

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

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

IT(TP)A No. 2222/Mum/2017

(Assessment Year: 2012-13)

Inventurus Knowledge Solutions Private Limited M/s. Serene Properties Private Limited (SEZ) Unit No. 204, Building No.5, MindSPACE, Airoli, Mumbai-400 708 PAN/GIR No. AABC 15573 J	Vs.	The Assistant CIT, Range 3(2)(1) Mumbai
(Appellant)	:	(Respondent)
Assessee by	:	Shri S. C. Tiwari
Revenue by	:	Ms. Samruddhi Dhananjay Hande
Date of Hearing	:	30.11.2022
Date of Pronouncement	:	22.02.2023

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the assessment order passed u/s. 143(3) r.w.s. 144C(5) & 144C(13) r.w.s. 92CA(3) of the Income Tax Act, 1961 ('the Act'), in pursuance to the direction issued by the Hon'ble Dispute Resolution Panel (Id. DRP for short), relevant to the Assessment Year ('A.Y.' for short) 2012-13.

2. The assessee has challenged the addition/disallowance made by the Assessing Officer (A.O. for short) on transfer pricing grounds along with the other grounds of appeal.

3. The brief facts are that the assessee is engaged in providing Revenue Cycle Management (RCM for short) to companies in US health care sector and has set up a subsidiary called Inventurus Knowledge Solution Inc (IKS Inc for short) in US to assist in the marketing and onsite support activity for the RCM business, which is wholly

owned subsidiary of the assessee company. The assessee filed its return of income dated 29.11.2013, declaring total loss of Rs.15,43,61,384/-. The assessee's case was selected for scrutiny and the assessment order dated 27.01.2017 was passed u/s. 143(3) r.w.s. 144C(5) and 144C(13) r.w.s. 92CA(3) of the Act, where the A.O. determined the total loss of Rs.13,98,27,598/-, as against the returned loss of Rs.15,43,61,384/-, pursuant to the direction of the Id. DRP. It was observed that from Form No. 3CEB, the assessee company has entered into the international transaction with its associated enterprises amounting to Rs.42,14,02,500/-. The assessee's case was referred to the Transfer Pricing Officer ('TPO' for short) to determine the Arm's Length Price ('ALP' for short) of the international transaction with AE's, whereby the TPO determined an upward adjustment of Rs.1,32,93,815/- vide order dated 29.01.2016. It is observed that the TPO had adopted the OP/OC of the AE's segment of the assessee at 22.63% as against 15.89% determined by the assessee, whereby resulting in an addition of Rs.1,32,93,815/- to the total income of the assessee. The A.O. had also made an addition u/s. 36(1)(va) r.w.s. 2(24)(x) of the Act for delayed payment of employees contribution to provident fund ('PF' for short) and Employees State Insurance Corporation ('ESIC' for short), aggregating to Rs.12,39,971/-. The assessee has raised an objection before the Id. DRP on various grounds against the draft assessment order dated 29.03.2016, where the total income was assessed at Rs.58,90,86,366/-. The Id. DRP has disposed of the objections raised by the assessee on the adjustments/additions proposed by the A.O. in the draft assessment order and had upheld the adjustment made by the TPO/A.O.

4. The assessee is in appeal before us, challenging the final assessment order dated 27.01.2017 passed in pursuance to the direction given by the DRP as under:

- i. The assessee has challenged the transfer pricing adjustment on the ground that the assessee being an India headquarters company wherein substantial portion of its profits are derived from tax holiday units, thereby contending that there was no intention to shift profit out of India and, hence, the transfer pricing provisions were not to be applied in assessee's case.
- ii. The assessee has challenged the transfer pricing adjustment on the ground that the TPO/A.O. had rejected the AE as the tested party for bench marking the international transaction of RCM services and had erred in taking the assessee as tested party by disregarding the functional profiles of the assessee and the AE.
- iii. The A.O./TPO has rejected the bench marking analysis undertaken by the assessee for the international transaction of RCM services and has erroneously rejected the AE as the tested party for the international transaction inspite of the fact that the annual reports of the comparable companies selected by the assessee was available in the public domain and the same was not looked into while making the TP adjustment.
- iv. The assessee has also challenged the ground that the bench marking analysis should be undertaken by using three years average data of the comparables instead of only single year data and has also challenged the application of filter for rejecting companies which followed a financial year other than April to March.
- v. The assessee has also challenged the search proceeding applied by the TPO, wherein eight companies selected as comparable by the A.O./TPO without sharing the search process undertaken for identifying the comparables.
- vi. The assessee also challenged the comparables namely Excel Infoways Ltd., University Prince System Ltd. and BNR Udyog Ltd. as comparable for bench marking the international transaction.
- vii. The assessee has challenged, on the ground that the assessee was not allowed benefit of working capital adjustment to account for the difference in working capital level between the assessee and the comparable companies. The assessee contended that the arms length price should be limited to the lower end of 5% range as per proviso to section 92C of the Act.

