

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No.2881 /DEL/2011 (A.Y 2004-05)

(THROUGH VIDEO CONFERENCING)

DCIT Circle 11(1), Room No. 312, C. R. Building New Delhi (APPELLANT)	Vs	Flextronics Software System Ld. (earlier known as Hughes Software System Ltd.) 5, Jain Mandir, Connaught Place, New Delhi AAACH0152P (RESPONDENT)
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Appellant by	Sh. Bhagwati Charan, SR. DR
Respondent by	Sh. Ajay Vohra, Sr. Adv, & Mr. Romit Katyal, Adv

Date of Hearing	04.03.2021
Date of Pronouncement	23.04.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against the order dated 29/03/2011 passed by CIT(A)-XX, New Delhi for Assessment Year 2004-05.

2. The grounds of appeal are as under:-

1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs. 7,32,39,369/- on account of adjustment in Arm Length .

2. The Ld. CIT(A) has erred by not allowing an opportunity to the AO/TPO while considering the fresh submissions before the CIT(A). While the need of

these details were mentioned in the AO/ TPO order. Thus, it is not as per the Rule 46A.

3. The CIT(A) has erred by not allowing an opportunity to the AO/TPO while considering the fresh submissions before the CIT(A), while the need of these details were mentioned in the AO/TPO order. Thus, it is not as per the Rule 46A.

4. The CIT(A) has erred by not considering the finding of the TPO that documents provided by the assessee before the TPO does not provide terms and conditions such as payment terms, service level agreements and qualification of my power deployed in BPO.

5. The CIT(A) has erred by not obtaining the Remand Report from the AO/TPO, while accepting the fresh submissions by the Assessee u/s 46A of the Act while accepting the Net margin of the comparables at 9.66%.

6. The CIT(A) has erred by not calling a remand report from the AO/TPO while considering fresh submission from the Assessee while accepting, the Net Margins of the assessee (after excluding the abnormal losses) at 12.71%. This is violation of Rule 46A.”

Revised grounds

1. The Id. CIT(A) has erred by not allowing an opportunity to the AO/TPO while considering the fresh submissions before the CIT(A) .While the need of these details were mentioned in the AO/TPO order. Thus it is not as per the Rule 46A.

2. The CIT(A) has erred by not allowing an opportunity to the AO/TPO while considering the fresh submissions before the CIT(A), while the need of these details were mentioned in the AO/TPO order. Thus, it is not as per the Rule 46A.

3. The CIT(A) has erred by not considering the finding of the TPO that documents provided by the Assessee before the TPO does not provide terms and conditions such as payment terms, service level agreements and qualification of my power deployed in BPO.

4. The CIT(A) has erred by not obtaining the Remand report from the

AO/TPO, while accepting the fresh submissions by the Assessee u/s 46A of the Act while accepting the Net margin of the comparables at 9.66%.

5. The CIT(A) has erred by not calling a remand report from the AO/TPO while considering fresh submission from the Assessee while accepting the Net Margins the assessee (After excluding the abnormal losses) at 12.71%. This is violation of R 46A.

3. The assessee is a company engaged in the business of developing package software and providing software consulting services primarily for the use in delivery communication Industry. The assessee during the relevant previous year has entered into the following international transactions:

S. No.	Description of transaction	Method Used	Value (In Rs.)
1	Sale of Software development product	CUP	29,05,100
2	Provision of software development service	TNMM	72,53,13,306
3	Payment for administration and support services	TNMM	1,88,70,124
4	Provision of business process outsourcing services	TNMM	16,62,13,210
5	Payment of marketing services	TNMM	50,11,564
6	Purchase of equipment	TNMM	2,82,71,893

The assessee has considered its business in two segments one related to Software Development and the other related to Business Process Outsourcing (BPO). All transaction other than the transaction of business process outsourcing, the assessee has used Transactional Net Margin Method (TNMM) as the most appropriate method that of OP/Sales as profit level indicator in respect of software segment. For transaction relating to Business Process Outsourcing (BPO) Services, the assessee had used Comparable Uncontrolled Price (CUP) method as the most appropriate method. A reference was made by the Assessing Officer u/s 92CA (1) of the Act the Transfer Pricing Officer (TPO)

for computation of the Arms Length Price in respect of this international transaction. The TPO after going through the Transfer Pricing Documentation and other details filed by the assessee during the proceedings u/s 92CA proposed adjustment in the transfer pricing of the international transaction relating to the provisions of BPO Services to the extent of Rs. 7,32,39,369/-. The Assessing Officer passed assessment order u/s 143(3) vide order dated 29/12/2006 thereby assessing total income at Rs. 19,39,43,196/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT (A). The CIT (A) partly allowed the appeal of the assessee.

5. The Ld. DR submitted that the CIT (A) erred in not allowing an opportunity to the Assessing Officer /TPO while considering the fresh submission before the CIT(A). Thus, the admission of the additional evidence/details is not as per Rule 46A. The Ld. DR further submitted the CIT(A) erred by not considering the finding of the TPO with documents provided by the assessee before the TPO as the same does not provide terms and conditions such as payment terms, service level agreement and qualification of assessee's power deployed in BPO. There is no remand report obtained from the Assessing Officer while exceeding the Net Margin of the comparable at 9.66 %. The Ld. DR further submitted that the CIT(A) has not given proper adjudication as to the acceptance of the Net Margins of the assessee after excluding the abnormal losses at 12.71% which is in violation of Rule 46A as the remand report was not called up.

6. The Ld. AR submitted that the CIT(A) has rightly calculated the operating margin of the assessee at 12% after allowing comparability adjustment on account of abnormal cost. The Ld. AR relied upon the following decisions:

- a) Transwitch India Pvt. Ltd. vs. ACIT (ITA No. 6083/Del/2010 approved by the Hon'ble Delhi High Court vide order dated 17.07.2013)
- b) DCIT vs. Terex India Pvt. Ltd. (ITA No. 6775/Del/2015)

- c) Ariston Thermo India Ltd. vs. DCIT (ITA No. 1455.PN/2010)
- d) Pangea3 & Legal Database Systems Pvt. Ltd. vs. ITO (ITA No. 2128/Del/2014)
- e) Smart Cube India Pvt. Ltd. vs. ACIT (ITA No. 6274/Del/2012)
- f) ACIT vs. Fiat India Pvt. Ltd. (ITA No. 1848/Mum/2009)
- g) Brintons Carpets Asia Pvt. Ltd. vs. ACIT (ITA No. 1296/PN/10)
- h) DCIT vs. Panasonic AVC Networks India Co. Ltd. (ITA No. 4620/Del/2011)

The Ld. AR further submitted that the comparability adjustment on account of abnormal cost was claimed by the assessee before the TPO. The adjusted margin after making the adjustments was worked out at 4.08%. The claim of the assessee was rejected by the TPO. Against the order of the TPO, the assessee claimed the adjustment before the CIT(A) and filed revised calculation of adjusted margin and adjusted margin was calculated at 12.71%. The Ld. AR submitted that claim of comparability adjustment was not made for the first time before the CIT(A) and only the calculation of the amount of adjustment was revised. The Ld. AR further submitted that no additional evidence was filed by the assessee before the CIT(A) and the CIT(A) has powers for allowing the claim of the assessee. The Ld. AR relied upon the following decisions wherein it has been held that the powers of the CIT(A) are co-terminus with that of the assessing authority:

- a) Jute Corporation of India Ltd. vs. CIT 187 ITR 688 (SC)
- b) CIT vs. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC)

The Ld. AR further submitted that in the transfer pricing documentation, the assessee determined arm's length price of the international transaction of rendering BPO services applying CUP method. Since the prices charged by the assessee at USD 19.20 per hour from the AE exceed the prices charged from the unrelated party, i.e., ALP @ USD 14.00 per hour, the 'international transactions' of BPO services were considered being at arm's length, in the Transfer Pricing Documentation. The Ld. AR further submitted that in the BPO industry the prevalent rate for services was in the range of USD 8 to USD 15

per hour and was comparable/lower to the rate of USD 19 charged by the assessee from the AE and was at arm's length applying CUP method. The Ld. AR further submitted that the assessee furnished the details with reference to Article on Mphasis BPO, Article on VKALP BPO Services, Article on IT Trends by Stephanie Moore and Dataquest's article on trends in BPO industry in India to the Assessing Officer at the time of assessment proceedings. But the same was ignored by the Assessing Officer. The Ld. AR submitted that the Hon'ble Gujrat High Court in case of CIT vs. Adani Wilmar Ltd. (ITA No. 240/2014) upheld the use of quotations as a valid CUP. Similarly, the Delhi Tribunal in case of Noble Resources and Trading India Pvt. Ltd. vs. DCIT (ITA No. 3132/Del/2013) upheld the use of quotations as a valid CUP. During the relevant previous year the assessee had generated billed man-month of 208 while the idle time of the people was 223 man-month. Accordingly, out of total billable 431 man months, only 208 man months were billed by the assessee. Therefore there was idle capacity to the extent of 51%. After making adjustment on account of idle employee cost the adjusted operating margins of the assessee is work out at 45.87% which is more than the arithmetic mean margin of the comparables companies at 15.49% (corrected margin 9.66%). Thus, this does not warrant any transfer pricing adjustment in respect of international transactions undertaken by the assessee. The Ld. AR further submitted that in terms of Rule 27, the assessee is entitled to defend the order of the CIT(A) before the Tribunal on all grounds including the grounds which have either not been decided by the CIT(A) or have been decided against the assessee. For which, the Ld. AR relied upon the decisions of Sanjay Sawhney vs. Pr. CIT 273 Taxmann 332 (Del.) and B. R. Bamasi vs. CIT 83 ITR 233 (Bom). Thus, the Ld. AR submitted that the adjustment made by the TPO is not sustainable even applying the CUP method.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the comparability adjustment on account of abnormal cost was claimed by the assessee before the TPO and the adjusted

margin after making the adjustments was worked out at 4.08%. The said claim of the assessee was rejected by the TPO. The assessee in appeal before the CIT(A) filed revised calculation of adjusted margin and adjusted margin was calculated at 12.71%. Thus, the claim of comparability adjustment was not made for the first time before the CIT(A) and only the calculation of the amount of adjustment was revised. This contentions of the assessee are tenable and emerges from the submissions made before the CIT(A). The CIT(A) held as under:-

9.5 Since the appellant was in the start-up phase and the abnormal expenses, as aforementioned, were incurred by the appellant, comparing the operating profit margin of the appellant without any appropriate adjustment, with the operating profit margin of the comparable companies identified by the TPO, in my considered view, would go against the true intention of the transfer pricing regulations. Such adjustments to the operating margin of the appellant are, thus, required so as to eliminate the difference between the appellant and the comparables.

9.6 Considering the operating profit margin of the appellant computed after excluding the abnormal cost / loss, at 12.71% as against the operating profit margin of the comparable companies identified by the TPO (after correctly computing the operating profit margin) at 9.66%, the adjustment made by the TPO, on account of the difference in the arm's length principle of the international transactions does not survive. In my considered view, even if the operating profit margin computed by the TPO at 15.49% is considered the operating profit margin of the appellant computed after excluding the abnormal cost / loss, at 12.71% falls within the range of +/-5% provided as per proviso to section 92C(2) of the Act and hence no adjustment calls for being made.

9.7 In my considered view the adjustment of Rs. 7.32,39,369 made by the TPO, therefore, is liable to be deleted. The issue on this ground, accordingly, is decided in favor of the appellant.

9.8 Since the aforesaid issue has been decided in favor of the assessee,

adjudication on the other grounds becomes wholly academic and hence requires no separate adjudication.”

Thus, the CIT(A) has given a detailed finding on the TP Adjustment and there is no other ground in respect of corporate issues by the Revenue. In the transfer pricing documentation, the assessee determined arm's length price of the international transaction of rendering BPO services applying CUP method. Since the prices charged by the assessee at USD 19.20 per hour from the AE exceed the prices charged from the unrelated party, i.e., ALP @ USD 14.00 per hour, the 'international transactions' of BPO services were considered being at arm's length, in the Transfer Pricing Documentation. There is no dispute on part of the revenue that in the BPO industry the prevalent rate for services was in the range of USD 8 to USD 15 per hour and was comparable/lower to the rate of USD 19 charged by the assessee from the AE and was at arm's length applying CUP method. Thus, the adjustment made by the TPO is not sustainable even applying the CUP method. Hence, there is no need to interfere with the findings of the CIT(A). Hence, the appeal of the Revenue is dismissed.

8. In result, the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on this 23rd Day of April, 2021

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Dated: 23/04/2021

*R. Naheed **

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	04/03/2021
Date on which the typed draft is placed before the dictating Member	04/03/2021
Date on which the typed draft is placed before the Other Member	23.04.2021
Date on which the approved draft comes to the Sr. PS/PS	23.04.2021
Date on which the fair order is placed before the Dictating Member for pronouncement	23.04.2021
Date on which the fair order comes back to the Sr. PS/PS	23.04.2021
Date on which the final order is uploaded on the website of ITAT	23.04.2021
Date on which the file goes to the Bench Clerk	23.04.2021
Date on which the file goes to the Head Clerk	