

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

**SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

ITA No. 1059/Del/2016
Assessment Years: 2006-07

Deputy CIT, Circle-16(1), New Delhi	Vs.	M/s. Marubeni India Pvt. Ltd., 5 th Floor, Lotus Tower, Community Centre, New Delhi-1100 65
PAN :AAACM6413A		
(Appellant)		(Respondent)

Assessee by	S/Shri Nageshwar Rao & S. Chakarborty, Adv.
Department by	Shri Vivek Verma, Sr. DR

Date of hearing	11.08.2022
Date of pronouncement	09.11.2022

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

Instant appeal has been filed by the Revenue challenging the directions of learned Dispute Resolution Panel (DRP)-2, New Delhi

for the assessment year 2006-07. Effective grounds raised by the Revenue are as under:

1. Whether on the facts and circumstances of the case the Hon'ble Learned DRP was right in law in rejecting the primacy of functions carried out by the assessee and basing its decision on the ground that risks were minimal in the case of the assessee?
2. Whether the DRP was correct in directing the TPO to re-compute segmental margin of the assessee for indenting and trading activities based on allocation of total indirect costs which has no base either in the TP guidelines or in any of the judicial pronouncement in assessee's own case either in this year or earlier years?
3. Whether the DRP was correct in directing the TPO to include Besant Raj International Ltd. in the comparable set upon verification of positive operating margins for F.Y. 03-04, without appreciating the fact that the turnover of the company from operating activities was less than Rs. 1 Cr. In F.Y. 05-06?

2. As could be seen from the grounds raised, they are inter-related and are against certain directions of learned DRP in relation to the transfer pricing adjustment suggested by the Transfer Pricing Officer (TPO) on the arm's length price (ALP) of the international transaction with the overseas Associated Enterprises (AEs).

3. Briefly the facts relating to this issue are, the assessee is a resident corporate entity and is a wholly owned subsidiary of

Marubeni Corporation, Japan. As stated, the assessee is primarily engaged in providing agency support services and marketing support services to various group entities. While providing such services, the assessee liaises between various business department/company of the group and their supplier/customers in India. Assessee's operations include coordination of import and export of goods and services and liaison activities. It coordinates the trade in a broad range of industrial, agricultural and consumer goods, commodities and natural resources. The assessee operates in two segments. In addition to agency support services provided to related parties, the assessee also undertakes trading activity is of certain commodities in domestic market. In so far as the trading activity is concerned, it is exclusively with unrelated Parties. In so far as the international transactions carried out with AEs, they are as under:

	Type of transaction	Value (in Rs.)	Method Used	MIPL's margin	Comparable margin
1.	Provision of agency support services	204,005,606	TNMM (see note 1 below)	23.53 percent (see note 2 below)	10.71

2.	Cost allocation of software usage and usage services provided by AEs	5,282,817			
3.	Reimbursement of expenses by MIPL to AEs	605,672			
4.	Reimbursement of expenses by MIPL to AEs	20,749,897			

4. Assessee benchmark the transaction relating to provision of agency support services adopting Transaction Net Margin Method (TNMM) as the most appropriate method and disclosed a margin of 23.53% on operating cost. For comparative analysis, the assessee shortlisted 13 comparables with arithmetic mean of 10.71%. Thus, the transaction with AEs were claimed to be at arm's length. The Transfer Pricing Officer (TPO), however, did not accept the benchmarking of the assessee. He recomputed the ALP at Rs.73,01,27,442 and compared it against the companywide operating revenue of Rs.64,61,08,345, thereby, proposing adjustment of Rs.8,40,19,097 to the ALP. While computing the ALP, the TPO considered the total operating cost for rendering agency support services at

Rs.60,91,50,211 as against actual operating cost of Rs.16,51,41,000 claimed by the assessee. Further, the TPO considered the total revenue earned by the assessee from both the segments i.e. agency support services segment and trading segment as against actual operating income from agency support services of Rs.20,40,05,606. While coming to such conclusion, the TPO observed that the assessee has developed unique intangibles, such as, supply chain management intangible and human capital intangible which provided advantage to the AEs in the form of low cost of product, and quality of product resulting in enhancing the profitability of the AEs while doing business in India. He further observed, the assessee had assumed significant risks such as sourcing risk, quality risk and capacity utilization risk while performing its function, hence, required to be compensated. He further observed that the segmental accounting done by the assessee is only in relation to income, whereas, the allocation of expenses are unreliable. Therefore, entity-wise operating income/operating cost have to be considered to benchmark the international transaction. In this context, the TPO held that the profit level indicator (PLI) of operating profit to operating cost used by the

assessee is inappropriate. Accordingly, he included cost of sales as the dominator and changed the PLI to operating profit to total cost. Finally, the TPO rejected two of the comparables selected by the assessee viz. Besant Raj International & Capital Trust Ltd. While proposing the draft assessment order, the Assessing Officer added back the transfer pricing adjustment suggested by the TPO. Against the draft assessment order, the assessee raised objections before learned DRP. While deciding the objections of the assessee, learned DRP has held as under:

- Transaction with both related and unrelated parties cannot be aggregated for benchmarking purpose. Therefore, learned DRP directed for benchmarking the related Party segment only.
- PLI of operating profit to total cost is inappropriate as there is no cost of goods involved qua provision of Agency Support Services to AEs. In this context, learned DRP observed, since, the comparables do not have cost of goods sold in their profit and loss account, it will not be appropriate if such cost of goods relating to trading activities with unrelated parties, is included in the cost base for application of TNMM. Learned DRP observed, if trading transaction's of the assessee were to be compared to comparable service providers as compared by the TPO, the margin of the assessee needs to be compared using PLI on return on value added cost excluding cost of goods sold by the assessee.
- Learned DRP directed the TPO to verify the segmental margin of assessee's transaction with AEs ensuring the

allocation of cost between the AE and non-AE segments in the ratio of income earned from AE segment and non-AE segment. In this regard, learned DRP set out the following guidelines for the TPO:

- Identify the Revenue from financial statements of the A' pertaining to indenting and trading activities separately.
- From the financial statements of the A' determine the cost of goods sold (purchase in India of traded goods + decrease in inventory) and the processing expense and assign them **entirely to the trading segment.**
- Allocate other income in the ratio of gross commission income (indenting segment) to gross margin (trading segment).
- Allocate personnel expenses, operating and other expenses, depreciation and amortization in the ratio of gross commission income (indenting segment) to gross margin (trading segment).
- The net margin of the indenting segment would therefore be the tested party margin for application of TNMM and shall be compared to the operating margin of comparables. The trading segment shall be absolved of any TP by reason of the fact that TP proceedings do not apply to uncontrolled domestic transaction.

5. As regards, assessee's objection against exclusion of Besant Raj International, learned DRP held that since the company earned profit in financial year 2003-04, it cannot be considered as a persistent loss

making company. Accordingly, learned DRP disposed of the objections of the assessee.

6. We have considered rival submissions and perused the material on record. It is a fact on record that the assessee operates in two segments. While, in one of the segment assessee undertakes international transactions relating to provision of agency support services to AEs, in the other segment, the assessee is engaged in trading of goods to customers in India. Thus, while the provision of agency support services is purely with related parties, the trading in goods domestically is exclusively with unrelated parties. While, rejecting assessee's benchmarking of international transactions with AEs, undisputedly, the TPO had aggregated transactions in both the segments at entity level and determined the ALP of the transactions with the AEs. This approach of the TPO is fundamentally wrong and against the statutory provisions. While benchmarking international transactions with AEs, the transactions relating to unrelated parties cannot be clubbed. Therefore, the benchmarking done by the TPO is flawed, hence, unacceptable. Further, the tinkering of PLI by

substituting the denominator with total cost is unacceptable considering that the TPO has included the cost of traded goods with unrelated parties in the total cost. Therefore, we do not find any infirmity in the decision of learned DRP in directing the TPO to recompute the ALP by strictly restricting himself to the international transaction with the AEs. In so far as, inclusion of Besant Raj International as a comparable, it is observed that only reason on which the TPO excluded this company is because it is a persistent loss making company. However, as per settled legal principles, a company can be considered as a persistent loss making company if it has shown loss in the current year as well as two preceding assessment years. Factually, the assessee has established that Besant Raj International Ltd. has shown profit in assessment year 2004-05. In fact, while giving effect to the directions of learned DRP, the TPO has accepted this fact. Therefore, Besant Raj International Ltd., being otherwise functionally similar to the assessee, has to be treated as comparable.

7. In view of the aforesaid, we do not find any deficiency in the directions of learned DRP. Grounds raised are dismissed.

8. In the result, the appeal is dismissed.

Order pronounced in the open court on 9th November, 2022.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 9th November, 2022.

Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation (Order drafted through Dragon software):	03.11.2022
2.	Date on which the draft of order is placed before the Dictating Member:	03.11.2022
3.	Date on which the draft of order is placed before the other Member:	04.11.2022
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	07.11.2022
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	07.11.2022
6.	Date on which the final order received after having been signed/pronounced by the Members:	10.11.2022
7.	Date on which the final order is uploaded on the website of ITAT:	10.11.2022
8.	Date on which the file goes to the Bench Clerk	10.11.2022
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	