5. The assessee contended that it operates from special category zone units in Mumbai and Hyderabad for which tax holiday u/s. 10AA of the Act for the profits earned were availed by the assessee. The assessee further contended that the assessee being a parent entity of the group has headquarters in India and the shareholders are also based in India, stating that the assessee does not intend to shift its profits out of India. The assessee also stated that the assessee's AE, IKS Inc is in USA where the corporate tax rate is higher than that in India which negates the fact that the assessee wants to shift profit out of India. The assessee relied on the decision of *Tata Consultancy Services Ltd. vs. Addl. CIT* (in ITA No. 7513/Mum/2010 vide order dated 04.09.2015) where the Tribunal held that no TP adjustment can be made in cases where the assessee is benefited out of section 10A or section 80HHE or where the tax rate of the AE's country is higher than that in India. The assessee's contention was not accepted by the Id. DRP/TPO/A.O. Though the assessee has raised various contentions in the grounds of appeal, it is pertinent to consider the grounds where the A.O./TPO has rejected the assessee as a tested party for bench marking the international transaction of provision of RCM services and had bench marked the said transaction by using the assessee as tested party. The assessee submits that the IKS India is the risk bearing entrepreneur entity which was solely responsible for the entire risk and reward of the client contracts and that IKS Inc acts only as a contracting entity with the clients, which is a risk free entity. The assessee contended that the foreign AE, i.e. IKS Inc is considered to be least complex entity and has to be selected as the tested party. The assessee relied on the decision of the coordinate bench in the case of *Tata Motors European Technology Centre Plc vs. ADIT* (in ITA No. 7630/Mum/2012 vide order 22.12.2014) which held that the foreign

comparables cannot be rejected for bench marking the ALP. The lower authorities had rejected the assessee's contention for the reason that the assessee has taken weighted average of three years of comparables which also have different financial year ending other than April to March and that the assessee has not used the current year data exclusively for all the comparable companies which violates Rule 10B(4) of the IT Rule where the proviso to the said Rules states that the earlier two years data can also be used when it is shown that the earlier year data had an influence in determining the price. The TPO/AO further held that the earlier year data can be used when the conditions are satisfied and it has to be used in addition to the current year data. The TPO/A.O. also stated that the assessee has failed to give any cogent reason as to why the earlier year data has an influence over the pricing in neither in assessee's case nor in uncontrolled enterprises. The TPO considered the comparable selected by the assessee as different in activities which involved human resources, finance accounting, advisory and marketing, whereas in assessee's case, it was into information technology service sector where the role of AE was limited to identifying clients, negotiation of contracts and co-ordination. The TPO/A.O. held that the comparable companies selected by the assessee are functionally different and that the information pertaining to the comparables was difficult to be sourced and also was difficult to get reliable information. The TPO/A.O. stated that only Indian entities are to be taken as tested party in assessee's case and that the AE cannot be taken as the tested party for the above mentioned reason.

6. The Id. AR for the assessee contended that the co-ordinate bench in the case of the assessee for A.Y. 2011-12 has held that the foreign associated enterprises is considered as a least complex functions and can be considered as an tested party. The Id. AR further

contended that the usage of data of three years should not be a ground for the Id. TPO/A.O. to reject the said comparable. The Id. AR stated that the foreign AE satisfies all the conditions required for a tested party.

7. The learned Departmental Representative (Id. DR for short) for the Revenue, on the other hand, controverted the same and relied on the order of the lower authorities.

8. Having heard the rival submissions and perused the materials on record. It is observed that the assessee is an Indian entity where its units are located in the Special Economic Zone units in Mumbai and Hyderabad for which it avails the tax holidays u/s. 10AA of the Act for substantial amount of its profit. The assessee here has contended that it has no intention of shifting of profits outside India and that the corporate tax rate of its AE (IKS Inc.) is based in USA where the corporate tax rate is higher than that in India. The assessee has also relied on the decision of the co-ordinate bench in the case of *Tata Consultancy Services Ltd.* (supra), wherein it has held that the TP adjustments should not be made in case where the assessee is benefited u/s.10A or section 80HHE of the Act or where the tax of the AE's country is higher than that of the rate in India. The assessee has also contended on the ground that the foreign AE has to be taken as a tested party for the fact that it is the least complex functions. We would like to place our reliance on the decision of the co-ordinate bench, which has been authored by us in ITA No. 2403/Mum/2018 & CO No.249/Mum/2019 for A.Y. 2011-12 vide order dated 21.10.2022, where we have taken a view that the foreign AE can be taken as the tested party whose functions are least complex in nature and for the reason that it does not own

any intangible and can be verified by using reliable data base. The relevant extract of the said decision is cited hereunder for ease of reference:

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.*

9. From the above, we are of the view that a consistent approach has to be taken in case of no variation in the facts. It is now a settled proposition that a foreign AE can be considered as a tested party for the reason that it has a least complex function and the information about the comparable are easily accessible. The Id. TPO has not given proper justification for rejecting the AE to a tested party. We hereby allow ground nos. 1 to 14 raised by the assessee on the transfer pricing adjustment.

10. Ground nos. 15, 16 & 17 pertains to the disallowance of contribution made towards PF & ESIC. As these grounds are covered by the decision of the Hon'ble Apex Court in the case of *Checkmate Services Pvt. Ltd. vs. CIT* (in Civil Appeal No. 2833 of 2016 vide order dated 12.10.2022), wherein it was held that belated payment of PF & ESIC after the due date prescribed under the relevant Act warrants disallowance u/s. 36(1)(v)(a) of the Act. By respectfully following the said decision, we confirm the disallowance made by the lower authorities. We hereby dismiss ground nos. 15, 16 & 17 raised by the assessee.

11. Ground nos. 18, 19 & 20 requires no adjudication.

12. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22.02.2023

Sd/-

(Prashant Maharishi)
Accountant Member

Mumbai; Dated : 22.02.2023

Roshani, Sr. PS

Copy of the Order forwarded to :

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

Sd/-

(Kavitha Rajagopal)
Judicial Member

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai