

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "K", MUMBAI
BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 7315/Mum/2012(Assessment year: 2008-09)

(Virtual Court No. III)

Jabil Circuit India Pvt Ltd, Arena House, Plot No.103, Road No12, Opposite, Tulip Telecom, Marol, MIDC, Andheri(E) Mumbai-400093 PAN : AACCP 7114 K	Vs	DCIT-(3)(2), Room No. 608, 6 th Floor, Aayakar Bhawan, M.K. Road, Mumbai-400020.
APPELLANT		RESPONDEDNT
Appellant by	Sh. Nitesh Joshi Advocate	
Respondent by	Shri Akhtar Hussain Ansari Sr-DR	
Date of hearing	28/07/2020	
Date of pronouncement	30/07/2020	

ORDER

PER PAWAN SINGH, JUDICIAL MEMEBR :

1. This appeal by assessee is directed against the assessment order dated 08.10.2012 under section 143(3) read with section (r.w.s.) 144C (13) of Income tax Act (Act), passed in pursuance of direction of dispute resolution penal (DRP-1) dated 06.06.2012 for assessment year (AY) 2009-09.
2. Brief facts of the case as gathered from the order of lower authorities are that assessee company and engaged in the business of manufacturing of assembly and customisation of printed Circuit Boards. The assessee filed its return of income for assessment year 2008-09 on 30th September 2008

declaring loss. The assessee revised its return of income and revised return of income was filed on 31st December 2009 declaring loss of ₹ 72,91,14,145/-. The assessee while filing return of income reported international transaction with its associated enterprises (AEs), in its report furnished under Form 3CEB. Consequent upon reporting of international transaction, the assessing officer (AO), made a reference to transfer pricing officer (TPO) for determination of arm's length price (ALP) about the international transaction reported by assessee. As noted by TPO in para 4 of his order, the assessee reported 16 international transactions with its AEs. The TPO identified item No. 4 and 15 for bench marking which are as follows:

4	Business support services rendered by Jabil US	TNMM (mark-up voluntary offered for disallowance)	Rs. 59,19,196/-
15	Reimbursement of third party cost incurred by Jabil Group entities on behalf of assessee	Reimbursement of cost	Rs. 4,77,68,244/-

3. Out of reimbursement of third party cost incurred by Jabil Group entities on behalf of assessee, the assessee before the TPO the assessee offered voluntary adjustment of Rs. 24,25,98,017/-, which is duly recorded in table No. 2 of para 4 of TPO's order. The TPO after issuing show cause notice considering the submission of assessee suggested the total adjustment of Rs. 25,76,88,325/- (including of Rs. 24,25,98,017/-) with regard to international transaction of assessee with its AEs. The TPO took his view that no

evidences are produced by the assessee. On the transaction of business support services the TPO rejected the basis of allocation for direct Selling, General and Administration (SG&A) and applied global asset as a base instead of Asia pacific asset by taking view that the assessee has not provided any basis of tracking of the cost of these regional services separately by US entity. Thus, effectively the TPO in addition to the voluntarily disallowance, suggested following adjustment;

Serial No.	Nature of international transaction	Amount in INR
1	Adjustment to the international transaction pertaining to business support services rendered by Jabil Circuit Inc (Jabil US) with respect to allocation of "Direct Selling, General and Administration (SG& A) cost.	19,28,994/-
2	Adjustment to the international transaction pertaining to reimbursement of expenses to Jabil US (salaries for employees to by Jabil US at JCIPL)	1,46,66,531/-
3	Adjustment to the international transaction pertaining to rendering business development services, regional human resource support services and information technology support services by JCIPL 2 Jabil US	1,02,883/-
	Total	1,66,98,408/-

4. On receipt of order of TPO the assessing officer past draft assessment order on 9th December 2011 under section 143(3) read with section (rws) 144C(1). On receipt of draft assessment order the assessee exercised its option for filing objections before dispute regulation panel (DRP). The learned DRP,

vide its direction dated 6th June 2012 confirmed the adjustments suggested by TPO. On receipt of direction of DRP, the assessing officer passed final assessment order, in pursuance of direction of DRP under section 143 (3) rws 92 CA & 144C (13) of Income tax Act. Further aggrieved by the addition/adjustment in the assessment order, the assessee has filed with present appeal before this Tribunal. The assessee has raised the following grounds of appeal:-

I. Ground of appeal in respect of transfer pricing adjustment.

(1) Proposed addition to the total income on account of transfer pricing adjustment.

Erred in making transfer pricing adjustment by rejecting the analyses undertaken by the appellant to determine arms length price for the international transaction and not considering all the documentation maintained and filed.

(2) Use of single year data.

Erred in not considering multiple year data for determining the arm's length price.

(3) Rejection of loss making company.

Erred on facts and in circumstances of the case and in law by rejecting CG BAK software and exports Ltd (CGV AK) from the set of comparables companies identified by the appellant (in case of IT support services) on the basis that it is a loss making company and the appellant is operating on cost plus model.

(4) Accepting companies having super normal profits.

Erred in law and in facts by accepting companies having super normal profit as comparable to the appellant in case of IT support services.

(5) Accepting certain additional companies by adopting inappropriate approach of cherry picking of companies as comparables to the appellant.

Erred on facts and circumstances of the case and law in accepting certain additional comparable companies to the assessee in relation to IT support services provided by it to its AEs, without providing any analyses as to why the same have been accepted as comparable companies and without providing any show cause in relation to the same.

(6) Rejection of allocation basis adopted by the appellant and adopting a different allocation basis for allocation of direct SG & A cost.

Erred on the facts and in the circumstances of the case and in law in rejecting the allocation basis determined by Jabil group for all the question of direct SG & A cost of Rs. 2,933,154/-forming of part of business support services rendered by Jabil US and using a different allocation basis for allocation of the same, without providing any cogent reason.

(7) Non consideration of documentation is provided in connection with international transactions of imbursement of third party costs by JCIPL.

Erred on the facts and in circumstances of BKC and the law in not considering the documentation produced in relation to international transactions pertaining to reimbursement of expenses by appellant to its AEs and accordingly making an adjustment to the value of such international transaction-based on absence of sufficient backup documentation.

(8) Applicability of 5% variation from mean of comparable margins.

Erred in computing the arms length price of design engineering services as the mean arms length price determined, without taking into account the lower 5% variation from the arms length price determined.

II. Initiation of penalty proceeding under section 271(1)(c) of the Act.

5. We have heard the submission of the learned authorised representative (AR) of the assessee and the learned departmental representative (DR) for the

revenue and perused the order of the lower authorities and also gone through the record of the case very carefully.

6. At the outset of hearing the learned AR of the assessee submits that ground No. 1 is general and needs no adjudication. Further, he is not pressing ground No. 2 to 5 and 8. Considering the submission of learned AR of the assessee ground No. 1 to 5 and 8 are dismissed as not pressed.
7. Ground No. 6 relates to rejection of allocation basis adopted by the assessee. The facts related to this ground of appeal are that US based AE of the assessee claimed to have allocated certain business support services cost to the assessee of Rs. 16,20,54,860/-, out of which the assessee already offered Rs. 15,61,35,664/- as voluntary disallowance in the return of income. Remaining of Rs. 59,19,196/- is the bone of contention between the assessee and revenue. The allocation were on account of various services consisting of corporate operation , direct selling, general and administration (SG&A), global IT manufacturing, global SG&A and human resources. The assessee claimed that these services were allocated on the basis of assessee's asset as a percentage of Jabil Group global assets (1.8845%), except for direct SG&A, which was allocated on the basis of assessee's asset as a percentage of its global group asset of the Asia Pacific Region being 5.5047%. the TPO rejected the basis of allocation for direct SG&A and applied global asset as

base instead of asset Jabil group's Asia Pacific Region by taking view that the assessee has not provided any basis for tracking of the cost of these regional services separately by US based AE. On objection before Id. DRP the action of TPO was upheld.

8. The Id AR for the assessee submits that the assessee submitted detailed documentary evidence before TPO and the learned DRP including sample invoices, internal correspondence evidence of receipt of business support services by assessee, financial statement of Jabil US, cost allocation working along with allocation keys, details of allocation method adopted by Jabil US for allocating cost to various Jabil groups entity and certificate from Jabil US substantiating the fact that expenses have been allocated based on appropriate allocation keys. Copies of such evidences are also furnished before this Tribunal as per page No. 361 to 364 Paper book and page No. 380 to 574 of paper books. The assessee also furnished the benefit in case of costs incurred in form of 'Corporate operations', Global IT manufacturing and global 'SG &A' is reaped by Jabil entities around the globe and hence, these costs are allocated to Jabil entity around the globe on the basis of global assets. On the basis of those costs are allocated to assessee and the assessee's assets as a percentage of global assets are 1.8845%. The learned AR of the assessee during the course of hearing submits that these

percentage are forming part of order of TPO as recorded in para 10.1.1 and 10.1.2 of his order. The ld. AR submitted that these services are provided by employees of the regional support entity, or expatriates assigned to provide specific services to entity are within a specific region. As an adverse to practice, rather than directly charging out cost associated with these regional services to the entities within that specific regions, the reason of support entity identifies these cost and charges them to U.S.-based AE, who intends to these cost separately and charges them out of the entities within the specific region as the benefit of these services were reaped only by the entities in the specific region. Thus, the cost for direct SG &A were allocated on the basis of assessee is assessed on a percentage of Jabil group's assets of Asia-Pacific region that is 5.5047%. The learned AR of the assessee further submits that the TPO and the DRP adopted wrong allocation of direct SG&A cost to assessee. The learned AR prayed for accepting the allocation used by US based AE that is assessee is assessed as a percentage of group's asset of Asia-Pacific region. The ld. AR vehemently submitted that this issue was not disturbed in earlier or subsequent years.

9. On the other hand the ld. DR for the revenue supported the order of TPO and DRP. It was submitted that similar submissions were mode before ld. DRP,

but the assessee has not been able to provide any evidence to prove its contention about such allocation of cost.

10. We have considered the rival submissions of the parties and have carefully gone through the orders of the TPO and DRP. During the TP adjustment proceedings the TPO the assessee claimed the costs incurred in form of 'Corporate operations', Global IT manufacturing except 'SG &A' is reaped by Jabil entities around the Globe and hence, these costs are allocated to Jabil entity around the globe on the basis of Global assets. On the basis of those costs are allocated to assessee and the assessee's assets as a percentage of global assets are 1.8845%. The contention of the assessee was rejected by TPO. The TPO applied global asset and made adjustment on the basis of assessee's asset as a percentage of Jabil group's asset at 1.885 %, instead of Asia- Pacific region i.e. 5.5047%. The TPO took his view that the assessee has not furnished tracking of cost of regional services by US AE of the assessee. It was also held that the assessee has not provided the details of asset of various entities on which allocation key has been computed. The Id. DRP affirmed the action of the TPO by holding that the assessee has not been able to furnish the new evidence or explanation regarding the basis of tracking the cost of regional services of various entities.

11. Before us, the Id AR for the assessee vehemently submitted that all details and documentary evidence were furnished before TPO and the learned DRP including sample invoices, internal correspondence evidence of receipt of business support services by assessee, financial statement of Jabil US, cost allocation working along with allocation keys, details of allocation method adopted by Jabil US for allocating cost to various Jabil groups entity and certificate from Jabil US substantiating the fact that expenses have been allocated based on appropriate allocation keys as per page No. 361 to 364 Paper book and page No. 380 to 574 of paper books. The assessee has also certified that all the evidences were furnished before the lower TPO and DRP. Perusal of TPO order reveals that the TPO in para 10.1.1 and 10.1.2 of his order had duly recorded the details of cost allocation of on the basis of assessee's asset as a percentage of Jabil group's asset on the Asia Pacific region. We have noted that the copies of all these documentary evidence were filed before the Tribunal on 24.08.2015, after supplying the copy in the office of Id. DR concerned. Till the time of hearing the Id. DR for the revenue has not disputed that the copies of these documents were not filed before the lower authorities, except makings submissions that the assessee failed to provide any evidence to prove its contention about such allocation of cost. Perusal of these documentary evidences reflects the breakup of cost

allocation with regard to 'Corporate operation', 'direct SG&A' global IT manufacturing, Global SG&A, Human resources along with allocation key used with allocation ratio (page No. 360 of PB). The assessee has also placed other corroborative evidence to substantiate its contention about its global as well as Asia-Pacific region asset. The TPO in its order has noted that in absence of complete supporting details and tracing of cost of regional services, the transaction cannot be considered at arm's length. However, the TPO has not disputed the percentage of assessee's total asset of Asia Pacific region. We have further noted that the TPO has not examined the fact whether the assessee is adopting similar treatment for allocation of cost, in earlier or subsequent years or not. Considering the aforesaid documentary evidences furnished by the assessee, we find merit in the submissions of the ld AR for the assessee that allocation of Direct SG&A cost on the basis of the assessee as a percentage of assessee's group's assets of Asia Pacific Region @ 5.5047% is appropriate as the benefit of direct SG&A cost was reaped by the entities in the Asia Pacific Region, whereas as the benefit of the other services which were allocated on the basis of percentage of assessee's global asset is reaped by the group around the Globe. Thus, we direct the assessing officer/ TPO to delete the adjustment. In the result this ground of appeal is allowed.

12. Ground No. 7 relates to non-consideration of documentation produced in connection with the international transaction of reimbursement of third party cost by assessee. The facts related to this ground of appeals are that assessee claimed that its group entity incurred expenses of ₹ 4,77,68,244/- on behalf of assessee and assessee reimbursed the same to the respective AEs. Out of the aforesaid expenses Rs. 2,35,07,513/- was offered to tax by assessee voluntarily in the return of income. Out of the remaining balance of Rs. 2,42,60,371/- the TPO accepted Rs. 95,94,200/- at arm's length on the basis of documentation furnished during the TP proceedings and for remaining the TPO suggested adjustment of ₹ 1,46,66,531/- by taking view that sample documentation submitted by assessee is incomplete and the back-to-back third-party documentation is incomplete. On objection before DRP, the action of TPO was affirmed.

13. The learned AR of the assessee submits that the assessee submitted a chart demonstrating AE wise breakup of the amount before the TPO and ld. DRP. The learned AR of the assessee further submits that the disallowance predominantly pertains to the reimbursement made by assessee U.S. based AE in the nature of salary and other cost which includes bonus and taxes for the employees deputed by Jabil US at assessee namely, Dayal Prasad and Ramesh Saligame. The learned AR for the assessee further submits that

Dayal Prasad is the Managing Director of assessee, whose salary was paid by Jabil US and cross charged to assessee and Ramesh Saligame in the Business Unit Director whose salary was paid by Jabil US and cross charged by assessee. The assessee furnished the salary and other cost, including the copy of invoices, Form -16 of Dayal Prasad and confirmation of Jabil US, stating that they had deputed him and Ramesh Saligame to assessee for the entire year under consideration and the salaries of these employees were paid by US AE (Jabil US) and subsequently recovered from the assessee. The TPO did not consider the back to back documentation produced by assessee during the course of TP proceedings.

14. The learned AR of the assessee also submitted that Form-16 of Ramesh Saligame as additional evidence before this Tribunal along with application dated 11.02.2019 under Rule 29 of Income Tax (Appellate Tribunal) Rules 1963. The learned CIT-DR forwarded the said additional evidence to the assessing officer for his comments. The assessing officer has already furnished his comments vide reply/ letter dated 27 February 2020, wherein the assessing officer has given his comments stating that the additional evidence may be considered on merit. The learned AR of the assessee further submits that the additional evidence furnished by assessee may be accepted as the evidence has direct relevance with the issue. It was further

submitted that all the supporting evidence in the form of third party back-to-back documentation for reimbursement of salary and another cost of deputed employees is furnished. The learned AR further submits that similar reimbursement for salary and other cost of the deputed employee was accepted by Tribunal in assessee's own case for AY 2009-10 in ITA No. 3627/Mum/2016, dated 20.03.2019, copy of which is placed on record.

15. The learned AR finally prayed that the documentation produced in relation to the international transaction of reimbursement of salary and other cost by assessee to Jabil US may be accepted as appropriate and adequate back-to-back documentation to substantiate reimbursement of actual salary and other cost of employees deputed by Jabil US.

16. On the other hand the learned DR for the revenue supported the order of TPO and learned DRP. On the admission of additional evidence under Rule 29, the learned DR for the revenue submits that he is strongly objecting to the admissions of additional evidence as the same is not in accordance with Rule 29 of Income Tax (Appellate Tribunal) Rules. The ld DR would submit that in case the application for admission of additional evidence is admitted, then the issue may be restored back to the file of TPO/AO for consideration of such evidence afresh.

17. We have considered the rival submissions of the parties and have carefully gone through the orders of the TPO and DRP. We have also deliberated on the orders of the Tribunal relied by learned AR of the assessee. We have also perused the contents of the application filed by the assessee under Rule 29 of Income tax (Appellate Tribunal) Rules dated 11.02.2019. In the application under Rule 29, for admission of additional evidences the assessee has contended that during the financial year 2007-08, overseas group entity incurred expenses of Rs.4.77 crore on behalf of the assessee. The same has been reimbursed by the assessee to the respective AEs. Out of the above reimbursement worth Rs.2.42 crore have been benchmarked by the assessee and the balance of ₹ 2.35 crore have been voluntarily disallowed by the assessee. The reimbursement transactions are mostly in the nature of salary and other related cost that have been paid by the AEs on behalf of the assessee. The TPO during the benchmarked proceedings considered the documentation filed in respect of ₹ 95.94 lakhs and concluded that the same is at the arm's length price. The balance amount was primarily in the nature of salary of two deputed employees namely Dayal Prasad and Ramesh Saligame. The TPO observed that the assessee submitted only intercompany invoices in relation to the expenses of ₹ 1.46 crore. It is further contended that in the application that the assessee submitted the copy of Form-16 of

Dayal Prasad and as deputation certificate from US entity and Ramesh Saligame as backup to documentation vide their submission dated 27 July 2011 and 13 September 2011 respectively. The TPO failed to take the consider these document and accordingly made adjustment of ₹ 1.46 crore in his order. The assessee before the DRP also furnishes the necessary documents to substantiate their contentions. It is further contended that considering the observation of lower authorities that the present documents were not before the lower authorities the assessee is filing necessary evidences which includes Form-16 of deputed employees.

18. We have considered the contents of application for additional evidence and the submission of learned AR of the assessee. Considering the submissions of the learned AR for the assessee that Dayal Prasad is the Managing Director of assessee, whose salary was paid by Jabil US and cross charged to assessee and Ramesh Saligame in the Business Unit Director whose salary was paid by Jabil US and cross charged by assessee, now before, us the assessee has furnished the copy Form 16 of Dayal Prasad and claimed that Jabil US, had deputed Ramesh Saligame to assessee for the entire year under consideration and the salaries of these employees were paid by US AE (Jabil US) and subsequently recovered from the assessee. We have further noted that similar reimbursement for salary and other cost of the deputed employee

was accepted by Tribunal in assessee's own case for AY 2009-10 in ITA No. 3627/Mum/2016. Therefore, considering the nature of the evidences we admit the additional evidences furnished by the assessee and restore the issue to the file of assessing officer to examine and verify the contents of Form-16 of these two employees and other evidences furnished by the assessee and grant appropriate relief to the assessee in accordance with law. The assessing officer is also directed that while considering the issue he shall consider the order of Tribunal in assessee's case for AY 2009-10 in ITA No. 3627/Mum/2016. In the result this ground of appeal is allowed for statistical purpose.

19. In the result appeal of the assessee is partly allowed as per Rule 34.

Order pronounced in open court on 30th day of July 2020.

Sd/-

Sd/-

(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 30th July, 2020

Self(PS)

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai