

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I-2' NEW DELHI**

**BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
SHRI K.N. CHARY, JUDICIAL MEMBER
[Through Video Conferencing]**

ITA No.851/Del/2021
Assessment Year: 2016-17

M/s. Orange Business Services India Solutions Pvt. Ltd., Tower-B, 8 th Floor, DLF Infinity Tower, Phase-II, Sector-25, Gurgaon, Haryana	Vs.	DCIT, Circle-3, Gurgaon
PAN :AABCE4540P		
(Appellant)		(Respondent)

Appellant by	Sh. Ravi Sharma, Adv.
Respondent by	Sh. Sukesh Kumar Jain, CIT(DR)

Date of hearing	23.09.2021
Date of pronouncement	18.11.2021

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against final assessment order dated 31/03/2021 passed by the Learned Additional/Joint/Deputy/Assistant Commissioner of Income-tax/Income Tax Officer (i.e. Learned Assessing Officer), of National E-assessment Centre, New Delhi, for assessment year 2016-17 pursuant to the direction of Learned Dispute Resolution

Panel-1, New Delhi (in short 'the Learned DRP'). The grounds raised by the assessee in its appeal are reproduced as under:

That on the fact and circumstances of the case, and in law;

1. *The Learned Assessing Officer ('Ld. AO) (following the directions of the Learned Dispute Resolution Panel ('Ld. DRP')) erred on facts and in law in enhancing the income of the Appellant by Rs. 29,20,68,757 without appreciating the factual positions/submissions of the Appellant.*
2. *The Ld. AO/ Learned Transfer Pricing Officer ('Ld. TPO') (following the directions of Ld. DRP) have red on facts and in law in enhancing the income of the Appellant by Rs. 29,20,68,757*
 - 2.1 *The Ld. TPO erred on the facts and in the circumstances of the case and in law in framing the order u/s 92CA of the Income Tax Act, 1961 ('the Act') on findings which are erroneous in law, contrary to the facts and based on mere conjectures and surmises.*
 - 2.2. *The Ld. TPO failed to appreciate the submissions made/contentions raised by the Appellant and further erred in making several allegations, observations, assertions and inferences in the order, which were both factually incorrect as well as legally untenable.*
3. *The Ld. AO/ Ld. TPO (while following the directions of the Ld. DRP) erred in enhancing the income of the Appellant by INR 18,46,77,370 holding that the international transactions of the Appellant pertaining to Contract Software Development ('CSD') services and Information Technology enabled services ('ITeS') do not satisfy the arm's length principle envisaged under the Income Tax Act, 1961 ('the Act') and in doing so, have grossly erred in:*
 - 3.1 *arbitrarily rejecting the segmentation carried out by the Appellant in the Transfer Pricing ('TP') documentation and aggregating the CSD and ITeS segments of the Appellant. While doing so, the Ld. AO/ Ld. TPO failed to appreciate the fact that the functional profile of both segments is completely different and warrant separate TP analysis;*
 - 3.2 *disregarding the Arm's Length Price ('ALP') as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules') as well as the search for comparables;*
 - 3.3 *rejecting comparability analysis undertaken by the Appellant in the TP documentation and conducting a fresh comparability analysis based on application of additional/revised filters, and disregarding Assessee's filters in determining the ALP for the international transactions;*

3.4 *disregarding and conveniently ignoring the submissions/rebuttals against the rejection reasons provided in the show cause notice on the comparables accepted by the Appellant in its TP Study, based on its surmise and conjecture without adequate supporting or evidence;*

3.5 *including companies having high margin / volatile operating profit margins in the final comparables' set for benchmarking a low risk captive unit such as the Appellant;*

3.6 *including certain companies in the final set of comparables that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

3.7 *excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*

3.8 *by committing factual /computational errors in selection/ rejection of proposed comparables and/ or in the operating profit mark-ups of the comparables;*

3.9 *ignoring the business/ commercial reality that the Appellant undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact.*

4. *The Ld. AO / Ld. TPO (following the directions of Ld. DRP) erred in facts and in law in enhancing the income of the Appellant by Rs. 10,73,91,387 by treating the receivables outstanding beyond 60 days from associated enterprises ('AEs') as deemed loan and charging notional interest on the basis of average State Bank of India ('SBI') base rate plus 300 basis points and in doing so, have grossly erred in:*

4.1 *not appreciating that continuing debit balances do not constitute an 'international transactions' within provisions of section 92B of the Act;*

4.2 *exceeded his jurisdiction by undertaking adjustments on alleged excess credit period without the same being referred by the Ld. AO under Section 92CA(i) of the Act;*

4.3 *by charging interest on outstanding receivables, despite the fact that the Appellant had carried out working capital adjustment and hence, no further adjustment on account of interest on outstanding receivables was warranted;*

4.4 not following the directions of Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2014-15 and AY 2015-16 with respect to adjustment of interest on delayed receivables.

- 5. Disregarding judicial pronouncements in India while making the transfer pricing adjustment with respect to provision of CSD / ITeS services and adjustment of interest on delayed receivables;*
- 6. The Ld. AO has grossly erred in computing interest under section 234A and 234B of the Act;*
- 7. The Ld. AO has grossly erred in initiating penalty under section 271(1) (c) of the Act mechanically and without recording any satisfaction for its initiation.*

The above grounds are without prejudice to each other.

The appellant craves leave to add, alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing.

For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the Appellant requests that the appeal be allowed as prayed.

2. Briefly stated facts of the case are that the assessee is a subsidiary of 'EGN BV', Netherland. During the year under consideration, the assessee was primarily engaged in providing information technology enabled network management/technical support and other back office support services (ITes) to its group company in Ireland and Contract Software Development services (CSD/IT) for downloading software application for use within Equant group/Associated Enterprises (AEs). For the year under consideration, the assessee filed return of income on 30/11/2016 declaring total income of ₹ 47,03,81,790/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In view of international

transaction entered into by the assessee with its Associated Enterprises, the Learned Assessing Officer referred the matter for determination of arm's-length price of those transactions to the Learned transfer pricing officer (TPO). The adjustment of ₹ 25,32,78,406/- to CST (Contract Software Development) and ITes segment and ₹ 10,73,91,387/- for interest on receivables, totalling to ₹ 36,06,69,793 proposed by the learned TPO was incorporated by the Assessing Officer in the draft assessment order dated 09/12/2019. On the objection raised by the assessee, the Learned DRP issued certain direction to the Assessing Officer, which are summarized as under:

- i. Upheld the benchmarking approach adopted by the Ld. TPO in its order, following the decision rendered by the ITAT in assessee's own case for AY 2013-14 in the first round of proceedings (This order has been subsequently overturned by ITAT vide its dated 15 July 2021 passed pursuant to remand back by the Hon'ble Delhi High Court)*
- ii. Directed the Ld. TPO to exclude certain comparables already adjudicated by DRP/ITAT in Appellant's own case for prior years.*
- iii. Directed the Ld. TPO to give working capital adjustment during the said years as well as in terms of the directions of the Panel during AY 2015-16 applying the SBIPLR as interest rate,*
- iv. Upheld the adjustment on account receivables categorised as a loan by the Ld. TPO.*

2.1 Pursuant to the directions, the Assessing Officer passed the impugned final assessment order, wherein the transfer pricing adjustment was reduced to ₹ 29,20,68,757/-. Aggrieved, the assessee is before the Tribunal raising the grounds as reproduced above.

3. Before us, the assessee filed a paper-book containing pages 1 to 184. Both the parties appeared through videoconferencing

facility. We have heard arguments of the parties in the light of the orders of the lower authorities and have perused the materials available on record.

4. The grounds No. 1 to 2.2 of the appeal are general in nature and, therefore, we do not require any specific adjudication on those grounds.

5. The ground No. 3 to 3.9 of the appeal relates to transfer pricing adjustment to CSD and ITes segment.

5.1 Brief facts qua the issue in dispute are that summary of the economic analysis conducted by the assessee is provided below:

Nature of International transaction	Most appropriate method	Profit level indicator	Assessee's operating mark-up (OP/TC)	Working capital adjusted OP/TC of comparables
<i>ITeS</i>	<i>TNMM</i>	<i>OP/TC</i>	<i>15.00%</i>	<i>35th Percentile : 13.79% Median: 15.91% 65th Percentile:19.20%</i>

Nature of International transaction	Most appropriate method	Profit level indicator	Assessee's operating mark-up (OP/TC)	Working capital adjusted OP/TC of comparables
<i>CSD</i>	<i>TNMM</i>	<i>OP/TC</i>	<i>15.00%</i>	<i>35th Percentile : 13.02% Median: 17.72% 65th Percentile:19.20%</i>

5.2 The learned TPO rejected the search analysis of the assessee and undertook a search using the current year data and revised filters. He proposed a set of 20 comparables and determined average of operating profit/total cost at 24.12%. The learned TPO rejected the separate benchmarking for CSD and ITeS segments and he aggregated both the segments for determining the arm's-length price.

5.3 Before us, the Learned counsel of the assessee submitted that Tribunal in the assessee's own case for assessment year 2013-14 has accepted that both the segments need to be benchmarked separately. The Tribunal while deciding the aforesaid appeal held that revenue department in the previous years have already accepted separate benchmarking analysis and since there was no change in the functional profile of the assessee, the segregated approach should be accepted and the Learned AO/TPO should be directed to dispose the issue following the direction of the Tribunal in assessment year 2013-14.

5.4 The Learned DR, on the other hand, relied on the order of the lower authorities.

5.6 We have heard rival submission of the parties and perused the orders, including the order of the Tribunal in ITA No. 6928/Del/2017 for assessment year 2013-14. The Tribunal (supra) in para 22nd and 23rd has directed as under:

“22. In the first round of litigation, ld. TPO in this case had proceeded to benchmark international transaction qua CSDS and ITES segment by adopting aggregated approach. Now, as per our findings returned in the preceding paras, both the segment i.e. CSDS and ITES are required to be benchmarked independently. Ld. AR for the taxpayer as well as ld. DR for the Revenue have contended in one voice that the issue of benchmarking both the segments independently is required to be remanded back to the ld. TPO as the entire exercise of benchmarking international transactions are to be redone.

23. Since the issue of benchmarking the international transaction is required to be examined qua both the segments i.e. CSDS and ITES separately and independently for factual analysis of taxpayer's TP study, the case is remanded back to ld. TPO who shall determine the ALP of international transactions of both the segments independently afresh after providing an opportunity of being heard to the parties. Consequently, the appeal filed by the taxpayer is allowed for statistical purposes.”

5.7 Both the parties agreed that there is no change in functional profile of the assessee and nature of transactions in the year under consideration as compared to AY 2013-14, therefore following the finding of the Tribunal (supra), we set aside the finding of lower authorities and remit the matter back to the Learned AO/TPO for determining arm's-length price of international transaction of Contract Software Development services (CSD) and ITes in segregated manner complying the direction of the Tribunal (supra) in assessment year 2013-14. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds No. 3 to 3.9 of the appeal are accordingly allowed for statistical purposes.

6. The ground No. 4 to 4.4 relates to transfer pricing adjustment of interest on receivables.

6.1 Brief facts qua the issue in dispute are that the learned TPO classified the trade receivables outstanding beyond 60 days as unsecured loan and charged notional interest at the rate of 12.70% per annum considering the SBI base rate +300 base points. The Learned DRP also upheld the adjustment proposed by the learned TPO.

6.2 Before us, the learned counsel of the assessee submitted that issue of interest on outstanding receivables has been adjudicated by the Tribunal in assessee's own case for assessment year 2014-15 (ITA No. 6751/Del/2018) and assessment year 2015-16 (ITA No. 7364/Del/2019). The learned counsel submitted that following the decision of the Hon'ble Delhi High Court in the case of PCIT Vs Kusum Healthcare Private Limited (supra), no adjustment is required, if working capital

adjustment has been allowed to the assessee while determining arm's-length price of main transactions.

6.3 The Learned DR, on the other hand, relied on the order of the lower authorities.

6.4 We have heard rival submission of the parties and also perused the order of the Tribunal relied upon by the assessee. We find that Tribunal in the case of the assessee for assessment year 2014-15 deleted the adjustment of interest on outstanding receivables observing as under:

"12. Having heard the rival submissions, we are of the considered opinion that since no disturbance has been made in so far as OP margin of the assessee is concerned the OPN has been arrived after making working capital adjustment. Operating mark up of the appellant company is 16.19% whereas the comparables working capital adjustment mark up comes to 15.72%. This shows that the profit margin of the appellant company is higher than that of the comparables. The ratio laid down by the Tribunal in the case of Kusum Healthcare Pvt Ltd., 6814/DEL/2014 squarely applies. The relevant findings of the coordinate bench read as under:

"From the above analysis, it is clear that assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricable connected is in accordance with established TP principles as well as ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communication India (P.) Ltd. (supra). For the aforesaid reasons, we allow the appeal of the assessee. It ordered accordingly."

13. This decision of the coordinate bench has been affirmed by the Hon'ble High Court of Delhi in ITA No. 765/2016 vide order dated 24.04.2017. The relevant findings of the Hon'ble High Court read as under:

11. The court finds that the entire focus of the AO was on just one AY and of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of

receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by the court in CTT v. EKL Appliances Ltd. (2012) 345ITR 241 (Del)."

The Id. DR pointed out that the Revenue has preferred SLP before the Hon'ble Supreme Court against the judgment of the Hon'bte High Court of Delhi. In our understanding, since the operation of the judgment of the Hon'ble High Court is not stayed by the Hon'ble Supreme Court, the same is binding on us and, therefore, respectfully following the decision of the coordinate bench, affirmed by the Hon'ble High Court [supra] we direct the Assessing Officer/TPO to delete the addition of Rs. 1,45,27,731/-."

6.5 It is undisputed that issue in dispute is covered by the decision of the Tribunal (supra). Thus, respectfully following the same, the addition in dispute needs to be deleted. However, we find that benchmarking of the main transaction has already been restored to the file of the learned AO/TPO, therefore, we restore this issue of benchmarking of interest on receivables also to the file of the Ld AO/TPO, who shall follow the decision of the Hon'ble Delhi High Court in the case of Kusum Healthcare Private Limited (supra) and ensure that, if working capital adjustment has been allowed to the assessee, no further addition is required for interest on outstanding receivables. The assessee shall be provided adequate opportunity of being heard on the issue in dispute. The ground Nos. 4 to 4.4 of the appeal are accordingly allowed for statistical purposes.

6.6 The ground No.5 is connected to transfer pricing adjustment adjudicated above, and therefore, we are not required to

adjudicate it separately. The ground is accordingly dismissed as infructuous.

6.7 The ground No. 6, being consequential in nature, and ground No.7, being premature, both are dismissed as infructuous.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 18th November, 2021

Sd/-
(K.N. CHARY)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 18th November, 2021.

RK/-^(DTDC)

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi