

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND  
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

SP No.5/Bang/2022 & IT(TP)A No.128/Bang/2022 Assessment year : 2017-18
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Brillio Technologies Ltd. [formerly known as Collabera Solutions Pvt. Ltd.], 4 <sup>th</sup> Floor, ‘Bren Optimus’, # 8/2, Dr. M.H. Marigowda Road, Bangalore – 560 029. <b>PAN: AABCP 2354A</b>	Vs.	The Assessing Officer, National Faceless Assessment Centre, Delhi / The Deputy Commissioner of Income Tax, 1(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Naresh K. Jain, Advocate
Respondent by	:	Shri M S Nethrapal, Addl. DIT

Date of hearing	:	06.06.2022
Date of Pronouncement	:	08.06.2022

**ORDER**

*Per Padmavathy S., Accountant Member*

This appeal is at the instance of assessee directed against the final order of assessment passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] by the Assessing Officer, National

Faceless Appeal Centre, Delhi dated 29.01.2021 for the assessment year 2017-18.

2. The assessee is a company and GCI Global Ventures, Mauritius owns 95% of the equity share capital of the assessee which is in turn a wholly owned subsidiary of Brillio LLC USA. The assessee is engaged in rendering software developer and support [SWD] services to third parties as well as to its Associated Enterprises [AEs].

3. In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services were “international transaction” i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, any income arising from an international transaction shall be computed having regard to the arm’s length price.

4. As per the Transfer Pricing [TP] documentation, the assessee has entered into following international transactions:-

Particulars	Amt (Paid)	Amt (Recd)	Method
Software development & support services		160,07,64,665	TNMM
Trade Receivable		83,62,94,157	TNMM
Recovery of expenses		1,28,32,158	TNMM
Availing professional services - erroneous provision created	35,33,400		Other
Outstanding balance of erroneous provision created	35,33,400		Other
Total	70,66,800	244,98,90,980	245,69,57,780

5. During the year under consideration, the assessee received a total revenue of Rs.160,07,64,655 in respect of international transaction of provisions of SWD services to its AE. The ALP of the transaction in SWD segment provided to AE has been determined by applying Transactional Net Margin Method [TNMM] to be the Most Appropriate Method [MAM]. The Operating Profit to Operating Cost [OP/OC] has been determined as the Profit Level Indicator [PLI] in the TNMM analysis. The assessee has undertaken the benchmarking as follows:-

Particulars	Exports			Domestic	Total
	AEs	Non-AEs	Non-AE IT Staffing		
<b>INCOME</b>					
<b>Software Sales and Services</b>					
Domestic	-	-	-	43,31,97,179	43,31,97,179
Exports	1,60,07,64,665	32,41,13,131	34,27,409	-	1,92,83,05,205
<b>Other operating income</b>					
Provision no	-	-	-	1,87,660	1,87,660

longer required written back					
Liabilities written back	-	-	51,09,153	-	51,09,153
Bad debts recovered	-	-	-	8,81,952	8,81,952
<b>Total</b>	<b>1,60,07,64,665</b>	<b>32,41,13,131</b>	<b>85,36,562</b>	<b>43,42,66,791</b>	<b>2,36,76,81,149</b>
<b>Expenditure</b>					
Operating expenses	87,14,96,904	20,43,68,581	2,73,234	34,18,86,649	1,41,80,25,368
Other Expenses	48,93,82,516	9,32,06,254	6,17,483	19,62,82,346	77,94,88,599
Depreciation	3,10,89,854	57,95,614	-	5,29,75,321	8,98,60,788
<b>Total Operating Cost (TC)</b>	<b>1,39,19,69,274</b>	<b>30,33,70,448</b>	<b>8,90,717</b>	<b>59,11,44,316</b>	<b>2,28,73,74,754</b>
<b>Operating Profit (Loss)</b>	<b>20,87,95,391</b>	<b>2,07,42,682</b>	<b>76,45,845</b>	<b>(15,68,77,524)</b>	<b>8,03,06,394</b>
<b>FLCP(OP/TC)</b>	<b>15%</b>	<b>6.84%</b>	<b>858.39%</b>	<b>-26.54%</b>	<b>3.51%</b>

6. The operating margin of the assessee at 15.00% from international transactions as compared to the margin earned by assessee from unrelated third parties is at 6.84%. Therefore, the assessee concluded that the international transaction of provision of SWD services undertaken by the appellant is at arm's length.

7. The assessee filed return of income for AY 2017-18 on 30.11.2017 declaring income at Rs.9,78,74,270 which was processed u/s. 143(1) of the Act. Subsequently, the case was selected for scrutiny under CASS on various parameters. The assessee has entered into large value of international transactions and therefore a reference was made to the Transfer Pricing Officer [TPO] for determination of ALP. The TPO rejected the tax payer's TP study stating that the assessee has used internal CUP method to arrive at the conclusion that SWD

services provided is at arm's length and that CUP method is applicable only in a scenario where the exact nature of the transactions can be replicated. On this basis, the TPO proceeded to make a fresh search of comparables whereby he arrived at median margin of 26.1% and made a TP adjustment of Rs.17,18,13,781.

8. Aggrieved, the assessee filed its objections before the DRP. The DRP confirmed the TP adjustment stating that the decisions cited by the assessee rendered by the ITAT Bangalore in assessee's own case for AYs 2011-12 to 2013-14 is not applicable for the year under consideration, since the TPO rejected the CUP method on the basis that it cannot match comparability criteria like similar market value and position in supply chain. The DRP also observed that the assessee has not demonstrated that non-AEs are operating in a similar market and there is no much difference as far as other criteria are concerned. Pursuant to the directions of the DRP, the final assessment order was passed, aggrieved with which, the assessee is in appeal before the Tribunal.

9. Before us, the Id. AR submitted that the coordinate Bench of this Tribunal in assessee's own case for AYs 2008-09 to 2013-14 has set aside the order of the TPO, in pursuance of which the TPO has passed the order accepting the internal benchmarking done by the assessee. He also submitted that for AY 2016-17, the assessee made submissions before the TPO on similar lines using internal benchmarking which was accepted and no adjustment was proposed by the TPO for that

year. He therefore submitted that the department has been consistently accepting the internal benchmarking done by the assessee and only for the year under consideration i.e., AY 2017-18, it was rejected.

10. The Id. AR brought to our notice that the TPO has erroneously considered that the assessee followed CUP method for arriving at the arm's length margin, whereas the assessee has used TNMM as the MAM.

11. On the other hand, the Id. DR submitted that the DRP has considered the TPO's observations with regard to comparability criteria for internal benchmarking and has also distinguished the applicability of the decision of the Hon'ble Tribunal in assessee's own case for earlier assessment years. Therefore, those decisions cannot be applied for the year under consideration and the facts need to be looked into afresh.

12. We have considered the rival submissions and perused the material on record. We notice that the TPO in his order has made contradicting observations about the MAM followed by the assessee for determination of ALP. In para 6.2 the TPO has stated that the assessee has followed TNMM as MAM, whereas in para 7.2 he has noted that assessee has followed internal CUP method for arriving at the ALP. These observations of the TPO are reproduced below:-

“6.2 The Arm's Length Price of the international Transactions in SWD segment provided to the Associated Enterprises (AE) has been determined by applying

Transactional Net Margin Method (TNMM), stating to be the Most Appropriate Method in the facts and circumstances of the case. The Operating Profit to Operating Cost ratio has been taken as the Profit Level Indicator (PLI) in TNMM analysis.

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7.2 The Taxpayer has used, Internal CUP method to come arrive at a conclusion that the Software Development Services (SWD) were provided at arm's length. The CUP is applicable in the scenarios where the exact nature of the transaction can be replicated.”

13. The basis on which the TPO has proceeded with the comparability analysis is on the wrong fact that the assessee followed CUP method as the MAM. The DRP has also not taken note of this contradicting findings of the TPO in his order and has proceeded to confirm the TP adjustment made by the TPO. The assessee in its TP study at pages 69 & 70 of PB has clearly stated that the MAM followed in arriving at the ALP by the assessee is TNMM.

14. Now coming to the issue of application of internal TNMM and other external comparables followed by the assessee, we notice that the coordinate Bench of the Tribunal in assessee's own case for the AYs 2011-12 & 2012-13 in ITA Nos. 518/Bang/2016 & 354/Bang/2016 by order dated 19.1.2018 has upheld the internal TNMM used by the assessee for determination of the ALP for international transactions. The relevant extract of this decision is as follows:-

“7. Having carefully examined the orders of lower authorities and the documents placed before us, we find that

the assessee has placed the relevant evidence with respect to scope of work, nature of services rendered for AE and non-AE in the same countries. But these aspects were not examined by the TPO. Therefore, we set aside the order of the AO passed consequent to the order of the DRP and restore the issue to the AO/TPO to re-examine the issue of determination of ALP for international transactions in the light of the transactions made with non-AEs in the same countries. It is settled position of law that if internal benchmarking is possible, the TPO should go with the internal benchmarking instead of going for external benchmarking by collecting various comparables from the database. In the instant case, since the assessee has placed the evidence to establish that the assessee has rendered similar type of services to AE and non-AE in the same countries, the internal benchmarking is possible. We therefore restore the matter to the AO/TPO to re-examine the issue of determination of ALP in the light of assessee's contentions. If the assessee is able to establish that he has undertaken the similar international transactions with AEs and non-AEs in the same countries, the internal benchmarking will be done, otherwise the AO/TPO will act in accordance with the law.”

15. We also notice that the TPO in the order passed u/s. 92CA(3) of the Act for the AY 2016-17 has accepted the international transaction of provision of SWD services to be at arm's length on the basis of internal comparables. The Tribunal has also taken a similar view for the order passed for the AYs 2009-10 & 2010-11 in assessee's own case in IT(TP)A No. 1319 & 1320/Bang/2016 dated 14.8.2020 and pursuant to the order of the Tribunal, the TPO has accepted the application of internal comparables for those assessment years.

16. Since the TPO in the present year under consideration has proceeded to make the TP adjustment on the mistaken fact that assessee has followed CUP method, we deem it fit and appropriate to remit this issue back to the TPO for fresh analysis considering the actual method followed by the assessee i.e., TNMM as the MAM. The TPO is also directed to consider the principles laid down by the coordinate Bench of the Tribunal in the earlier years in assessee's own case in terms of considering the internal comparables for TNMM and also the stand taken by the TPO for the AY 2016-17 where the internal comparables has been accepted. Needless to say that assessee may be given opportunity of being heard.

17. In the result, the appeal by the assessee is allowed for statistical purposes.

18. In view of the appeal having been adjudicated, the Stay Petition filed by the assessee in SP No.5/Bang/2022 has become infructuous and dismissed as such.

Pronounced in the open court on this 08<sup>th</sup> day of June , 2022..

Sd/-  
( BEENA PILLAI )  
JUDICIAL MEMBER

Sd/-  
( PADMAVATHY S. )  
ACCOUNTANT MEMBER

Bangalore,  
Dated, the 08<sup>th</sup> June, 2022.

*/Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.