

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI**

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

AND

SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA NO. 561/Mum/2011

(Assessment Year: 2005–06)

The Deputy Commissioner of Income-tax-8(3), Mumbai PAN : AAACP5960H	vs	SITEL India Ltd 4A, Park Davis Complex (Main) Sakinaka, Mumbai-72 PAN : AAFCS1297M
(APPELLANT)		(RESPONDENT)

Appellant by	Shri Manpreet Duggal (DR)
Respondent by	Shri Ajit Jain / SiddheshChoughule

Date of hearing	15-12-2021
Date of Pronouncement	09/02/2021

ORDER

Per Saktijit Dey (JUDICIAL MEMBER)

This is an appeal by the revenue against order dated 08-11-2010 of learned Commissioner of Income Tax (Appeals)-15, Mumbai for the assessment year 2005-06.

2. The only ground raised by the revenue reads as under:-

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in restricting the addition of Rs.8,51,35,703/- to Rs.1,56,78,265/- made by the Assessing Officer on the basis of working provided by the TPO, where the arms length margin was taken at 27.80%."

3. Briefly the facts are, as stated by the Transfer Pricing Officer the assessee, a resident company, is a joint venture between Systems Integrated Telemarketing, Netherlands and Tata group India with equal participation. Basically, the assessee provides contact centre services, i.e. e-mail web based chat solutions and voice responses to the customers of SITEL Corporation, USA and SITEL UK Ltd. During the year under consideration, the assessee received an amount of Rs.69,77,57,962 from SITEL, USA and SITEL UK towards provision of customer contact services. The assessee benchmarked the aforesaid transaction with the Associate Enterprises (AEs) by applying transactional net margin method (TNMM). Since, the margin shown by the assessee at 12.83% was higher than the average margin of the comparables worked out at 9.95% on multiple year data and 9.73% on the current year data, the transaction was claimed to be at arm's length. The Transfer Pricing Officer (TPO), however, did not accept the benchmarking of the assessee. He observed, due to idle capacity of salaried employees, the profit margin of the assessee has been reduced. He observed, since the assessee has not undertaken any domestic transaction or transaction with third parties, the idle capacity is only on account of AEs not giving enough business to the assessee. Therefore, he disallowed idle capacity adjustment claimed by the assessee. Having done so, the TPO determined the assessee's margin on cost at (-) 5.21% as against arm's length margin determined by him at 27.80%. Accordingly, he computed arm's length profit at Rs.20,46,34,976/-, thereby, proposing an adjustment of Rs.24,29,58,729/-. However, considering the fact that the amount

of revenue retained by the AEs amounted to Rs.8,51,35,703/-, he restricted the adjustment to that extent. The aforesaid adjustment proposed by the TPO was added back to the income of the assessee in the assessment order. The assessee contested the aforesaid addition before learned Commissioner (Appeals). In course of proceedings before the first appellate authority, the assessee furnished additional evidence under rule 46A to demonstrate that out of the gross revenue earned from the end customers, the AEs have retained certain amount towards marketing related functions performed by them and remitted the balance revenue to the assessee. It was submitted, the revenue retained by the AEs varied between 0% to 28% of the gross revenue earned from the end customers for various projects. It was further submitted, as against the revenue returned of Rs.8,51,35,703/- by the AEs, they have incurred cost of Rs.6,03,09,108/-. Thus, it was submitted, there is no question of assessee shifting any profit to AEs. After considering the submissions of the assessee, learned Commissioner (Appeals) forwarded the additional evidences to the Transfer Pricing Officer for his verification and comments. As observed by the learned first appellate authority, without examining the additional evidences furnished by the assessee on merits, the Transfer Pricing Officer simply stated that they should not be admitted. After verifying the additional evidences, learned Commissioner (Appeals) found that the profit margin of the AEs from the amount retained from gross revenue received from end customers varied between loss figure to 20.93%. After verifying all relevant facts, the learned Commissioner (Appeals) observed that in US & UK where the AEs are located, the arm's length profit margin for marketing services of the nature provided by them generally ranges from 5% to 7% depending upon the facts and circumstances of each case. Considering the same, he concluded

that profit margin of 6% of the AEs could be considered as appropriate arm's length consideration for the marketing efforts put up by them. Therefore, he held that any amount paid to AEs resulting in profit margin exceeding 6% cannot be considered to be at arm's length. By applying such principle, he found that in case of SITEL UK and NAFS UK, profit margin of more than 6% has been generated. Accordingly, the excess profit over and above 6% was considered for adjustment to ALP, which, amounted to Rs.1,56,78,265/-. Therefore, he directed the AO to restrict the addition to that extent.

4. The learned Departmental Representative strongly relying upon the observations of the TPO submitted, since the assessee was unable to justify the claim of idle capacity adjustment, the TPO was correct in disallowing it. Therefore, he submitted, the adjustment proposed by the TPO should be restored.

5. Per contra, strongly relying upon the observations of the first appellate authority learned Counsel for the assessee submitted, the assessee, on its own, has no clients in the overseas market. He submitted, the AEs in USA and UK perform marketing activities and arrange the end customers to whom assessee provides services. He submitted, since the AEs arranged the customers and provided marketing services, they retained, on an average, 12% of the gross revenue earned from the end customers and repatriated 88% of the gross revenue to the assessee. Drawing our attention to documents placed in the paper book, the learned Counsel submitted, in case of some projects the AEs did not retain even a single rupee and entire revenue was passed on to the assessee. He submitted, considering the function performed by the AEs and the cost incurred,

the revenue retained by the AEs and the profit margin earned by them is at arm's length. Further, he submitted, under identical facts and circumstances, similar adjustment made by the TPO was set aside by the Tribunal to the Assessing Officer/TPO and the TPO has ultimately accepted the transaction to be at arm's length in Assessment Year 2004-05. Thus, he submitted, there is no reason to interfere with the decision of learned Commissioner (Appeals).

6. We have considered rival submissions and perused materials on record. As could be seen from the facts on record, the nature of service provided by the assessee falls in the category of information technology enabled services (ITES). As per the modus operandi, the overseas AEs do all the marketing functions and arrange clients / customers to whom assessee provides services. As per the terms of the agreement between assessee and AEs, for performing marketing function the AEs on an average retain 12% out of the gross revenue received from the end customers and pass on 88% to the assessee. It is evident, the adjustment proposed by the TPO is on account of disallowance of idle capacity adjustment and rejection of certain comparables. Whereas, before the first appellate authority, the assessee had furnished a number of additional evidences to demonstrate that the profit earned by the AEs from the revenue retained from end customers is at arm's length. From the materials placed before us we find that in respect of some of the projects the AEs, in fact, have incurred loss and in respect of some of the projects with the end customers the AEs have earned negligible profit margin of 1.69%, 2.29% and 3.39%. Only, in respect of two of the projects, the profit margin earned by the AEs work out to 6.97% and 20.93%. Thus, compared to the marketing functions performed by the AEs and cost incurred in that behalf, the profit margin earned by the AEs from the amount

retained out of the gross revenue received from end customers cannot be said to be unreasonably high so as to infer that the assessee has shifted a part of its profit to the AEs. Moreover, learned Commissioner (Appeals) has held that the ALP margin of the AEs towards their marketing efforts can be reasonably fixed at 6%. Therefore, wherever the AE's profit margin has exceeded 6%, learned Commissioner (Appeals) has considered such excess as adjustment to the ALP. That's how he has worked out adjustment to be made at Rs.1,56,78,265/-. As it emerges from record, the facts on the basis of which learned Commissioner (Appeals) has concluded thus, clearly emerge from the additional evidences furnished by the assessee. It is a fact that the additional evidences were forwarded to the TPO for his examination and necessary comments; however, he has chosen not to do so and has simply stated that additional evidences should not be admitted. Thus, in our view, the assessee has amply demonstrated that the transactions with the AEs are at arm's length. It is further to be noted that in Assessment Year 2004-05 similar adjustment made by the TPO and reduced by learned Commissioner (Appeals) by adopting identical method was restored back to the Assessing Officer by the Tribunal in ITA No.3535/Mum/2005 dated 05-12-2012. Thus, on overall consideration of facts and circumstances of the case, we are of the view that the revenue has failed to bring on record any material or substantive argument before us to controvert the findings of learned first appellate authority. That being the case, we do not find it appropriate to interfere with the decision of learned Commissioner (Appeals). Ground raised is dismissed.

7. In the result, appeal is dismissed.

Order pronounced in the Open Court on this 09/02/2021.

Sd/-

sd/-

(N.K. PRADHAN)	(SAKTIJIT DEY)
ACCOUNTNT MEMBER	JUDICIAL MEMBER

Mumbai, Dated : 09 / 02/2021.

Pavanan, Sr.P.S (on contract)

Copy of the order forwarded to :

1. The Appellant.
2. The Responent.
3. The CIT(A)
4. 4. The CIT
5. D.R., ITAT, Mumbai.
6. Guard File.

//True Copy//

By order

I.T.A.T., Mumbai.