

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No. 869/DEL/2014
Assessment Year : 2009-10

The Deputy Commissioner of Income Tax, Circle – 16(1), New Delhi.	Vs.	M/s. Thomson Holding India Pvt. Ltd., C/o Robinson AIR Services Central Warehousing Corporation, Opp. SBI Colony, Rana Pratap Bagh, G.T. Karnal Road, New Delhi – 110 033. PAN: AACCT0862G
APPELLANT		RESPONDENT

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ITA No. 1911/DEL/2014
Assessment Year : 2009-10

M/s. Technicolor India Pvt. Ltd., (Formerly known as Thomson Holdings India Pvt. Ltd.), 306-308, 3 rd floor, Bestech Chambers Block B, Sushant Lok-I, Gurgaon, Haryana – 122 009. PAN: AACCT0862G	Vs.	The Deputy Commissioner of Income Tax, Circle – 16(1), New Delhi.
APPELLANT		RESPONDENT

Assessee by	:	Shri Mukesh Butani, Advocate
Revenue by	:	Shri Sunil Kumar Singh, CIT-DR

Date of Hearing	:	20-10-2022
Date of Pronouncement	:	31-10-2022

ORDER

PER BENCH

Present cross appeals are filed by assessee as well as revenue against order dated 31/01/2014 passed by the Ld.DCIT, Circle – 16(1), New Delhi for A.Y. 2009-10 on following grounds of appeal:

Assessee's appeal:

“1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the income of the Appellant for the relevant assessment year at a loss of INR 23,79,37,650, as against returned loss of INR 24,47,39,972.

2. That on facts and circumstances of the case and in law, the AO/ Transfer Pricing Officer ("TPO") erred in making transfer pricing adjustments and the Dispute Resolution Panel ("DRP") further erred in upholding the adjustment to extent of INR 68,02,330 in respect of the international transactions, alleging that the same to be not at arm's length in terms of the provisions of sections 92C(1) and 92C(2) of the Act, read with Rule 10D of the Income-tax Rules, 1962 ("the Rules").

3. That on the facts and circumstances of the case and in law, the AO / DRP/ TPO have erred in making an adjustment to the extent of INR 46.74,778 in respect of international transaction pertaining to marketing support services alleging that the same to be not at arm's length.

3.1 That on the facts and circumstances of the case and in law, the AO/ TPO have erred in including certain comparable companies by conducting a fresh search (without sharing the search methodology) using subjective filters and the DRP further erred in upholding the inclusion of such companies.

3.2 That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in arbitrarily rejecting comparable companies chosen by the Appellant on a subjective basis.

4. That on the facts and circumstances of the case and in law, the AO / DRP/ TPO have erred in making an adjustment to the extent of INR 5,44,715, in respect of international transaction pertaining to warranty support services, alleging that the same to be not at arm's length.

4.1 That on the facts and circumstances of the case and in law, the AO/ TPO have erred in including certain comparable companies by conducting a fresh search (without sharing the search methodology) using subjective filters and the DRP further erred in upholding the inclusion of such companies.

4.2 That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in arbitrarily rejecting comparable companies chosen by the Appellant on a subjective basis.

5. That on the facts and circumstances of the case and in law. the AO/ DRP/ TPO erred in making a transfer price adjustment of INR 15,82,837 in respect of the international transactions under trading function on account of purchase of spare parts and components from its Associated Enterprises ("AEs"), alleging that the same to be not at arm's length.

5.1 That on the facts and circumstances of the case and in law, the DRP erred in not adjudicating the inclusion of certain companies arbitrarily selected as comparable without sharing the search methodology by the TPO, especially when such companies were functionally not comparable.

6. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in not granting the benefit of economic/ risk adjustments.

7. That on facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in not providing the Appellant the benefit of 5 percent range as provided by the proviso of section 920(2) of the Act.

8. That on the facts and circumstances of the case and in law, the AO / TPO / DRP erred in not considering foreign exchange fluctuation gain / loss and other income while computing the operating margins.

9. That on facts and circumstances of the case and in law, the AO/DRP/TPO have erred in ignoring the provisions of Rule 10B(4) of the Rules and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal."

Revenue's appeal:

1. "On the facts and in the circumstances of the case and in law, Ld. DRP, Panel-II, New Delhi erred in deleting the addition of Rs.9,22,79,668/-(9,90,81,998 - 68,02,330) disallowed by the AO u/s 92CA of the Act."

2. *"The appellant craves for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of appeal".*

2. At the outset, we note that the final assessment order has been passed based on the directions issued by DRP and the revenue has filed an appeal against the final assessment order. The issue raised by the revenue is on the addition being deleted in respect of the international transaction that was proposed by the Ld.TPO.

3. Before this *Tribunal*, the Revenue has been submitting that the DRP had not verified the documents / evidences filed by the assessee. It is submitted by the Revenue that it is not clear if the Ld.TPO was provided with the evidences / documents, based on which the DRP directions were issued.

The Ld.AR on the contrary submitted that the DRP called for a remand report from the Ld.TPO, based on which the additions stood deleted.

We have perused the submissions advanced by both sides in the light of records placed before us.

4. We note that the DRP, based on the observation of the Ld.TPO regarding the additional evidences had directed deletion of addition. The Ld.TPO vide its remand report dated 05/11/2013 accepted the submissions of the assessee that it had not undertaken any services under the R&D segment during the year under consideration.

The relevant extract of the remand report forms part of the DRP direction dated 20/12/2013.

5. Before us the Revenue do not have anything else to submit or has any evidences to establish that assessee rendered services under the R&D segment for the relevant year.

6. As the Ld.TPO on the remand proceedings by the DRP passed an order dated 05/11/2013 accepting the factual contentions of the assessee based on the evidences filed. The DRP relying on the report by the Ld.TPO, and also independently applying the mind had deleted the additions amounting to Rs.9,22,79,668/-. Today before us, revenue do not have any contrary evidences that could distinguish the view adopted by the DRP. We therefore do not find any basis to consider the revenue's appeal.

Accordingly, the appeal filed by the revenue stands dismissed.

7. In the assessee's appeal, the Ld.Counsel submitted that assessee do not wish to press Ground no. 5 and accordingly the same stands dismissed.

8. The issue that remains in **Ground Nos. 3-4** is against the additions made under the head marketing support service segment and warranty support service segment amounting to total of Rs.52,19,493/-.

9. On a query being raised by the bench regarding the issues, that has led to the above addition, considering the transfer pricing relief granted by the DRP, the Ld.Counsel submitted that, the additions remain only because of certain comparables that was upheld after the DRP directions.

10. The Ld.AR submitted that through these grounds, assessee wishes to seek exclusion of following comparables under market support service segment.

a) Aptico Ltd.

b) Orient Engineering and Commercial Company Ltd.

c) TSR Darashaw

11. Under warranty support service segment, assessee wishes to seek exclusion of following comparables.

a) Archohm Consultant

b) IBI Chematur

c) Mahindra Consulting Engineers Ltd.

d) Semac Ltd.

e) L&T Ramboll Cons

f) Zipper Trading Enterprises Ltd.

12. The Ld.AR submitted that, these transactions are undertaken by assessee on year to year basis with its AE, and therefore these comparables needs to be adjudicated for exclusion. It is submitted that these comparables are not functionally similar with that of assessee and it would appear in the search matrix of Ld.AO/TPO for every year. The Ld.AR also submitted that, in the subsequent year, the appeal that is pending before this *Tribunal* consists of issues, wherein the assessee is seeking exclusion of most of the above comparables under the two segments being a) market support service segment and b) provision of warranty support service segment.

The Ld.DR on the contrary relied on the orders passed by authorities below.

We have considered the rival submissions of both sides based on the records placed before us.

13. We note that the quantum of addition in respect of the two issues that remains to be adjudicated in assessee's appeal is of miniscule amount. More importantly, the assessment year involved

is 2009-10. Considering the fact that long period of time lapsed and in order to put an end to the litigation, it was submitted that assessee may not press the appeal filed on the two issues that remains to be adjudicated, due to the smallness of quantum of addition on the condition that, the rights of the assessee would not be prejudiced in terms of contesting the issues / comparables under the two segments, in the subsequent years for exclusion. At that juncture, the Ld.Counsel also referred to the transfer pricing order dated 24/01/2013, wherein a direction was issued by the Ld.TPO to initiate penalty proceedings which could be a consequence in case the present appeal is dismissed.

We have considered all the above submissions.

14. We note that, the direction of initiating penalty by the Ld.TPO is not in accordance with law. We expunge this direction of the Ld.TPO. We also grant liberty to the assessee to contest the comparables that remained to be adjudicated in the surviving issues. We keep all issues open to be adjudicated / contested in an appropriate assessment year.

In the result, the appeal of the assessee as well as revenue stands dismissed.

Order pronounced in the open court on 31st October, 2022.

Sd/-
(LAXMI PRASAD SAHU)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 31st October, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore