in to total rate of interest at 8.8%. The Hon'ble Delhi High Court in CIT Vs Cotton Naturals (I) (P) Ltd (supra) while considering the question of law whether the Income-Tax Appellate Tribunal was right in holding that the interest @ 4% p.a. charged by the respondent assessee from its subsidiary i.e. the Associated Enterprise was arm's length rate of interest and the adjustment made in the Assessment Order determining the arms' length rate of interest at 12.20% was unwarranted, held that Arm's length interest rate for loan advanced to foreign subsidiary by Indian company should be computed based on market determined interest rate applicable to currency in which loan has to be repaid.

20. Further, the Hon'ble Jurisdictional High Court in CIT Vs Tata Autocomp System Ltd (supra) also held that where assessee advanced loans to its AE situated in Germany, rate of interest was to be determined on basis

of rate prevailing in Germany where loan had been consumed. Considering the aforesaid decisions of Hon'ble High Courts, we direct the AO/TPO to recompute the adjustment of interest on loan by following the decision of CIT Vs Tata Autocomp System Ltd (supra). The assessee is directed to provide necessary details to AO/TPO. In the result this Ground of appeal is allowed for statistical purpose.”

16. Considering the order of the Tribunal for earlier years, we direct the AO/TPO to compute the interest by following the order of Tribunal in AY 2008-09 and 2009-10 dated 16.06.2020. In the result this ground of appeal is partly allowed.
17. Ground No. 3 relates to short deduction of TDS of Rs. 168,01,746/- The ld AR for the assessee submits that while filing return of income the assessee claimed tax credit of Rs. 6,02,59,755/-. The AO while passing the assessment order and computing tax liability granted credit to the extent of Rs. 4,3458,009/-, without assigning any reasons. The ld AR for the assessee prayed for passing appropriate direction to the AO.
18. The ld. DR for the revenue fairly submits that this issue may be restored to AO to verify the facts and to grant the appropriate credit of tax to the assessee.
19. Considering the submissions of the ld. representative of the parties the AO is directed to verify the fact and grant appropriate relief to the assessee. Needless to direct that at the time of verification of TDS credit the AO shall

grant opportunity of hearing to the assessee. In the result this ground of appeal is also allowed for statistical purpose.

20. Ground No. 4 relates to error in computing the tax payable in terms of Section 115JB. The ld. AR for the assessee submits that the AO computed the tax liability in terms of section 115 JB by applying Minimum Alternate Tax rate of 18% instead of correct rate of 15%. The assessee has already filed an application for rectification on 29<sup>th</sup> January 2015, which has not yet been disposed by AO. The ld. AR prayed for appropriate directions to the AO.

21. The ld. DR submits that the Tribunal may pass necessary direction to the AO.

22. We have considered the rival submissions of the parties. Considering the submissions of the ld. AR for the assessee that the rectification application of the assessee is pending disposal from the year 2015, we direct the AO compute the tax liability in terms of the provisions of section 115JB as amended up to date.

23. In the result the appeal of the assessee is allowed and the appeal of the revenue is dismissed due to low tax effect.

**ITA No. 5828/Mum/2015 for AY 2011-12 by assessee**

24. The assessee in its appeal for AY 2011-12 has raised following grounds of appeal;

1.0 Re: Adjustment of Rs. 2,53,51,510/- as regards provision of guarantee:

1.1. The learned Assessing Officer/ Dispute Resolution Panel/ Transfer Pricing Officer have erred in making an upward adjustment of Rs. 2,53,51,510/- to the total income of the Appellant by holding that transaction of provision of guarantee by the Appellant to its Associated Enterprise ("AE") is not at arm's length.

1.2. The learned Assessing Officer/Dispute Resolution Panel/ Transfer Pricing Officer erred in not appreciating that, considering the facts and circumstances of its case, provision of corporate guarantee and the performance guarantee cannot be considered as an "international transaction" which can be benchmarked.

1.3. Without prejudice to the above, the learned Assessing Officer/Dispute Resolution Panel/Transfer Pricing Officer has erred in alleging that guarantees extended by the Appellant should be compensated by way of guarantee commission and thereby alleging a guarantee fee @ 1.25% for provision for corporate guarantee and 1.50% for provision of performance guarantee by simply relying on the DRP directions of the prior year i.e. AY 2010-11.

1.4. The Appellant submits that the Assessing Officer be directed to delete the upward adjustment of Rs. 2,53,51,510/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

2.0 Re: Adjustment of Rs. 1,20,03,931/- as regards provision of loans:

2.1. The learned Assessing Officer/ Dispute Resolution Panel/Transfer Pricing Officer have erred in making an upward adjustment of Rs. 1,20,03,931/- to the total income of the Appellant by holding that international transaction relating to interest received on loans granted by the Appellant to its AEs is not at arm's length.

2.2. The learned Assessing Officer/the Dispute Resolution Panel/the Transfer Pricing Officer erred in appreciating that under the given facts and circumstances of its case and the various judicial precedents and law prevailing on the subject, the interest received by it from its AEs on the loans granted by it is at arm's length and hence no adjustment in respect thereof was called for.

2.3. The Appellant submits that the Assessing Officer be directed to delete the upward adjustment of Rs. 1,20,03,931/- made by him to the Appellant's total income and to re-compute its total income and tax liability accordingly.

25. Ground No. 1 of the appeal is identical to the ground No. 1 in appeal for 2010-11, wherein we have restricted the adjustment of corporate guarantee at the rate of 0.5%, however, the part of the ground related with the performance guarantee is restored back to the file of AO/TPO therefore, part of this ground of appeal is also restored to the file of AO with similar direction. In the result this ground of appeal is partly allowed.
26. Ground No. 2 of the appeal is identical to the ground No. 2 in appeal for 2010-11, which we have allowed, considering the principles of consistency this ground of appeal is also partly allowed with similar observation.
27. In the result the appeal for AY 2011-12 is partly allowed.

Order pronounced in open court on 17<sup>th</sup> August 2020.

Sd/-  
**M. BALAGANESH**  
ACCOUNTANT MEMBER

Mumbai, Date: 17.08.2020  
SK

**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

Sd/-  
**PAWAN SINGH**  
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar  
ITAT, Mumbai