

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI '1-1' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 415/DEL/2013
[Assessment Year: 2005-06]

Aricent Technologies Holdings Ltd.,
Erstwhile Flextronics Software
Systems, Ltd, 5, Jain Mandir Marg
[Annexe] Connaught Place
New Delhi.

Vs.

The Addl. CIT,
Range-11,
New Delhi.

PAN: AACCK 8280 B

[Appellant]

[Respondent]

Date of Hearing : 10.06.2021
Date of Pronouncement : 10.06.2021

Assessee by : Shri Neeraj Jain, Adv
Shri Ramit Katyal, Adv

Revenue by : Ms. Shashi Kajle, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the
ld. CIT(A)-XX, New Delhi dated 31.10.2012 pertaining to A.Y 2005-06.

2. The grievance of the assessee read as under:

"1. That on the facts and circumstances of the case, the Commissioner of Income- tax (Appeals) erred on facts and in law in confirming the adjustment of Rs 6,66,23,138 made by the Transfer Pricing Officer under section 92CA(3) of the Act on account of alleged difference in the arm's length price of the 'international transactions' of provision of Business Process Outsourcing services

1.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in disregarding the Comparable Uncontrolled transactions placed on record for demonstrating the intentional transaction of provision of BPO services undertaken by the appellant, as the most appropriate method.

1.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting the comparable uncontrolled transactions placed on record by the appellant holding that averaging of hourly charges is inappropriate for the purpose of applying the Comparable Uncontrolled Price Method

1.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in rejecting the internal benchmarking undertaken by the appellant for determining the arm's length price of the international transactions applying TNMM on the basis that cost allocation between the segments is artificial, holding that there are large amounts which have not been allocated on the ground that

they are abnormal

1.4 That the CIT(A) erred on facts and in law in evaluating the international transactions applying TNMM by comparing the net operating profit margin of the appellant with net operating profit margin of external comparable uncontrolled enterprises

1.5 That the Commissioner of Income-tax (Appeals) erred on — upholding the selection of following companies as comparables by the TPO for the purpose of benchmarking the international transactions of the appellant:

- (i) Allsec Technologies Limited
- (ii) Saffron Global
- (iii) Wipro BPO Solutions Limited
- (iv) Airline Financial Support Services (I) Ltd.
- (v) Transworks Information Services Ltd.

1.6 Without prejudice that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that profitability of the appellant was lower due to underutilization of capacity during the relevant previous year and disregarding the appellant's contention of making an appropriate comparability adjustment for under utilization of capacity holding that reliable data is not available in this regard.

1.7 That the Commissioner of Income-tax (Appeals) erred on facts and in law in appreciating that appropriate adjustments are

required to be made on account of the appellant being a start up enterprise having incurred substantial start up cost / establishment cost during the relevant financial year.

1.8 That the Commissioner of Income-tax (Appeals) erred on facts and in law in disregarding the risk immune profile of the appellant and rejecting the claim towards adjustment for differences in the risk profile of the appellant vis-a-vis the comparable companies.

1.9 That the Commissioner of Income-tax (Appeals) erred on facts and in law in disallowing deduction under section 10B of the Act to the extent of Rs 37,02,996 allegedly holding that export proceeds have not been realized within the prescribed period.

1.10 Without prejudice, that the Commissioner of Income-tax (Appeals) erred on facts and in law in not appreciating that export turnover was required to be reduced to the extent of unrealized export proceeds of Rs 37,02,996 for the purpose of computing deduction Under section 10B of the Act."

3. Briefly stated, the facts of the case are that the assessee company develops packaged software products, provides software consulting services and other ancillary products and services, primarily for use in tele-communications industry. The company also provides business process outsourcing services, primarily in the areas of on-line customer care.

4. During the year under consideration, the assessee had entered into international transactions with its Associated Enterprises [AE] for Rs. 101.64 crores and accordingly, reference was made u/s 92CA(3) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] for determining the arm's length price.

5. During the transfer pricing assessment proceedings, the TPO analysed the application of CUP for international transactions relating to BPO segment. The relevant observations of the TPO read as under:

"5.2 Analysis of application of CUP for international transactions relating to BPO segment:-

I have carefully examined applicability' of CUP, a method selected by the assessee to benchmark international transaction and have held that method is not suitable to benchmark international

transaction for the following reasons:

5.2.1 The issue of applicability of CUP was discussed in the TP order for AY 2004-05 and it was concluded that CUP is not the most appropriate method for benchmarking of the international transactions. The extracts of the order are as under-

"Analysis of CUP in BPO Segment

4.0 As mentioned above since the assessee has considered Comparable Uncontrolled Price Method as most appropriate method to benchmark international transaction of providing BPO services to its associated enterprise, the veracity of comparative prices need to be examined. The relevant information is appearing at page 89 of the Transfer Pricing documentation where the assessee has benchmarked this international transaction by mentioning that the assessee has been charging rates of USD 19.20 per hour from HNS, USA as compared to USD 14 per hour for similar services being charged from the unrelated party. It is on this premise that the transaction in BPO segment has been considered to be at arm's length. This kind of Comparable Uncontrolled Price is known as *internal CUP*. No information about the particulars of unrelated party, terms & conditions of service, and other details were made available in the documentation so as to demonstrate that the transactions which are being compared do not vary from each other."

6. From the above observations, it is abundantly clear that while proposing the adjustment in ALP, the TPO has followed the findings even in A.Y 2004-05. In A.Y 2004-05, this quarrel travelled upto the Tribunal and the Tribunal in ITA No 2881/DEL/2011, vide order dated 23.04.2021, held as under:

"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."

7. As no distinguishing factor has been brought to our notice and since the TPO followed the findings of A.Y 2004-05, therefore, respectfully following the findings of the co-ordinate bench [supra] we direct the Assessing Officer/TPO to delete the impugned addition.

8. In the result, the appeal of the assessee in ITA No. 415/DEL/2013 is allowed.

The order is pronounced in the open court on 10.06.2021.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER

sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated : 10th June, 2021

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
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