

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through video Conferencing)

ITA No. 5665/Del/2016
(Assessment Year: 2007-08)

Orange Business Services India Solutions Pvt. Ltd, (earlier known as Equant Solutions India Pvt. Ltd) Tower-B, 8 th Floor, DLF Infinity Tower, Phase-II, Cyber City, Sector-25, Gurgaon PAN: AABCE4540P (Appellant)	Vs.	DCIT, Circle-3, Gurgaon (Respondent)
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Assessee by :	Shri Ravi Sharma, Adv
Revenue by:	Shri H. K. Chourdary, CIT DR
Date of Hearing	28/08/2020
Date of pronouncement	25/11/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by Orange business services India solutions private limited (earlier known Equant solutions India private limited) (assessee/appellant) against the order of The Deputy Commissioner Of Income Tax, Circle – 3, Gurgaon passed u/s 143 (3) read with Section 144C of The Income Tax Act 1961 (The Act) dated 31st of August 2016 wherein the return filed by the assessee on 31 October 2007 declaring a taxable income of Rs 769,642 was assessed at ₹ 75,977,580/- wherein the addition on account of the arm's-length price of the international transaction was of ₹ 75,207,938/- in pursuance of the direction of the learned Dispute Resolution Panel – I, New Delhi (the learned DRP) is made.
2. Assessee aggrieved with that order has preferred this appeal raising following grounds of appeal:-
 - “1. *The Learned Assessing Officer ('Ld. AC)/ Learned Transfer Pricing Officer ('Ld. TPO') (following the directions of the Hon'ble Dispute Resolution Panel ('Hon'ble DRP')) erred on facts and in law in enhancing the income of the Appellant by Rs. 7,52,07,938 without appreciating the factual positions/ submissions of the Appellant.*

2. *The Hon'ble DRP grossly erred on facts and in law in not following the specific directions of the Hon'ble Tribunal and in doing so exceeded its jurisdiction by giving the following directions;*
 - 2.1. *Inclusion of Maple E-Solutions Ltd and Triton Corp Ltd - deviating from the directions of the Hon'ble Tribunal that companies whose directors were involved in fraud cannot be taken as comparable as their financials are not reliable;*
 - 2.2. *Inclusion of Vishal Information Technologies Limited- deviating from the directions of the Hon'ble Tribunal that companies acting merely as intermediary having outsourced its activity cannot be taken as comparable;*
 - 2.3. *Inclusion of Persistent Systems Limited, Sasken Communications Technologies Limited (Seg), Accentia Technologies Limited , Mold-Tek Technologies Limited- deviating from the directions of the Hon'ble Tribunal that companies with extra ordinary circumstances, like those which suffered events like merger/demerger, impacting the financial results cannot be taken as comparable;*
 - 2.4. *Inclusion of functionally dissimilar companies - deviating from the directions of the Hon'ble Tribunal that companies which are functionally dissimilar cannot be taken as comparable.*
3. *The Hon'ble DRP grossly erred on facts and in law in not following the rule of consistency, by including Accentia Technologies and Vishal Information Technologies Limited as comparable in AY 2007-08 and holding the same companies incomparable in the immediately subsequent year (AY 2008-09).*
4. *The Ld. AO/ Ld. TPO (following the directions of the Hon'ble DRP) erred in enhancing the income of the Appellant by Rs. 7,52,07,938 holding that the international transactions of the Appellant pertaining to provision of information technology enabled services ('ITeS') segment and contract software development ('CSD') segment do not satisfy the arm's length principle envisaged under the Income Tax Act, 1961 ('the Act') and in doing so, have grossly erred in:*
 - 4.1. *not appreciating that none of the conditions set out in section 920(3) of the Act are satisfied in the present case;*
 - 4.2. *ignoring the fact that the Appellant is entitled to tax holiday under section 10A of the Act on its profit and therefore would not have any untoward motive of deriving a tax advantage by manipulating transfer prices of its international transactions;*
 - 4.3. *disregarding the functional analysis submitted by the Appellant in the Transfer Pricing ('TP') documentation with respect to ITeS segment and classified the Appellant as a Knowledge Process Outsourcing ('KPO') service provider;*
 - 4.4. *disregarding the Arm's Length Price ('ALP') as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules') as well as fresh search; and in particular modifying/ rejecting the filters applied by the Appellant;*
 - 4.5. *disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2006-07) data for comparable companies should be used despite the fact that the same was not necessarily available*

applying this filter selectively only to the CSD segment; more so when the said filter was applied to the ITES segment in the previous assessment year i.e. AY 2006-07 and thus acting in an inconsistent and arbitrary manner;

- 4.9. *including companies having high margin / volatile operating profit margins in the final comparables' set for benchmarking a low risk captive unit such as the Appellant (disregarding judicial pronouncements on the issue), thus demonstrating an intention to arrive at a pre-formulated opinion without complete and adequate application of mind with the single-minded intention of making an addition to the returned income of the Appellant;*
 - 4.10. *including certain companies that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*
 - 4.11. *resorting to arbitrary rejection of low-profit/ loss making companies based on erroneous and inconsistent reasons;*
 - 4.12. *excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*
 - 4.13. *ignoring the business/ commercial reality that since the Appellant (vis-a-vis both its ITES/ CSD services) is remunerated on an arm's length cost plus basis, i.e. it is compensated for all its operating costs plus a pre-agreed mark-up based on a benchmarking analysis, the Appellant undertakes minimal business risks as against comparable companies that are full- fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact;*
 - 4.14. *not allowing the appellant the application of (+/-) 5% range available as per the proviso to section 92C(2) of the Act; and*
 - 4.15. *disregarding judicial pronouncements in India in undertaking the TP adjustment;*
 5. *The Ld. AO/TPO grossly erred in not taking cognizance of adopting the computation of operating mark-up of comparable companies as per Safe Harbour Rules, 2013 as directed by the Hon'ble DRP. Hence, ignoring the fact that the said directions are binding on the Ld. AO as per Section 1440(13) of the Act.*
 6. *The Hon'ble DRP erred in disregarding the detailed arguments/ submissions put forth by the Appellant during the course of the DRP/ assessment proceedings while passing its direction under section 144C of the Act;*
 7. *That the Ld. AO erred on facts and in law in charging interest under sections 234 A, B, C and D of the Act;*
 8. *The Ld. AO has grossly erred by initiating penalty under section 27i(i)(C) of the Act mechanically and without recording any satisfaction for its initiation."*
3. Brief facts of the case shows that assessee is a subsidiary of EGN Bv Netherlands and is engaged in providing IT enabled network management/technical support and other back-office support services. Assessee is also engaged in providing contract software development services for developing software application for use within the group.
 4. The assessee filed its return of income on 31/10/2007 declaring a taxable income of ₹ 769,642/-. During the course of assessment proceedings it was found that assessee has entered into certain international transaction and therefore the reference was made to the

learned transfer pricing officer to determine the arm's-length price of those international transactions assessee reported following international transaction in its Form no 3CEB report.

Serial number	nature of transaction	amount in rupees
1	software development services/IT enabled services	97,11,94,161
2	purchase of fixed assets	3,42,43,723
3	interest on loan	1,60,71,371
4	reimbursement of expenses paid	4,73,41,015

5. The assessee benchmarked these international transactions by adopting the transactional net margin method as the most appropriate method. The assessee aggregated both the transactions of software development services and IT enabled services. Assessee selected 18 comparables with an average profit margin at the rate of 13% on its cost and mark up on total cost to the taxpayer is arrived at 15% on cost and therefore it was stated in transfer pricing study report that the price charged by assessee is at arm's-length.
6. The learned transfer pricing officer agreed with the most appropriate method of the transactional net margin method however rejected the filter applied by the assessee. He also segregated the transactions of the software development services and IT enabled services. With respect to the IT enabled services he selected 26 comparable companies whose average Arithmetic mean of profit level indicator was 29.42% and after that he has granted working capital adjustment of 3.13% and therefore the adjusted Arithmetic mean of profit level indicator was 26.29%. He applied the above margin on the operating cost of ₹ 698,079,289 resulting into the arm's-length price of ₹ 881,604,314 whereas the price shown by the assessee was 80,60,91,154 and therefore proposed a shortfall/adjustment on account of ITeS services of ₹ 75,513,180.
7. Similarly with respect to the software development services he selected 26 comparables whose Arithmetic mean of profit level indicator was 25% and thereafter granted working capital adjustment of 2.87 percentage and therefore the adjusted mean PLI was derived at 22.13%. He applied on the total operating cost of ₹ 145,867,314 the above ratio and determine the arm's-length price of the international transaction as Rs 17,81,47,750 against

the price charged by the assessee of ₹ 165,103,007/- and therefore proposing the shortfall/adjustment on account of software development services of Rs 1 30,44,743. The order u/s 92CA of the Income Tax Act was passed on 25th of October 2010 by The Additional Commissioner Of Income Tax (Transfer pricing) – 1 (2), New Delhi. The assessee preferred objection is before the Dispute Resolution Panel – 1, New Delhi who passed its direction. The DRP confirmed the adjustment proposed by the TPO. Consequently the final assessment was passed by the learned assessing officer u/s 143 (3) making an adjustment of ₹ 88,557,923/- to the assessee is returned income. The assessee preferred an appeal before the coordinate bench which remanded the matter back to the learned Dispute Resolution Panel for fresh adjudication. Consequent to that the learned Dispute Resolution Panel has issued a direction u/s 144C (5) on 29th of June 2016 in case of the assessee and directed the TPO to recompute the transfer pricing adjustment after making the revised calculations. The learned transfer pricing officer then revised conclusion wherein for software development services, he selected 25 comparables whose average mean of the profit level indicator was 23.55% and after granting working capital adjustment the adjusted mean was derived at 20.97% and according to that the arm's-length price was derived at ₹ 176,455,689 and adjustment based on the direction of the learned Dispute Resolution Panel was Rs. 1 30,52,682/-. Similarly for ITeS segment the average mean of PLI was determined at 27.69% of 25 comparables and after granting working capital adjustment of 3.07% the adjusted mean was derived at 24.62% and thereafter the adjustment of Rs. 6,38,55,256/- was made. The learned Transfer Pricing Officer passed an order in pursuance to the direction of the Dispute Resolution Panel in pursuance to the direction of the coordinate bench on 29 June 2016. Consequently the final assessment order was passed by the learned assessing officer on 31st of August 2016 u/s 143 (3) read with Section 144C of the income tax act 1961 on 31st of August 2016 determining the total income of the assessee at ₹ 75,977,580/- against the returned income of the assessee of Rs. 7,69,004 642/-.

8. At the time of the hearing it was pointed out that there is a rectification order dated 2 June 2019 passed wherein the adjustment on account of information technology enabled services segment was revised to RS Nil. Therefore the assessee does not want to press upon the grounds related to that addition. Therefore the only addition remains is with respect to the software development services segment. Assessee objects to inclusion of Infosys technologies Ltd, Wipro Ltd, celestial labs Ltd, thirdware solutions Ltd and persistent Systems Ltd.

9. The learned authorised representative submitted a detailed chart along with the annual financial statements of the comparable companies and has raised several objections with respect to inclusion of the above comparable selected by the learned Transfer Pricing Officer and retained by the learned Dispute Resolution Panel. He also referred to plethora of judicial precedents to support his case.
10. The learned departmental representative vehemently supported the order of the learned transfer pricing officer/dispute resolution panel.
11. We have carefully considered the rival contentions and perused the orders of the lower authorities.
12. With respect to the Infosys technologies Ltd in assessee's own case for assessment year 2010 – 11 the coordinate bench in ITA number 1202/del/2015 has directed to exclude this company from comparability analysis based on the reason of comparable company is having huge brand value. The order of the coordinate bench has further been affirmed by the honourable Punjab and Haryana High Court. Further the learned Dispute Resolution Panel in assessee's own case for assessment year 2010 – 11 placing reliance on the decision of the honourable Delhi High Court in Agnity India technologies private limited ITA number 1204/2011 has also excluded this comparable. The learned departmental representative could not show us any reason to retain this comparable on those two grounds. Accordingly we direct the learned assessing officer/TPO to exclude Infosys technologies Ltd from the comparability analysis.
13. With respect another comparable Wipro Ltd's turnover is Rs. 9668 crores against the assessee's total sales and turnover is of ₹ 17 crores. The turnover of the comparable is more than 500 times the size of the assessee. The honourable Bombay High Court in case of CIT versus Pentair water India private limited [2016] 69 taxmann.com 180 (Bombay)[16-09-2015] has held that where comparable has multiple times of turnover over the size of the assessee, same is not comparable. This particular comparable was excluded in that particular case where the turnover was Rs. 939 crores of the comparable company against the turnover of the assessee of only ₹ 11 crores. Therefore respectfully following the decision of the honourable Bombay High Court we direct the learned transfer pricing officer/assessing officer to exclude Wipro Ltd as a comparable company from the comparability analysis.
14. With respect to persistent Systems Ltd in assessee's own case for assessment year 2000 – 11 this comparable company was rejected in ITA number 1202/del/2015 which has been affirmed by the honourable Punjab and Haryana High Court. Therefore respectfully following the decision of the honourable High Court, in absence of any distinguishing facts

and features brought to our notice, we direct the learned transfer pricing officer/AO to exclude the above comparable company.

15. Accordingly we direct the learned Transfer Pricing Officer/AO to exclude the above three comparable companies from the comparability analysis for software development segment. Accordingly ground number four of the appeal of the assessee is partly allowed.
16. The assessee submitted before us that if Infosys Limited, Wipro Ltd and persistent Systems are excluded from the comparability analysis, he does not want to press any other further arguments with respect to the transfer pricing adjustment. As we have already directed the learned AO/TPO to exclude the above three comparables, all other grounds of appeal are disposed of as dismissed without further adjudication.
17. Accordingly appeal of the assessee is partly allowed.
Order pronounced in the open court on 25/11/2020.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 25/11/2020
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	25.11.2020
Date on which the typed draft is placed before the dictating member	25.11.2020
Date on which the typed draft is placed before the other member	25.11.2020
Date on which the approved draft comes to the Sr. PS/ PS	25.11.2020
Date on which the fair order is placed before the dictating member for pronouncement	25.11.2020
Date on which the fair order comes back to the Sr. PS/ PS	25.11.2020
Date on which the final order is uploaded on the website of ITAT	25.11.2020
date on which the file goes to the Bench Clerk	25.11.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	