

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS KAVITHA RAJAGOPAL, JM

ITA No. 2403/Mum/2018

(Assessment Year 2011-12)

The Dy. Commissioner of
Income Tax
Central Circle 3(2)(1)
Room no. 357, 3rd Floor,
Aayakar Bhavan,
M.K. Road,
Mumbai-400 020

(Appellant)

M/s Inventurus Knowledge
Solutions Private Limited
151, Nariman Bhavan,
Vinay Shah Marg,
Nariman Point,
Mumbai-400 021

Vs.

(Respondent)

PAN No. AABCI 5573 J

CO No. 249/Mum/2019

(Arising in ITA no. 2403/Mum/2018 for A.Y. 2011-12)

M/s Inventurus Knowledge
Solutions Private Limited
151, Nariman Bhavan,
Vinay Shah Marg,
Nariman Point,
Mumbai-400 021

(Appellant)

Vs.

The Dy. Commissioner of
Income Tax
Central Circle 3(2)(1)
Room no. 357, 3rd Floor,
Aayakar Bhavan,
M.K. Road,
Mumbai-400 020

(Respondent)

Assessee by : Shri SC Tiwari/
Ms Umamagswari M, ARs
Revenue by : Ms Samruddhi D Hande, Sr. AR

Date of hearing: 25.07.2022
Date of pronouncement : 21.10.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA No.2403/Mum/2018 is filed by the learned Dy. Commissioner of Income-tax 15(2)(1), Mumbai (the learned Assessing Officer) for A.Y. 2011-12 against the

appellate order passed by the Commissioner of Income-tax (Appeals)-56, Mumbai [the learned CIT (A)] dated 31st January, 2018. By this order the appeal filed by the assessee against the assessment order passed by the learned Assessing Officer under Section 143(3) read with section 144C(3) of the Income-tax Act, 1961 (the Act) dated 5th May, 2015 was partly allowed.

02. The Assessee has also filed cross objection no. 249/Mum/2019 in the above appeal raising following grounds of appeal:-

"1. That on the facts and in the circumstances of the case and in law, Id. CIT(A) has erred in not adjudicating upon the Respondent-assessee's submissions against the application of special provisions of adjustments Section 92 to 92F (transfer pricing) to the international transactions of the respondent-assessee.

2. That on the facts and in the circumstances of the case and in law, Id. CIT(A) has erred in not adjudicating upon, on merits, the submissions of the respondent-assessee against adjustment as made in the order u/s. 92CA(3) of the Act and followed in the assessment order."

03. The cross objection is merely supportive in nature.
04. The brief facts of the case of the shows that assessee is a company engaged in the business of providing revenue cycle management services focusing on US healthcare



segment. It is providing business process outsourcing services. This company is wholly owned subsidiary in the United States which provides marketing and sale services to the assessee. Assessee furnished the return of income declaring total loss of ₹12,91,71,248/- on 29th November, 2011.

05. Assessee has entered the international transaction of availing of marketing sale support and customer relationship services amounting to ₹2,18,98,411/- and also provision of revenue cycle management services earned of ₹12,34,01,474/-. The assessee benchmarked this transactions separately , adopted Transactional Net Margin Method as the most appropriate method selecting the wholly owned subsidiary in US as tested party, conducted search in Standard & Poor's Compustat and Merchant Database, selected nine comparable companies considering the 3 years database financial results holding that (profit level indicator)PLI of operating profit to operating cost of the comparable companies in 8.73% and whereas the Associated Enterprises is remunerated at cost plus 7% and thereby stated that its international transaction availing marketing support services from its Associated Enterprises is at Arm's Length Price. During the course assessee updated the PLI as a comparable company taking single year data for F.Y. 2010-11 and determined arithmetic mean at 10.13%.
06. With respect to the provision of revenue cycle management services which is provided by assessee to its

wholly owned subsidiary, the US subsidiary was taken as a tested party adopting Transactional Net Margin Method as the most appropriate method using profit level indicator of operating profit to operating cost and conducting search in one source global business data browser database selected 16 comparable whose three years margin is 9.07 percentage and in TPSR it was stated that this transaction is at Arm's Length Price. During TP audit, the margin comparable were taken for one year having arithmetic mean of 10.74%.

07. The learned Transfer Pricing Officer rejected the foreign Associated Enterprises as a tested party and directed the assessee to show the benchmarking comparability analysis considering the assessee as a tested party. Assessee was also asked to submit the segmental accounts or Associated Enterprises as well as non-Associated Enterprises transaction it was submitted. The learned Transfer Pricing Officer also wanted to club together both these services for benchmarking analysis. Assessee objected to the same as both transactions are distinct. The learned Transfer Pricing Officer rejected the same and clubbed together both the transactions. After taking the assessee as tested party and clubbing together both the transactions classifying the assessee as an ITES company using the capitaline and prowess database, The learned Transfer Pricing Officer selected 6 comparable taking PLI of OP/TC whose margin was 21.17% whereas the margin of the assessee was computed at (-) 35.47% and made an



adjustment of ₹7,78,08,046/-. The order under Section 92CA (3) was passed by DCIT (TP) 1(1)(1), Mumbai dated 30th January, 2015.

08. Based on this, the assessment order under Section 143(3) of the Act was passed on 5th May 2015 determined total income of the assessee at a loss of ₹5,13,63,202/- against the return loss of ₹12,91,71,248/-.
09. Assessee preferred the appeal before the learned CIT (A), who passed an order dated 31st January 2018, wherein he upheld that foreign Associated Enterprises is correctly taken as a tested party by the assessee as it was having least risk and simpler entity. He directed the learned Transfer Pricing Officer to take the foreign Associated Enterprises as a tested party. He also held and directed the learned Assessing Officer to consider the comparability analysis whether the assessee has taken the correct comparable and determined adjustment if require. Accordingly, he directed TPO to compute ALP of International Transaction afresh.
010. The learned Assessing Officer is aggrieved with this and has raised following grounds of appeal: -

"In view of the Appellate Order of the CIT(A)-56, Mumbai in the case of M/s. Inventurus Knowledge Solutions Private Limited for the Assessment Year 2011-12, I hereby direct the DCIT 15(2)(1), Mumbai, to file an appeal to the Appellate Tribunal, Mumbai, against the order of the CIT(A)-56, Mumbai, bearing



No.CIT(A)-56/ACIT(OSD)-3/2016-17/448 dated 31.01.2018 in the above case on the following grounds:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the TPO to consider Associate Enterprise (AE) of the assessee as tested party, AE being a foreign entity.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in going beyond his power u/s 251(1)(a) by setting aside the case to AO/TPO with specific directions to carry out transfer pricing analysis after giving opportunity of being heard to the assessee.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in going beyond his power u/s 251(1)(a) by setting aside the case without giving any comments on the findings of the TPO that the comparable selected by the assessee taking AE as a tested party are not functionally comparable with the functions of AE.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the TPO to use data for common period within a financial year for comparability instead of rejecting a comparable merely on ground that Financial Year is different without taking into consideration the decision of jurisdictional High Court, in the case of PTC Software 75 taxmann. Com 31(Bombay),

wherein it is held that the comparability data should relate to the same accounting year.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that many of the comparable used by the TPO are in marketing/ marketing services or business/financial advisory which are not even reasonably in the line of business appellant is in, without appreciating the fact that comparable taken by the TPO are in the business of software development considering assessee as a tested party, which is in the business of software development and the business of the appellant is not marketing/marketing services or business/financial advisory, but it is the business of the AE of the appellant."

011. The learned Departmental Representative vehemently supported the order of the learned Transfer Pricing Officer and held that the learned CIT (A) is incorrect in holding that foreign Associated Enterprises is to be taken as tested party. It was submitted that if foreign Associated Enterprises istaken as tested party the comparability analysis becomes difficult. He therefore submitted that order of the learned CIT (A) should be reversed, and order of the learned Assessing Officer/Transfer Pricing Officer should be restored. He further stated that the learned CIT (A) does not have any power of setting aside to the learned Assessing Officer or Transfer Pricing Officer.



012. The learned Authorized Representative on the appeal of the learned Assessing Officer supported the order of the learned CIT (A) and further stated that CIT (A) failed to adjudicate on other issues. He submitted a paper book containing 308 pages as well as another paper book containing 24 pages along with extract form OECD TP guidelines UNTPGuidelines, US transfer pricing regulations and guidance note on transfer pricing issued by the ICAI. He further submitted the TP report as well as the financial of the associated enterprise. Accordingly, he stated that Foreign Tested party is correctly taken as Tested party as held by Id. CIT (A).

013. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that Assessee is a private limited company engaged in providing revenue cycle management services to its clients in healthcare sector in the US region. The assessee has wholly owned subsidiary in United States. The brief functions of the assessee are with respect to healthcare sector in the United States. Assessee is providing in services with respect to settlement of bills in healthcare sector of insurance companies. The insurance companies require detail supporting documentation and therefore, the clients outsource this process to the assessee. The functions involved in this cycle are as under: -

- *Checking the patient's reported insurance coverage prior to the visit once an appointment is made at a hospital/clinic.*



- *Creating a record of the patient's name, other personal information and details of insurance provider;*
- *Categorizing and coding the nature of the treatment received by a patient;*
- *Ensuring all the charges are captured accurately into the system.*
- *Submit claims for insured healthcare services to the insurance companies and billing the patient for the balance services.*
- *Forwarding required documentation to insurance companies for processing of claims; and*
- *Following up with the insurance companies and patients for settlement of claims.”*

014. Assessee has set up a subsidiary in United States to assist him on marketing sale support and relationship activities. This part of on-site delivery system to the assessee based on the functions to assist and risk profile of assessee as well as the Associated Enterprises, the assessee states that assessee itself is an entrepreneurial entity, whereas the US entity is having very limited risk for marketing support services. Assessee reimburses AE at cost plus 7%. On this basis for marketing support services foreign Associated Enterprises has taken as tested party. The



learned Transfer Pricing Officer rejected the same stating that the Associated Enterprises cannot be treated as tested party for the reason that Associated Enterprises is located in various locations i.e., USA, Europe, Asia specific and therefore, it becomes difficult to determine the appropriate Arm's Length Price with respect to each transaction in each region. The learned CIT (A) on this issue has categorically held that the foreign Associated Enterprises is the least complex entity and therefore there is no reason that same cannot be taken as a tested party.

015. The discussion on benchmarking of the transaction has taking the Associated Enterprises as the tested party is at Para no.6.10 of the order of the learned Transfer Pricing Officer is as under: -

"6.10 Rejection of Associated Enterprises as the tested party

The assessee made the following submissions as to why the AE may be considered as the tested party:

IKS India is clearly the risk bearing entrepreneurial entity, responsible for the entire risk and reward arising out of the services it provides to its customers. It is the developer and owner of all intangibles. As submitted earlier, IKS Inc is engaged in provision of support services for which it is remunerated on a cost-plus mark-up basis. Therefore, in comparison with IKS India, IKS Inc is the least complex entity. IKS Inc being least complex of the two transacting entities has accordingly been



selected as the tested party. The assessee has determined IKS Inc as the tested party basis the following well accepted key elements of determining the tested party:

- The party that is the least complex in terms of functions performed, assets employed, and risks undertaken should be selected as the 'tested party' in, the party to the international transaction whose functions are simpler to evaluate, which does not own valuable non routine intangible assets and does not undertake substantial business risks.*
- Reliable information about the 'tested party' must be more easily and readily available and should be capable of being verified independently.*
- Reliable information about the 'comparable' must be more easily and readily available and should be capable of being verified independently.*
- The available information on 'tested party' and 'comparable' shall be sufficient to carry out reliable adjustments for material differences, if any.*

TPO Comments:

The taxpayer's contentions with respect to considering the Foreign AE as the Tested Party have been perused. It is mentioned in the OECD Guidelines



that the least complex entity should be taken as the Tested party. However, the transaction in the instant case is taking place in India. Therefore, the taxpayer is considered as the "Tested Party". The assessee's contention that major risks are borne by the AE, is factually incorrect as is clear from the risk analysis of the assessee and the AE. The assessee bears almost the entire risk.

