

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 1291/Del/2015
(Assessment Year: 2010-11)

Agilent Technologies India Pvt. Ltd, Unit No. 105-116, First Floor, Splendor Forum, Plot No. 3, District Centre Jasola, New Delhi PAN: AABCA9874A	Vs.	DCIT, Circle-1(2), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Abhishek Tilak, Adv Shri Priyansh Singh, Adv Shri Anshul Sharma, CA
Revenue by:	Shri Sanjay I Bara, CIT DR
Date of Hearing	28/08/2020
Date of pronouncement	27/11/2020

ORDER

PER PRASHANT MAHARISHI, A. M.

1. Assessee has filed this appeal against the order of Deputy Commissioner of income tax, Circle 1 (2), New Delhi [The Ld AO] dated 29/11/2014 passed u/s 143 (3) read with Section 144C of the income tax act, 1961 (The Act) wherein the returned income of the assessee of ₹ 95,232,168 as per return of income filed on 28/9/2010 is assessed at ₹ 115,775,011/- in pursuance of the order of the transfer pricing officer and direction of the learned dispute resolution panel [ld DRP] there in.
2. The assessee has raised the following grounds of appeal:-
 - “1. *The Learned Deputy Commissioner of Income-tax ('Ld.AO') (following the directions of the Learned Dispute Resolution Panel ('Ld. DRP')) have erred on facts and in law in enhancing the income of the Appellant by INR 2,05,42,843 under section 143(3) of the Income-tax Act, 1961 ('the Act').*
 2. *The Ld. AO and Ld. DRP have erred on facts and in law in enhancing the income of the Appellant by INR 88,20,574 by holding that the Appellant's international transaction pertaining to provision of software development services does not satisfy the arm's length principle envisaged under the Act and doing so grossly erred in:*
 - 2.1 *disregarding multiple year/ prior years' data as used by the Assessee in the TP documentation and holding that current year (i.e. FY 2009-10) data for comparable companies should be used despite the fact that the same was not*

necessarily available to the Assessee at the time of preparing its TP documentation;

- 2.2 rejecting comparability analysis in the TP documentation/ Assessee's fresh search and in conducting a fresh comparability analysis based on application of the additional/ revised filters in determining the ALP and rejecting, in particular, the following filters applied by the Assessee in its TP documentation/ fresh search;*
 - 2.2.1 rejecting companies having turnover of less than INR 5 crore in the final comparables' set for benchmarking;*
 - 2.2.2 including companies having abnormal margins/ volatile margins in the final comparables' set for benchmarking;*
 - 2.2.3 rejecting companies whose accounting year does not end with March 31, 2010 on the basis that the transactions taking place in a different period cannot be compared;*
 - 2.2.4 rejecting companies who have export sales less than 75% of the sales from software development;*
 - 2.3 erroneously including certain functionally dissimilar companies that are full-fledged risk taking entrepreneurs and high-profit making companies for benchmarking a low risk captive service provider like the Appellant (in the software services segment) and excluding certain comparable companies on arbitrary/ frivolous grounds;*
 - 2.4 including reimbursement expenses amounting to INR 13,73,771 for software development segment for applying mark-up and consequently for the purpose of computing arm's length price;*
 - 2.5 ignoring the business/ commercial reality that since the Assessee 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 Assessee undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Assessee on account of this fact;*
 - 3. The Ld. AO has erred on facts and in law in enhancing the income of the Appellant by INR 88,20,574 in software development segment, by incorrectly computing the working capital adjusted operating margin of comparables and also arbitrarily modifying the final set of comparables in the assessment order.*
 - 4. The Ld. AO and Ld. DRP erred in enhancing the income of the Assessee by INR 1,17,22,269 by imputing interest on receivables from the AEs beyond the credit period of the Assessee on an ad hoc basis of credit period and interest rate, while completely disregarding the detailed submissions made by the Assessee to explain that such adjustments are not mandated under the facts and circumstances of the Assessee.*
 - 5. The Ld. AO has grossly erred in initiate penalty proceedings under section 27i(i)(C) of the Act.*
 - 6. The Ld. AO erred in charging interest under sections 234A, 234B, 234C and 234D of the Act mechanically and without recording any satisfactory reasons for the same."*
3. Brief facts of the case shows that Assessee Company is engaged in the business of trading in and servicing of analytical and testing and measurement equipment and research and

development on software. It is a wholly owned subsidiary of Agilent Technologies International Europe BV and is engaged in the provision of software development services and IT enabled services to its overseas group companies. It has entered into several international transactions. In nutshell the company is primarily engaged in facilitating sales of groups products in the Indian market. For this purposes it purchase products from various factories of Agilent group. It also provides software development and marketing services to its associated enterprise.

4. Assessee filed its return of income on 28/9/2010 declaring total income of ₹ 95,232,170/-. The learned transfer pricing officer on examination of those international transactions proposed an adjustment of Rs 158,58,881 u/s 92CA of the act determining the ALP of the international transaction amounting to ₹ 169,398,894 at ₹ 185,257,775/- . The learned transfer pricing officer further made an adjustment on account of an outstanding dues receivable from the associated enterprise at ₹ 21,374,029. Accordingly total adjustment on account of the arm's-length price of the international transaction of ₹ 37,232,910 was proposed by The Additional Commissioner Of Income Tax (Transfer Pricing Officer – 1 (1), New Delhi [The Id TPO] as per order dated 20/1/2014. The assessee filed objections before the learned Dispute Resolution Panel and after such direction the adjustment on account of software development services was retained at only ₹ 88,20,574 and on account of the outstanding dues from associated enterprise of RS 1 17,22,269/-. Consequently the final assessment order was passed by the learned assessing officer on 29/11/2014 determining the total income of the assessee at ₹ 115,775, 011/-. Assessee being aggrieved with the same has preferred this appeal.
5. The main contention of the assessee is with respect to the adjustment on account of adjustment of software development services segment for exclusion of only two comparables namely (1) Infosys technologies Ltd and (2) Tata Elexi Ltd. The claim of the assessee is that both these comparables have been excluded by the coordinate bench in assessee's own group entity's case. Therefore being similar functional profile, both these comparables should be excluded in the case of the assessee also. He also submitted the annual accounts of both these comparables and drawn attention to the bench with respect to the functional dissimilarity and quantitative dissimilarity of these comparable companies with the assessee and stated that both these comparables should be excluded from the comparability analysis. He also referred to several judicial precedents where these comparables were excluded from the comparability analysis in case of other assessees.
6. With respect to the adjustment on account of outstanding dues receivable from its associated enterprise is submitted that the learned transfer pricing officer has held to be the same as a

transaction of deemed loan advanced to the associated enterprises. He submitted that when the working capital adjustment is granted it takes into account the impact of outstanding receivables on the profitability and accordingly no separate adjustment is warranted on account of outstanding receivables. He further stated that the learned dispute resolution panel has allowed working capital adjustment to the assessee and the learned transfer pricing officer in the order giving effect to the direction of the learned dispute resolution panel has also given working capital adjusted margin for computing the ALP. In view of this, no separate adjustment can be made in the hands of the assessee. He further submitted that for the same assessment year the identical issue is covered in case of another group entity and a related party of the appellant company by the coordinate bench in favour of that assessee. He also referred to several other judicial precedents on this issue.

7. The learned department representative referred to page number 32 of 58 of the order of the learned dispute resolution panel with respect to Tata Elxsi Limited and submitted that the total revenue of the comparable has been considered. He further submitted that the learned dispute resolution panel has held that this company provides software development services which are similar to the IT services provided by the assessee. He also submitted that only the learned transfer pricing officer has included the software segment of that comparable company for benchmarking. With respect to Infosys technologies Ltd he referred to para number seven of the order of the learned dispute resolution panel wherein it has been held that this company is primarily engaged in the development of software and software services and can be functionally compared with the functions of the taxpayer. The learned dispute resolution has also considered the decision of the honourable Delhi High Court and stated that this company is comparable to the assessee as assessee has a turnover of ₹ 238.50 crores. It is further held that high turnover does not have the effect on margin of the companies in service industries. With respect to the AMP Brand expenditure it has been held that unless there is a specific finding to the fact that the advertisement marketing and promotion expenditure by any comparable has resulted into higher profit, this factor does not have an effect on benchmarking analysis. It was further stated that in the instant case the taxpayer has not brought any such evidence and therefore the expenditure on advertisement and marketing promotion is not a distinguishing factor. In view of this he submitted that above two comparables contested by the assessee for exclusion is incorrect.
8. With respect to the adjustment on account of outstanding receivables overdue from associated enterprise he submitted that all the four points that has been raised by the learned TPO and against which the objection has been raised by the assessee (1) whether the law provides for benchmarking of the interest on receivable as per the provisions of the income

tax act, (2) whether the transfer pricing officer was justified in his approach of separately benchmarking the receivables as transaction by CUP method, (3) whether the TPO was justified in charging interest on receivable at arm's-length price beyond the period of 30 days and (4) the rate of interest charged by the TPO with the rate of 14.88% was justified. He submitted that the learned dispute resolution panel has given its finding in detail on all these four aspects. He relied on the same.

9. We have carefully considered the contentions of the rival parties and perused the order of the learned transfer pricing officer and direction of the learned dispute resolution panel. We deal with the both the comparables challenged by the assessee.
10. With respect to the Infosys technologies it is the claim of the assessee that the turnover of the above company is such a huge turnover that it is not comparable with the assessee company is software development division. For this proposition we look at page number 165 of the paper book wherein the software development division revenue of the assessee is only Rs.16.80 crores whereas the turnover of the comparable company i.e. Infosys technologies Ltd compared by the learned transfer pricing officer is ₹ 21,140 crores. It is also submitted before us that the asset base of the assessee company is merely 42.7 crores whereas the asset base of Infosys technologies Ltd is ₹ 4188 crores. The assessee has not incurred any expenditure on brand whereas the comparable company has incurred an expenditure of ₹ 57 crores. The learned departmental representative could not controvert the above dissimilarity between the asset base, turnover of the company, the brand utilised by the comparable. Thus, In view of such a huge turnover of the comparable company, relying on the decision of the honourable Bombay High Court in case of CIT versus Pentair water private limited and of honourable Delhi High Court in case of CIT versus Agnity India technologies Ltd in ITA number 1204/2011 dated 10 July 2013 the above comparable is directed to be excluded.
11. Now we come to the second comparable Tata Elxsi Ltd it is pointed out that in the directors report of the company it is stated that the above company is engaged in software development in service segment wherein that segment comprises of product design services which comprises of hardware and software design and development, innovation design engineering and visual computing labs. Further in the revenue of the above company there is no bifurcation about the sales and services with respect to the products. In schedule 18 it is also shown that there is income from sale of goods. Further, the learned authorised representative referring to the order of the coordinate bench in case of a sister concern in ITA number 1084/del/2016 has stated that in para number 56 it shows that the comparable company provides global customer with service towards technology product development and outsourcing research and development including digital TV unable products such as

advanced display and set-top boxes, multimedia and portable entertainment product such as audio and media players, consumer electronics such as digital video cameras, mobile phone et cetera and enable value to its customers through cost-effective and timely service delivery of its technology and domain expertise . Further it is also pointed out that the comparable company is a design company that blends technology, creative and engineering to help customers transform ideas into world-class products and solutions. The learned dispute resolution panel though has considered the above functions of the comparable company however it is directed that the comparable company provides software development services which are similar to the IT services provided by the assessee. In view of this we find that the direction of the learned dispute resolution panel is not based on the appreciation of the functions and the product profile of the comparable company. In view of this, we direct the learned transfer pricing officer to exclude the above comparable.

12. With respect to the adjustment on account of the overdue receivable from the associated enterprises, the learned dispute resolution panel in objection number 7.5 has held that TPO's objection in not allowing working capital adjustment does not hold good and directed the learned transfer pricing officer to give working capital adjustment using the OECD methodology applying SBI prime lending rate as the interest rate. When working capital adjustment is granted to the assessee there is no requirement once again of making any adjustment on account of the overdue receivable from associated enterprises as the sundry debtors outstanding of the assessee includes outstanding receivable from associated enterprise. In view of this, we direct the learned transfer pricing officer to delete the adjustment on account of outstanding receivable from associated enterprise.
13. No other contentions were raised before us. In view of this, subject to the above finding, the appeal of the assessee is partly allowed.
14. In the result ITA number 1291/del/2015 filed by the assessee is partly allowed.

Order pronounced in the open court on 27/11/2020.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 27/11/2020
A K Keot

Copy forwarded to

1. Applicant

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	27.11.2020
Date on which the typed draft is placed before the dictating member	27.11.2020
Date on which the typed draft is placed before the other member	27.11.2020
Date on which the approved draft comes to the Sr. PS/ PS	27.11.2020
Date on which the fair order is placed before the dictating member for pronouncement	27.11.2020
Date on which the fair order comes back to the Sr. PS/ PS	27.11.2020
Date on which the final order is uploaded on the website of ITAT	27.11.2020
date on which the file goes to the Bench Clerk	27.11.2020
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	