

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

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
DR. B. R. R. KUMAR, ACCOUNTANT MEMBER**

**ITA No. 6577/DEL/2016 (A.Y 2012-13)
(THROUGH VIDEO CONFERENCING)**

Majorel India Pvt. Ltd. ("Company") (earlier known as Bertelsmann Marketing Services India Pvt. Ltd.)215, Second Floor, Suneja Tower- II, District Centre, Janakpuri, New Delhi AABCB8378G (APPELLANT)	Vs	ACIT Circle 4(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Vishal Kalra, Adv & Sh. Yishu Goel, Adv
Respondent by	Sh. F. R. Meena, Sr. DR

Date of Hearing	17.08.2021
Date of Pronouncement	12.11.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 28/10/2016 order passed by 143 (3) read with Section 144C of the Income Tax Act, 1961 for Assessment Year 2012-13.

2. The grounds of appeal are as under:-

1. *That on facts and in the circumstances of the case and in law, the Learned Assessing Officer (AO) / Learned Transfer Pricing Officer (TPO)/ Hon'ble Dispute Resolution Panel (DRP) erred in making an addition of Rs. 1,57,59,899 to the returned income of the appellant by re-computing the arm's*

length price (ALP) of the international transactions under section 92 of the Income-tax Act, 1961 (the Act).

2. That on facts and in the circumstances of the case and in law, the reference made by the AO to the TPO suffers from jurisdictional error as the AO has not recorded any reasons in the assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the TPO for computation of ALP, as is required under section 92CA(1) of the Act.

3. That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case.

4. That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in rejecting the Internal Transactional Net Margin Method ("TNMM") applied by the Appellant and thereby applying external TNMM to benchmark the international transactions of the Appellant.

5. That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in rejecting the segmental accounts maintained by the Appellant.

6. That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in application of external TNMM by:

6.1. Rejecting the economic analysis conducted by the Appellant during the course of assessment proceedings;

6.2. Not accepting the quantitative filters selected by the Assessee in fresh search during the course of assessment proceedings and instead applying his additional/modified quantitative filters which lacked valid and sufficient reasoning; and

6.3. Accepting companies which are functionally not comparable to the Appellant in terms of functions, assets and risk profile.

7. The DRP/AO/TPO erred on facts and in the circumstances of the case and in law by holding the Appellant as a knowledge process outsourcing ("KPO") company and thereby accepting certain companies which were performing

high end and different services as compared to the Appellant.

8. *The DRP/AO/TPO erred in facts and circumstances of the case and in law by disregarding the multiple year data selected by the Appellant in the transfer pricing report and in selecting the current year (i.e. financial year 2011-12) data for comparability.*

9. *That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in treating the overdue receivables from AEs as an international transaction.*

10. *Without prejudice, the DRP/AO/TPO erred on facts and in law by selecting incorrect methodology to compute the ALP of international transaction of receivables as on March 31, 2012.*

11. *That on the facts and circumstances of the case and in law the AO/TPO erred in initiating the penalty proceedings u/s 271 (1) (c) of the Act mechanically and without recording any adequate satisfaction for such initiation.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.”

3. The assessee company is a wholly owned subsidiary of Arvato Direct Services GmbH and is engaged in rendering back of his support services and back in information technology enabled support (ITeS) Services to its associated enterprises as well as non AE's for the Assessment Year 2011-12. The assessee filed its return of income on 28.11.2012 declaring loss of (-) Rs.1,51,07,942/-. During the year under consideration, the Assessee entered into International Transactions with 'Associated Enterprises' (AE). The case was referred to Transfer Pricing Officer (TPO) as per the provisions of Section 92CA(4) of the Act. The TPO vide order dated 29/1/2016 made total upward transfer pricing adjustment of Rs. 8,65,80,474/-. The Draft Assessment order was passed on 25.02.2016. The assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide order/directions dated 26.09.2016

affirmed the order of the TPO. The details of Transfer Pricing Adjustment proposed by the TPO and affirm by the DRP are as follows:-

Sr. No.	Adjustment on account of	Adjustment made by TPO (INR)	Adjustment affirmed by DRP(INR)
1	Provision of ITeS	8,64,62,364	1,57,652 (Post direction given by the DRP to restrict adjustment to AE segment)
2	Interest on receivables	1,18,110	42,248 (Post DRP direction to take LIBOR+ 400 basis points as rate of interest)
	Total	8,65,80,474	1,57,59,899

The Assessing Officer, pursuant to the directions of the DRP completed the assessment incorporating the addition of Rs. 1,47,59,899/- to the return of income vide order dated 28.10.2016.

4. Being aggrieved by the assessment order, the assessee filed appeal before us.

5. The Ld. AR submitted that Ground No. 1,2,3 are general in nature.

6. As regards Ground No. 4 & 5 relating to rejection of internal TNMM applied by the assessee, the Ld. AR submitted that the assessee is engaged in the provisions of ITeS Services to both AE's as well as non-AE's wherein the functions performed and risk assumed in relation to the provision of such services are similar and comparable. Therefore, based on the Functions, Assets and Risk i.e. FAR analysis and the availability of data for determining the Arms' Length Price of its international transactions, the assessee applied internal TNMM and compared the OP/OC margin of AE claimed with OP/OC margin of non-AE segment. Since the OP/OC margin of 12.8% in its AE segment was higher than 7.24% OP/OC margin earned in the non-AE segment, it was concluded that the international transaction in respect of provision of ITeS undertook by the assessee are at Arms' Length in accordance with Indian TP Regulations. The TPO in the show cause notice, proposed to reject internal

TNMM applied by the assessee for benchmarking provision of ITeS. However, the submissions of the assessee in this respect were not considered. The TPO proceeded to apply external TNMM to benchmark the said international transaction. Further, the DRP while dealing with internal TNMM applied by the assessee, rejected the project stating that the nature of services being performed in AE Segment are totally different from nature of Services in non-AE segment as well as no audited segments are being maintained and the assessee has created artificial segmentation.

7. The Ld. AR further submitted that the following nature of Services are being rendered by the assessee:

- * The customer query resolution a call centre Services
- * Accounts receivable/payable management services
- * Data processing support services
- * Sale support services
- * other support services for e.g. warehouse services.

The nature of services rendered by the assessee to non-AEs broadly comprised of customer care and technical support, viz., payroll, recruitment, IT support etc. The Ld. AR further submitted that business operations of the assessee are divided into various operational processes that it performs for its customers (AE's and non AE's). While processes carried out for the AE and non AE may differ, the fundamental functions performed by the assessee under each of these processes are the same and fall under the category of ITeS Industry. The Ld. AR submitted that the DRP has erred in considering the services/scope of work from the agreement entered into by the assessee with its AE for 'procurement of IT Services' and comparing the same with the back-end ITeS Services provided by the assessee to AEs and non AEs. In this regard, the Ld. AR submitted that Rule 10C of the Income Tax Rules, 1962 provides that the

most appropriate method shall be the method which is best suited to the facts and circumstances of each particular international transaction, and which provides the most reliable measure of an Arms' Length Price in relation to the intentional transactions. Since, the financial data pertaining to internal segmentation is more reliable and accurate, as compared to financial data of external comparable companies, and is more reliable to the facts and circumstances of the case, internal benchmarking analysis should be selected over external benchmarking analysis. The Ld. AR relied upon the OECD Transfer Pricing guidelines for Multinational Enterprises and Tax Administrations which highlight the preference of internal comparables over external comparables. (relied upon Para 3.27 and 2.58 of OECD guidelines). Further, the Ld. AR submitted that even the United Nations Practical Manual on Transfer Pricing for Developing Countries, released in 2013 (UN manual) also provides that TNMM is less dependent on product comparability because net margins are less influenced by differences in products and functions, as compare to other methods like CUP. The Ld. AR relied upon the following cases wherein it has been held that TNMM is not dependent on product similarity, and in TNMM, broad nature of Services/functions is to be seen:

- DCIT vs. Isagro (Asia) Agrochemicals Pvt. Ltd. (ITA No. 5093/Mum/2017)
- Diageo India Pvt. Ltd. Vs DCIT (2013) 59 SOT 150 (Mumbai Tri.)
- Eaton Fluid Power Ltd. Vs. ACTI (2015) 56 Taxman.com 135 (Pune Tri.)

8. The Ld. AR further submitted that the DRP observed that the segments furnished by the assessee were not audited. But the DRP or the TPO did not highlight any defect or discrepancy that led to such a conclusion. The segmental analysis was based on valid allocation keys and the same was furnished in the TP study. The Ld. AR relied upon the following decisions wherein it has been held that segments do not have to be audited and that they cannot be rejected without any basis:

- Lummus Technology Heat Transfer BV Vs. DCIT (2014) 64 SOT 47 (Delhi Tri.)
- Destination of the World Subcontinent (P) Ltd. Vs. ACIT (2011) 47 SOT 1 (Delhi Tri.)
- CSR Technology India Pvt. Ltd. Vs. ACIT (2018) 90 Taxman.com 85 (Delhi Tri.)
- Birlasoft (India) Ltd. Vs. DCIT (2011) 44 SOT 664 (Delhi Tri.)
- S.B.& T Designs Ltd. Vs. ACIT (2017) 82 Taxman.com 385 (Mumbai Tri.)

9. The Ld. DR submitted that the TPO in the show cause notice, proposed to reject internal TNMM applied by the assessee for benchmarking provision of ITeS. The TPO proceeded to apply external TNMM to benchmark the said international transaction. The DRP while dealing with internal TNMM applied by the assessee, rejected the project stating that the nature of services being performed in AE Segment are totally different from nature of Services in non-AE segment as well as no audited segments are being maintained and the assessee has created artificial segmentation. Thus, the Ld. DR submitted that the external TNMM is appropriate for benchmarking provision of ITeS.

10. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the nature of services rendered by the assessee to non-AEs broadly comprised of customer care and technical support, viz., payroll, recruitment, IT support etc. The business operations of the assessee are divided into various operational processes that it performs for its customers (AE's and non AE's). While processes carried out for the AE and non AE may differ, the fundamental functions performed by the assessee under each of these processes are the same and fall under the category of ITeS Industry. These aspects were never disputed by the TPO/AO at any stage. In fact, the TPO/AO simply stated that the nature of services performed in AE segment are totally different from nature of services in non-AE segment. But how the services are fundamentally different has not been demonstrated by the

Assessing Officer. In fact, in broader context the services rendered to AE and non-AE are that of customer care and technical support. Thus, rejecting the internal TNMM on this ground is not valid as internal TNMM is the method which makes it easy to find comparable companies and reasonably determine the arm's length nature of related as well as unrelated transactions. Besides this the TPO/AO has also rejected internal TNMM on the ground that there were no audited segments maintained. But at the same time, the TPO/AO has not pointed out any discrepancy related to segmental analysis based on valid allocation keys furnished by the assessee in its TP study. Therefore, these two aspects cannot be valid for rejecting the internal TNMM. The DRP was not correct in considering the services/scope of work from the agreement entered into by the assessee with its AE for 'procurement of IT Services' and comparing the same with the back-end ITeS Services provided by the assessee to AEs. In the present case best suited method is that of internal TNMM. The financial data pertaining to internal segmentation is more reliable and accurate, as compared to financial data of external comparable companies, therefore, it will be appropriate to apply internal benchmarking analysis over external benchmarking analysis. This finds support from the "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" which highlight the preference of internal comparables over external comparables. (relied upon Para 3.27 and 2.58 of OECD guidelines). In fact, the United Nations Practical Manual on Transfer Pricing for Developing Countries, released in 2013 (UN manual) also provides that TNMM is less dependent on product comparability because net margins are less influenced by differences in products and functions, as compare to other methods like CUP. Therefore, we direct the TPO/AO to adopt internal TNMM for benchmarking provision of ITeS. Ground Nos. 4 and 5 are allowed.

11. As regards Ground No. 6, 7 & 8 relating to inclusion/exclusion of comparable companies under external TNMM, the Ld. AR submitted that without prejudice to the above submissions for Ground Nos. 4 and 5, it is

submitted that internal TNMM is most appropriate method to benchmark provisions of ITeS, the assessee submitted detailed analysis of comparable Companies taken by the TPO and sought to be excluded by the assessee. The Functions, Assets, Risk analysis (FAR) as per the TP study of the assessee is as follows:-

“Functions performed by assessee:

- Customer query resolution
- Call centre services
- Accounts receivable/ payable management services
- Data processing services
- Sales support services
- Other support services,e.g., warehouse services

Assets employed:

S.No	Particulars	Net Block Amount (INR)
1	Data Processing Devices	2,40,22,404
2	Software	27,17,345
3	Office Equipments	27,17,345
4	Furniture & fittings	77,12,517
5	Vehicles	16,96,620
6	Leasehold improvements	2,88,71,255
	TOTAL	7,85,63,030

Risks :

S. No.	Risk Borne	BMSI	AE
1	Foreign Exchange Risk	Yes	No
2	Credit Risk	LOW	Yes
3	Market Risk	Yes	Yes
4	Employee turnover Risk	Yes	Yes

5	Contract Risk	Yes	Yes
6	Idle capacity risk	Yes	No

The Ld. AR submitted that the TPO/DRP erred in not comparing the margin of AE segment (i.e. 12.08%) with the margin of comparable companies. Since, the impugned transaction of provisions of ITeS has been undertaken with AE's as well as with non AEs comparison of ALP margin with entity level margin, as undertaken by the TPO, is not warranted in as much as comparison with margin of AE segments is the appropriate bench mark for comparison. Such an approach was even followed by the TPO in the Transfer Pricing Order based for the previous Assessment year 2011-12 wherein the margin of AE segments was considered by the TPO for comparing the ALP margin of comparable companies.

12. The Ld. DR relied upon the order of the TPO/AO and the directions of the DRP.

13. We have heard both the parties and perused all the relevant material available on record. Since we have already accepted the ground No. 4 and 5 of the assessee's appeal, thereby allowing internal TNMM, these grounds becomes infructuous. Hence, Ground Nos. 6, 7 and 8 are dismissed.

14. As regards ground No. 9 & 10 relating to adjustment on account of notional interest on receivables, the Ld. AR submitted that the TPO has erred in treating the delay receipts of receivables from the AEs as unsecured loans advance to the AEs. The TPO applied an interest rate of 12.60% (i.e. PLR of SBI 300 basis points) to receivables, thereby making adjustments of Rs. 1,18,110/-. However, post DRP direction to apply LIBOR + 400 basis points as PLR, the adjustment was reduced to Rs.42,248/-. The Ld. AR submitted that the business model of the assessee is such that receivables as well as payables are generally outstanding with both the AEs and non AEs for a period

exceeding one month purely because of business reasons and it was not with an intention to extent in direct credit facility to the debts or obtain credit facility from creditors. Hence, no adjustment is warranted on this account. The Ld. AR further submitted that without prejudice to the above submissions with no adjustment on this account is warranted. The Ld. AR prayed that if at all any adjustment has to be made on account of overdue receivables, adjustment by way of netting of the account receivable received before the credit period of 30 days be granted and the resultant figure may be considered as an adjustment. Without prejudice to above submissions, the Ld. AR further submitted the benefit of no interest having been paid on account of payables due to AEs shall also be granted to the assessee for computation of such adjustment.

15. The Ld. DR relied upon the Assessment order, order of the TPO and the directions of the DRP.

16. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee is admitting that the business model of the assessee is such that receivables as well as payables are generally outstanding with both the AEs and non AEs for a period exceeding one month. But the contention of the Ld. AR that this is purely because of business reasons and it was not with an intention to extent indirect credit facility to the debts or obtain credit facility from creditors is not sustainable. Hence, we find that the DRP has rightly directed the TPO to compute the adjustment applying the rate of LIBOR plus 400 basis points on receivables due from its AE in US\$ for the year under consideration. There is no need to interfere with the said directions. Hence, Ground No. 9 and 10 are dismissed.

17. As regards Ground No. 11, the same is consequential, hence not adjudicated at this juncture.

18. In result, appeal of the assessee is partly allowed.

Order pronounced in the Open Court in presence of both the parties on this 12th Day of November, 2021

**sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER**

**sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 12/11/2021
R. Naheed

Copy forwarded to:

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

ASSISTANT REGISTRAR
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