Further, the AEs cannot be treated as the tested party for the following reasons: The AEs are located in various locations, i.e., USA, Europe and Asia Pacific. Therefore, it becomes difficult to determine the appropriate arm's length price each transaction in each region. The assessee has taken weighted average of 3 years of comparable.

The assessee has used comparable which have a different financial year ending than 31.3.2011. As per the Rule 108(4), it is mandatory to use the current year data i.e., the data for the FY 2010-11. The taxpayer has not used current year data exclusively in all of the comparable companies, which vitiates the TP documentation. The proviso to Rule 108(4) says that earlier two-year data can also be used when it is shown that such earlier year data had an influence in determining the price. Further, the earlier year data can be used provided the condition is satisfied, and also is in addition to the current year data. The taxpayer did not give any reasons as to how the earlier year data had an influence over the pricing



either in the case of taxpayer or in the case of uncontrolled enterprises.”

016. The learned CIT (A) held that there is no infirmity in taking the foreign Associated Enterprises as a tested party. The learned CIT (A) in Para 9 held as under: -

"9. The matter is examined. I find that the appellant has rebutted each of the items listed by Assessing officer for not treating IKS Inc as tested party. In this case there is only one AE, and such AE need not be based in India. The 3-year data and F.Y. difference are adjustable issues when comparable are selected and analysis for inclusion/elimination. If usage of data of 3 years is not acceptable, Assessing Officer after recording reasons can change the same but usage of data of 3 years is not a determining factor as to who the tested party should be. Moreover, the assessee has provided single year date during course of proceedings before Transfer Pricing Officer. Here method to be adopted is TNMM and broad comparability is sufficient. Hence, I hold that the Transfer Pricing Officer has wrong in not holding IKS Inc as not tested party in the case.”

017. The OECD guideline states that choice of the tested party should be constant with the functional analysis of the transaction. Generally, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparable can be found and further it would be most often the party that is the less complex functional



analysis. UN transfer pricing guidelines are also on the similar lines. Further, the Indian Jurisprudence is also on the similar principles. Therefore, the principle emerges that it is better if a tested party is taken whose functions are less complex in nature, does not own any intangible generally and the results which can be verified by using reliable data base. In the present case, the foreign Associated Enterprises is admittedly least complex functions and does not know any intangible and further the assessee has used the Standard and Poor's CompStat and Merchant Database. The comparability analysis shows that the total population of 285 companies was available with respect to market sales support and customer relationship services and 940 companies were available in provision of revenue cycle management services by using one source global business process database. Thus, foreign Associated Enterprises satisfied all the criteria for being taken as a tested party. The learned Transfer Pricing Officer merely rejected the same as Associated Enterprises is located in different geographical locations. We do not find it a proper justification by the learned Transfer Pricing Officer to reject the foreign Associated Enterprises as a tested party. Ld CIT (A) order is affirmed.

018. With respect to comparability analysis, the directions are given by the learned CIT (A) in Para no. 11 which are subject to verification by the learned Transfer Pricing Officer. We do not find any infirmity in these directions.



Accordingly, grounds nos.1 to 5 of the appeal of the learned Assessing Officer are dismissed.

019. In the result, the appeal filed by the learned Assessing Officer is dismissed.

020. The CO of the Assessee is with respect to various comparability issues for which the learned CIT (A) has directed the learned Assessing Officer/ learned Transfer Pricing Officer to verify. Therefore, the submissions of the assessee would be open to be adjudicated before the learned Transfer Pricing Officer/ learned Assessing Officer. Accordingly, both the grounds of Cross Objection are premature and hence, dismissed.

021. Accordingly, the Cross Objection of the assessee is also dismissed.

022. In the result, appeals of the Assessing Officer and CO of the assessee are dismissed.

Order pronounced in the open court on 21.10.2022.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.10.2022

Sudip Sarkar, Sr.PS



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai