

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.4558/Del/2018
Assessment Year: 2014-15

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| M/s. Bentley Systems India Pvt. Ltd., 203, Okhla Industrial Estate Phase-III, New Delhi | Vs. | DCIT, Circle-4(2), New Delhi |
| PAN :AABCB5645E | | |
| (Appellant) | | (Respondent) |

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| Appellant by | Sh. Nageshwar Rao, Advocate Sh. S. Chakraborty, Advocate |
| Respondent by | Sh. Surender Pal, CIT(DR) |

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| Date of hearing | 07.12.2021 |
| Date of pronouncement | 19.01.2022 |

ORDER

PER SAKTIJIT DEY, JM:

Captioned appeal has been filed by the assessee challenging the final assessment order dated 27.04.2018 passed under section 143(3)/144C of the Income-tax Act, 1961 (in short 'the

Act) for the assessment year 2014-15, in pursuance to the direction of learned Dispute Resolution Panel (DRP).

2. Ground nos. 1 to 3 being general grounds, do not require specific adjudication.

3. In ground nos. 4 to 13, the assessee has raised various issues relating to adjustment of Rs. 2,14,02,959/- to the Arm's Length Price (ALP) of the international transaction relating to provision of software development services to Associated Enterprises (AEs).

4. Briefly stated facts are, the assessee, a resident company, is a wholly owned subsidiary of M/s. Bentley Systems, incorporated in United States of America (USA). In the year under consideration, the assessee had entered into certain international transactions with its overseas AEs, including, provision of software development services. Noticing that the assessee had entered into international transactions with the AEs, the Assessing Officer made a reference to the Transfer Pricing Officer (TPO) to determine the ALP of the international transactions.

5. On verifying the materials on record, including, the transfer pricing study report of the assessee, the TPO noticed that insofar as provision of software development services is concerned, the

assessee has benchmarked the transaction by applying Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit to Total Cost (OP/TC) ratio as the Profit Level Indicator (PLI). Since, PLI of the assessee at 12% was more than the PLI of the selected comparables worked out at 7.99%, the assessee claimed the transaction with AEs to be at arm's length. After examining the transfer pricing analysis of the assessee, though, the TPO accepted that TNMM is the most appropriate method to benchmark the transaction, however, he was not convinced with the approach adopted by the assessee in selecting comparables and working out the margin. He observed, the assessee has not applied proper filters to select comparables resulting in omission of appropriate comparables and selection of inappropriate comparables. Further, he observed that while working out the margin, the assessee has used multiple year data as against the current year data. Thus, ultimately, the TPO rejected certain comparables selected by the assessee and introduced fresh comparables. Finally, the TPO selected a set of 16 comparables with average PLI of 23.92% and made an upward adjustment to the ALP of the software development services provided to the AEs. The Adjustment

proposed by the TPO was added to the income of the assessee in the draft assessment order. Against the adjustment made, the assessee raised objections before learned DRP. While dealing with such objections, learned DRP granted partial relief to the assessee. Still unsatisfied with the direction of learned DRP, the assessee is before us.

6. Learned counsel for the assessee submitted, Infobeans Technologies Ltd. cannot be considered as a comparable as it has diversified and high-end activities, hence, functionally different. He submitted, financial data and segmental information relating to various services provided by the company is not available in public domain. Further, he submitted, the company has shown super normal profit. Thus, he submitted, the company cannot be treated as a comparable. In support of his contention, learned counsel relied upon the following decisions:

1. *M/s. Alkatel Lucent India Ltd. Vs. Addl. CIT, ITA No. 4706/Del/2018, dated 29.11.2019.*
2. *M/s. Avaya India Pvt. Ltd. Vs. Addl. CIT, ITA No.7290/Del/2018, dated 24.09.2019*

7. Strongly relying upon the observations of the TPO and DRP, learned Departmental Representative submitted that the company is providing similar nature of services as the assessee. In this regard, he drew our attention to the annual report of the company placed in the paper-book. Thus, he submitted, the comparable being functionally similar cannot be excluded.

8. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The assessee has contested the inclusion of this company as a comparable primarily on the ground that, though, the company has various segments, however, segmental details are not available in public domain. On a perusal of the Annual Report of the company, it is seen that this company is in diversified activities, however, segmental details have not been specifically provided. Taking note of this factual position, the coordinate Bench in the case of *M/s. Avaya India Pvt. Ltd. (supra)*, has excluded this comparable with the following observations:

“7.4 We have heard rival submission of the parties. We find that the Note - 27 of the annual report has provided details of earning in foreign exchange, which mentioned that export of goods/services amounting to Rs.32,96,59,883/- have been calculated on FOB basis. The Note - 20 of the annual report mention revenue from operations

earned on sale of software (export) amounting to Rs.32,96,59,883/-. Thus, in view of the Note 27, the quantum of export of the goods and export of the services cannot be ascertained and thus in view of no segmental data of export of the goods and export of the services available separately, we are of the opinion that the company cannot be selected as comparable at entity level. Accordingly, we direct the Ld. AO/TPO to exclude the company from the set of the comparables.”

9. Similar view was again reiterated by the coordinate Bench in the case of *M/s. Alkatel Lucent India Ltd. (supra)*, while observing as under:

“15. The last concern which is under adjudication is Infobeans Technologies Ltd. The Annual report of the said concern is at pages 261 to 282 of the Paper Book of Annual Report Compilation. At page 267 of the Paper Book of Annual Report Compilation, the Revenue is recognized from operations and at page 274 of the Paper Book of Annual Report Compilation, the break-up is given up for sale of export as revenue from operations. Further, for the year under consideration, Infobeans Technologies Ltd. had declared that it was engaged in providing custom development services to offshore and was engaged in software engineering services in different fields. No segmentals were available. In such facts and circumstances, we find no merit in inclusion of the said concern in the final list of comparables. We direct its exclusion and also direct the Assessing Officer to re-compute the arms length price of the international transaction, if any in the hands of the assessee, after excluding 04 concerns as directed in the para above. Thus, Ground Nos. 6 & 6.1 raised by the assessee are allowed.”

10. Since, the aforesaid decisions of the coordinate Benches are for the very same assessment year, respectfully following them, we exclude this company from the list of comparables.

11. In addition to the aforesaid comparable, learned counsel for the assessee has pleaded for exclusion of two more comparables, viz., Thirdware Solution Ltd. and ICRA Techno Analytics Ltd. Further, he also pleaded for inclusion of two more comparables, viz., Maveric Systems Ltd. and Caliber Point Business Solution Ltd. (segmental).

12. As could be seen from the observation of learned DRP in paragraph 2.5.1 of the directions, none of these four comparables now agitated before us, appear to have been specifically objected before learned DRP. When a specific query was raised by us in this regard to learned counsel for the assessee, he submitted that the assessee has raised objection in the course of proceeding, however, they have been ignored by learned DRP. Thus, he submitted, the issue relating to these four comparables may be restored back to AO/TPO.

13. Having considered rival submissions, we are of the view that entire logic behind determination of arm's length price in terms of section 92C read with Rule 10B is to compare the value of transaction between related parties with the value of similar transaction between unrelated parties. Therefore, a FAR analysis has to be undertaken to find out whether a particular company is

functionally similar to the assessee. In case, a particular company selected by the assessee as comparable is functionally similar and capable of being considered as a comparable, it should not be rejected. Similarly, a functionally different comparable which cannot at all be considered as a comparable to the assessee, but, included by the TPO has to be excluded. However, the burden is entirely on the assessee to establish the functional similarity or otherwise of the comparables with supporting evidence. Since there is no finding of learned DRP on the aforesaid four comparables, we are inclined to restore the issue to the file of the Assessing Officer for examining the assessee's claim regarding comparability of companies, viz., Thirdware Solution Ltd., ICRA Techno Analytics Ltd., Maveric Systems Ltd. and Caliber Point Business Solution Ltd. (segmental) after due opportunity of being heard to the assessee.

14. At this stage, we must observe, the assessee has raised certain issues regarding error in computation of margin of certain comparables as well as not granting adjustment in the working capital and risk profile while computing margin of the comparables. Since, we have excluded one of the comparables selected by the TPO, i.e., Infobeans Technologies Ltd. and directed the Assessing Officer to examine the comparability of some other

comparables in all fairness, the issues relating to adjustment in working capital and risk profile as well as error in computation of margin is also restored back to the file of the Assessing Officer for examining afresh after due opportunity of being heard to the assessee.

15. In ground nos. 14 to 19, the assessee has challenged the transfer pricing adjustment of Rs. 1,44,81,820/- on account of outstanding receivables from AE.

16. Briefly stated facts are, on verifying the balance-sheet of the assessee, the TPO noticed that payment for the invoices raised on the AE was not received within the time frame provided in the service agreement. Therefore, the TPO called upon the assessee to furnish the details of outstanding receivables and also to explain, as to why the period of delay in receivables should not be treated as loan facility provided to the AE and interest at the appropriate rate should not be charged.

17. In response, the assessee submitted that as a matter of principle, the assessee does not charge interest on delayed receivables, either from unrelated parties or from the AE. Without prejudice, it was submitted that though, there may be delay in receivables from the AE, however, there is similar delay from

assessee's side on payables to the AE. Thus, it was submitted that the adjustment, if any, ought to be restricted on net outstanding receivables. Further, it was submitted that the assessee has already undertaken working capital adjustment to account for the difference in the working capital intensity of the comparables which inevitably considers the impact of receivables and payables. The TPO, however, was not convinced with the submissions of the assessee. He observed deferred payment receivables or any other debt arising during the course of business has to be treated as an international transaction under Section 92B(1) of the Act. Having held so, the TPO proceeded to determine the arm's length price of interest at 12.84% and suggested an adjustment of Rs.1,44,81,820/-, which was added to the income of the assessee in the draft assessment order. While dealing with assessee's objections against the aforesaid adjustment, learned DRP, more or less, agreed with the decision of the TPO in treating the delay in receivables as a deemed loan to the AE, hence, an international transaction and, for which, interest has to be charged. However, learned DRP held that considering the normal trade practice, credit period of 60 days for getting the receivables is to be considered as reasonable. Further,

learned DRP directed to net off the payables against the receivables and charge interest on net receivables.

18. Reiterating the stand taken before the Departmental Authorities, learned counsel for the assessee submitted that the assessee has not charged any interest for delay in receivables, both, in respect of AE and non AE. He submitted, it is not a case where there is delay in receivables from AE only. He submitted, the assessee has also entered into certain transactions with the AE, wherein the assessee had made payment to the AE with substantial delay. Thus, he submitted, there is delay, both, in payables as well as in receivables. Hence, interest cannot be charged only on outstanding receivables without considering the delay in payables. He submitted, the TPO cannot re-characterize the outstanding receivables as a loan. He submitted, the assessee is a debt free entity, hence, does not bear any interest for funding its working capital requirement. Therefore, there cannot be any interest on outstanding receivables. He submitted, the assessee has provided for working capital adjustment which subsumes the impact of outstanding receivables. Therefore, no further adjustment towards interest on delayed receivables can be made.

In support of his submissions, the learned counsel relied upon the following decisions:

1. *PCIT Vs. Kusum Healthcare Private Ltd., ITA 765/2016, order dated 25.04.2017 (High Court, Delhi)*
2. *PCIT Vs. M/s. Bechtel India Pvt. Ltd., ITA No. 379/2016, dated 21.07.2016 (High Court, Delhi)*
3. *Bentley Systems India Pvt. Ltd. Vs. DCIT, ITA No. 6161/Del/2013, Order dated 04.11.2015.*

19. In reply, learned Departmental Representative submitted, receivables from AE are more than the payables to the AE. In this context, he drew our attention to assessee's balance-sheet as on 31st March, 2014. Thus, he submitted that there cannot be any doubt that outstanding receivables is an international transaction, but interest at appropriate rate has to be charged on the delayed receivables as the AE has been benefited by holding on to the payment to be made to the assessee beyond the stipulated period provided in the agreement. Thus, he strongly relied upon the observations of learned DRP.

20. In rejoinder, learned counsel for the assessee drew our attention to the qualified opinion of the Auditor and submitted that the payables are more than the receivables.

21. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. The fact that there is a delay in outstanding receivables from the AE beyond the time limit prescribed under the service agreement is not disputed. It is also a fact that the TPO has re-characterized the outstanding receivables as unsecured loan provided to the AE.

22. It is the contention of the assessee from the very initial stage of the transfer pricing proceeding that it has not charged interest on outstanding receivables, both from AE and non AE. Further, it is the case of the assessee that the Revenue cannot consider delay in outstanding receivables only while completely ignoring the delay in payables by the assessee. In this context, learned counsel has drew our attention to the qualified opinion of the Auditor forming part of the Audit Report. On going through the same, it appears that the assessee has foreign currency receivables amounting to Rs. 10,33,840/- which are outstanding for a period of more than one year. Whereas, foreign currency

payables amounting to Rs.2,66,35,865/- are outstanding for a period of more than three years. Thus, as per the qualified opinion of the Auditor, payables to the AE are more than the receivables from AE. However, the aforesaid contention of the assessee has been strongly refuted by the Revenue by drawing our attention to the balance-sheet of the assessee as on 31st March, 2014, as per which, trade payables are Rs.8,80,15,490/-. Whereas, trade receivables are Rs. 29,37,87,509/-. According to the computation furnished before us, the average period of delay in receivables from the AE works out to 91 days. Whereas, learned DRP has considered delay of 60 days as reasonable.

23. In our view, the decision of the Hon'ble Delhi High in the case of PCIT Vs. Kusum Healthcare Pvt. Ltd. (supra) cannot be read in a manner to suggest that the delay in receivables under no circumstances can be considered as an international transaction. On the contrary, the Hon'ble Delhi High Court has observed that, whether receivables constitute an international transaction, has to be considered in the context of various factors resulting in delay in collection of amount from AE. The Hon'ble Delhi High Court has also observed that the impact of delay in receivables on the working capital of the assessee, also has to be

studied. However, it cannot be said that there is no benefit to the AE, in case, the delayed receivables follow a regular pattern. Though, the working capital adjustment subsumes the interest on delayed receivables, however, that can be the case with regard to the outstanding receivables. However, interest in relation to the receivables realized during the year with delay beyond the reasonable time limit, has to be considered for the purpose of charging interest. Thus, all these factual aspects need to be verified. Further, assessee's claim that payables are more than the receivables, assumes significance considering the fact that learned DRP has directed the Assessing Officer to compute interest on the net receivables. In case, payables are more than the receivables, no interest can be charged. For factually verifying all these aspects, we restore this issue to the Assessing Officer for proper examination and thereafter decide the issue after due opportunity of being heard to the assessee. In view of the aforesaid, the Grounds are allowed for statistical purposes.

24. In ground no. 20(I), the assessee has raised the issue of error committed by the Assessing Officer in treating the loss of Rs.60,07,715/- as a profit.

25. Having considered rival submissions and perused material on record, we direct the Assessing officer to properly verify the return of income and other materials available on record and allow assessee's claim of loss after due opportunity of being heard to the assessee.

26. In ground no. 20(ii), the assessee has challenged the addition of adjustment proposed by the TPO to the book profit computed under Section 115JB of the Act.

27. Learned Counsel for the assessee submitted, section 115JB is a code by itself. He submitted, no adjustment to the book profit can be made unless it is specifically provided under Explanation 1 to section 115JB(2). Thus, he submitted, the transfer pricing adjustment made to the book profit should be deleted. In support, he relied upon the decision of the Hon'ble Supreme Court in Apollo Tyres Ltd. Vs. CIT, (2002) 120 Taxman 562 (SC).

28. Learned Departmental Representative submitted, this issue was not before learned DRP. Therefore, there is no observation of learned DRP on this issue.

29. We have considered rival submissions and perused the material on record. We fully agree with the submission of learned counsel for the assessee that section 115JB is a code by itself and

the book profit has to be computed by strictly following the provisions contained therein. Any adjustment to the book profit can be made in the manner provided in Explanation 1 to section 115JB(2) and other provisions contained under the said section. Therefore, unless transfer pricing adjustment, as provided under Chapter X, is specifically included under section 115JB, no such adjustment can be made.

30. In the case of Apollo Tyres Vs. CIT (supra), the Hon'ble Supreme Court while referring to pari materia provisions contained under Section 115J of the Act has held that the Assessing Officer has no authority to reopen accounts of a company which is approved by the Board of Directors under the provisions of the Companies Act, save and except, to the extent provided under the provision. The aforesaid principle laid down by the Hon'ble Apex Court, clearly applies to computation of book profit under Section 115JB. Therefore, the Assessing Officer has authority to make adjustment to the book profit only to the extent provided under Section 115JB itself and no further. It is observed that after final assessment order was passed, the assessee has filed rectification application under section 154 of the Act on 30th May, 2018 seeking rectification of the order, wherein, addition of

transfer pricing adjustment to the book profit computed under Section 115JB of the Act is one of the issues. We were informed that the Assessing Officer has not yet disposed of the rectification application. In view of the aforesaid, we direct the Assessing Officer to decide the issue raised by the assessee regarding addition of transfer pricing adjustment to the book profit at the earliest after due opportunity of being heard to the assessee.

31. While doing so, the Assessing Officer must bear in mind that the computation of book profit has to be made strictly in terms with section 115JB. Unless, a particular adjustment is specifically provided under the said provision, it cannot be made while computing the book profit. Grounds are allowed for statistical purposes.

32. In Ground No. 20(iii), the assessee has raised the issue of short credit of TDS.

33. We have considered rival submissions and perused the materials on record. It is the submission of the assessee before us that, though, in terms of Form No. 26AS, the assessee has claimed TDS of Rs. 5,38,97,625/- in the return of income, the Assessing Officer has granted credit for Rs.1,01,29,437/-. Keeping in view the aforesaid submission of the assessee, we

direct the Assessing Officer to properly verify the facts on record and grant credit of TDS as per law. Accordingly, ground no. 20(iii) is allowed for statistical purposes.

34. Ground No. 21, being premature at this stage, is dismissed.

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

Order pronounced in the open court on 19th January, 2022

Sd/-
(PRADIP KUAMR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 19th January, 2022.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi