

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

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI KULDIP SINGH, JM**

ITA No. 1994/MUM/2014
(Assessment Year 2009-10)

ITA No. 7523/MUM/2016
(Assessment Year 2010-11)

ITA No. 462/MUM/2018
(Assessment Year 2011-12)

ITA No. 588/MUM/2017
(Assessment Year 2012-13)

Publics Communication P. Ltd
15th Floor, Tower A Urmi
Estate, 95 Ganpat Rao Kadam
Marg, Lower Parel West,
Mumbai-400 013

(Appellant)

PAN No. AABCA5234G

DCIT CIR 7(3)(2)
Aayakar Bhavan, M.K.Road,
Mumbai-400 020

(Respondent)

CO 180/MUM/2019

Arising out of ITA 588/MUM2017

DCIT CIR 7(3)(2)
Aayakar Bhavan, M.K.Road,
Mumbai-400 020

(Appellant)

PAN No. AABCA5234G

Publics Communication P. Ltd
15th Floor, Tower A Urmi
Estate, 95 Ganpat Rao Kadam
Marg, Lower Parel West,
Mumbai-400 013

(Respondent)



Assessee by : Shri Ketan Ved
Revenue by : Shri Asif Karmali

Date of hearing: 31.01.2023
Date of pronouncement : 27.04.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Publicis Communication P. Ltd, Mumbai (assessee/ appellant) for A.Y. 2009-10 in ITA No. 1994/Mum/2014 against the assessment order passed by the Dy. Commissioner of Income Tax, Circle 7(1), Mumbai (the learned Assessing Officer) under Section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act), wherein the total income of the assessee was assessed at ₹5,76,08,860/-, against ₹1,06,57,180/- of income as per return of income filed on 30th August, 2009.
02. The learned Assessing Officer has made an adjustment of ₹3,15,47,177/- as per order of the learned Transfer Pricing Officer, Circle 11(9), Mumbai, (the learned Transfer Pricing Officer) passed under Section 92CA(3) of the Act being adjustment to the Arm's Length Price of the international transactions which has been upheld by the learned Dispute Resolution Panel-3, Mumbai (the learned Dispute Resolution Panel) as per direction passed under Section 144C(5) of the Act dated 31st December, 2013 . Further ₹11,73,198/- is disallowance of deprecation on goodwill.
03. The assessee has raised following grounds of appeal:-

“1. Re : Adjustment of ₹2,48,37,132/- on account of provision of and availing of services :

1.1 The Assessing Officer/ the Dispute Resolution Panel / the Transfer Pricing Officer have erred in making an upward adjustment of ₹ 2,48,37,132/- to the total income of the Appellant by holding that the international transactions relating to the provision of an availing of services by the Appellant with its Associated Enterprise (“AE”) were not at an arm’s length.

1.2 The Assessing Officer / the Dispute Resolution Panel / the Transfer Pricing Officer have erred in holding that advertisement support services rendered by the Appellant were akin to the Knowledge Processing Outsourcing [“KPO”] services and thereby rejecting the comparable companies selected by the Appellant and selecting companies which are not comparable to the Appellant.

1.3 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the international transactions relating to the provision of and availing of services by it were at an arm’s length and hence no adjustment in respect thereof was called for and the stand taken by the Assessing Officer/ the Dispute Resolution Panel / the Transfer Pricing Officer in this regard is misconceived, erroneous and incorrect.

2. Re: Adjustment of ₹ 67,10,045/- on account of recovery and reimbursement of expenses:

2.1 *The Assessing Officer / the Transfer Pricing Officer have erred in making an upward adjustment of ₹ 67,10,045/- to the total income of the Appellant by holding that the international transactions relating to the recovery and reimbursement of expenses by the Appellant with its Associated Enterprise (“AE”) were not at an arm’s length ignoring the specific directions of the Dispute Resolution Panel to verify the details filed by the Appellant.*

2.2 *The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the international transactions relating to the recovery and reimbursement of expenses by it were at an arm’s length and hence no adjustment in respect thereof was called for and the stand taken by the Assessing Officer/ the Transfer Pricing Officer in this regard is misconceived, erroneous and incorrect.*

3. Re : Disallowance of depreciation on goodwill:

3.1 *The learned DCIT erred in disallowing depreciation on goodwill of ₹ 11,73,198 claimed by the Appellant under section 32(1)(ii) of the Act.*

3.2 *The learned DCIT erred in observing that once the asset is adjusted and removed from the books of accounts, then no depreciation can be claimed by the Appellant as per the provisions of the Act.*

4. Re : Disallowance of depreciation on goodwill in the protective assessment manner:

4.1 The learned DCIT erred in disallowing depreciation on goodwill to the extent of ₹ 9,77,321 in the protective assessment manner.

4.2 The learned DCIT erred in observing that the Appellant has not raised an objection before the DRP in respect of the said ground.

5. Re: Short grant of credit of tax deducted at source('TDS')

5.1 The learned DCIT erred in granting TDS credit for ₹ 4,94,69,889 in the return of income based on the original TDS certificates, leading to a short credit of TDS of ₹ 2,01,07,508.

6. Re: Others

6.1 The Appellant submits that the learned DCIT, TPO and DRP have erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material in deciding the case. Further, they also failed to consider the contrary material and evidence adduced by the appellant.

6.2 The learned DCIT erred in not granting credit of advance tax paid of ₹ 5,00,000.

6.3 The learned DCIT erred in levying interest under section 234D of the Act.

6.4 The learned DCIT erred in initiating penalty proceedings under section 271(1)(c) of the Act.

6.5 The Appellant submits that each grounds of appeal are without prejudice to one another.”

04. The fact of the case of the assessee shows that assessee is a wholly owned subsidiary of Publicis Group Holdings B.V. engaged in providing a range of creative advertising services to its clients, which include film production, print production, artwork etc.
05. Assessee filed its return of income on 30th August, 2019 of ₹1,06,57,180/-. As assessee has entered into seven different types of international transactions, the learned Assessing Officer referred to determine its Arm's Length Price to the learned Transfer Pricing Officer. The learned Transfer Pricing Officer found that assessee has entered into different international transactions of receipt and payment of commission/ fees for non media services, client co-ordination fees, client creative fees, Advisory services fees and regional advisory services fees. The assessee adopted Transactional Net Margin Method as the most appropriate method. The net operating profit was considered as the appropriate profit level indicator. It selected 14 comparable companies, took three year weighted average net operating profit ratio whose arithmetic means was derived at 9.09%. The assessee's margin was determined at 11.81% and thus, in its transfer pricing study report Assessee stated that the international transactions are at Arm's Length Price.
06. The learned Transfer Pricing Officer on examination found that assessee has considered three years margin instead of single year margin and directed the assessee to submit the revised working. The

revised working was submitted to show the arithmetical mean of the margin of comparable is only 7.77%. With respect to the advisory and Regional advisory services were also benchmarked considering Transactional Net Margin Method as the most appropriate method where the arithmetic mean of 11 comparables was found at 12.70%. The learned TPO found that assessee has considered foreign comparables in its transfer pricing study report hence, rejected those for reason that the data related to foreign comparables is not available in Prowess and Capitaline database. He further directed the assessee to provide the list of Indian comparables with single year margin. On examination, he found that most of the companies were not comparable to the assessee's function, however, out of the five comparables, the learned Transfer Pricing Officer accepted the quadrant communications limited as functionally comparable. The learned Transfer Pricing Officer held that the assessee is engaged in high end knowledgeable process outsourcing services i.e. advertising services and therefore, he issue a show cause notice stating that why assessee should not be compared with KPO (Knowledge Process Outsourcing) units. He proposed four comparables whose average margin was 52.57% and thereafter, he computed the margin of five comparables including one comparable of the assessee accepted by him at 42.62% and found that the margin earned by the assessee is lesser and made an adjustment of ₹2,48,37,132/-. He further determined the amount of transaction, cost of transaction and profit from transaction. He computed that the total cost of transaction is ₹7,91,02,906/-. He applied Arm's Length Price margin of 42.62% and made an adjustment of ₹2,48,07,132/-.



07. The learned Transfer Pricing Officer was also found that there is also an international transaction of reimbursement and recovery of expense amounting to ₹2,75,66,373/-. The Associated Enterprises incurred certain expenses on behalf of assessee related to the hotel, Visa and other cost. These were reimbursed by the assessee to the Associated Enterprises on cost to cost basis. similarly; there were certain expenses on behalf of Associated Enterprises for non media services. The claim of the assessee is that reimbursement of expenses is essentially for administrative convenience and therefore, same were benchmarked at cost to cost basis. Assessee provided sample invoices. The learned Assessing Officer found that out of the total expenses of ₹2,75,66,373/-, assessee could submit only the bills of ₹2,08,56,328/- and therefore, the balance sum of ₹69,10,045/- was considered as an adjustment in respect of reimbursement of expenses. Accordingly, the total adjustment of ₹3,15,47,177/- was made by order under Section 92CA(3) of the Act on 28th January, 2013.
08. The learned Assessing Officer further found that as per schedule 15 of the accounts, the assessee has claimed depreciation on goodwill on account of amalgamation with another company. The amalgamation was approved by Hon'ble Bombay High Court with effect from 1st April, 2007. The assessee claimed depreciation on the goodwill on the opening Written-down value at the rate of 25%. Such depreciation was ₹11,73,198/-. The learned Assessing Officer noted that in A.Y. 2008-09, such depreciation was disallowed. However, the learned CIT (A) directed the learned Assessing Officer to re-compute the depreciation as the computation of Written-down

value in A.Y. 2000-01 was pending before him. Therefore, the learned Assessing Officer disallowed the above depreciation.

09. The draft assessment order was passed on 10th March, 2013, determining the total income of the assessee at ₹5,76,08,856/-.
010. The assessee preferred the objection before the learned Dispute Resolution Panel, who issued issue direction on 31st December, 2013. The learned Dispute Resolution Panel found that the entire crux of the functions shows the services provided by the assessee is similar to KPO and further in any case the Transactional Net Margin Method is fairly tolerant, therefore no interference is called for. With respect to reimbursement claimed, The learned Dispute Resolution Panel directed the assessee to furnish the complete information about the other invoices not submitted before the learned Assessing Officer/ Transfer Pricing Officer and the learned Transfer Pricing Officer was directed to verify the same if any adjustment is required. With respect to the depreciation on goodwill, the learned Dispute Resolution Panel held that the adjustment of the goodwill against share premium was part of the order of the Hon'ble High Court and therefore, no goodwill exists and hence, it upheld the action of the learned Transfer Pricing Officer in disallowing the depreciation.
011. Based on this, the final assessment order was passed by the learned Assessing Officer on 23rd January, 2014, wherein the adjustment on account of transfer pricing adjustment of ₹3,15,47,177/- and disallowance of depreciation of goodwill of ₹11,73,198/- was made.



012. The assessee is aggrieved with the above two disallowances/additions. Further, the assessee was concerned with the short credit of TDS of ₹2,01,07,508/- and therefore, is in appeal before us.
013. The learned Authorized Representative submitted that assessee is aggrieved with the fact that assessee is classified as KPO. He referred to the functions of the assessee and submitted that assessee is engaged in management services, creative services and co-ordination services. These functions of the assessee are referred to at page no.68 of the Paper Book being part of the transfer pricing study report. He further submitted that comparables providing advertisement services can be considered to be the comparables. He submitted that assessee has merely provided advertisement services which is different from knowledge process outsourcing services. Therefore, the learned Transfer Pricing Officer and the learned Dispute Resolution Panel has wrongly classified assessee as KPO and comparables selected which are KPOs. He referred to transfer pricing study report as well as the submissions made before the learned Transfer Pricing Officer as per letter dated 19th December, 2012. It was further stated that comparables selected by the learned Transfer Pricing Officer i.e. four comparables such as Acropetal Technologies Limited, Coral Hub Ltd., Eclerx Services Limited, Mold-Tek Technologies Ltd, are not at all functionally comparable to the advertising agency business of the assessee. In paper book at page no.681 to 1038, he submitted the annual report of those companies and refer to their function to show that these are not in the advertisement segment.
014. The learned Authorized Representative further submitted that the learned Transfer Pricing Officer has made adjustment with respect to



non submission of the certain bills. He submitted that vide letter dated 19th December, 2012, the assessee has submitted sample copies of back to back invoices for recovery of expenses and also sample copy of intercompany invoices. He referred to the various annexures. It was his claim that the learned Transfer Pricing Officer despite direction of the learned Dispute Resolution Panel has not verified the invoices and made the adjustment. He submitted that the assessee has maintained complete details of invoices for recovery of expenses and intercompany invoices for reimbursement of expenses and therefore, the learned Transfer Pricing Officer and the learned Dispute Resolution Panel is not justified in making the adjustment.

015. With respect to the third ground of disallowance of depreciation of goodwill disallowed by the learned Assessing Officer of ₹11,73,198/-, he submitted that for A.Y. 2008-09, the learned CIT (A) has given a direction stating that adjudication for assessment year 2000-01 is pending and therefore, based on the same the depreciation is required to be computed. Thus, in the earlier years the issue has been restored to the learned Assessing Officer.
016. With respect to the TDS credit, he submitted that relevant direction to the learned Assessing Officer for verification and granting credit may be given.
017. The learned Departmental Representative vehemently supported the order of learned lower authorities.
018. We have carefully considered the rival contentions and perused the orders of the lower authorities. The fact shows that with respect to the international transaction of receipt of commission fee, client co-ordinate fees, advisory services and client creative fees, assessee



benchmarked adopting the Transactional Net Margin Method as the most appropriate method. However, for the purposes of comparing of Profit Level Indicator (PLI), assessee has chosen itself i.e. an Indian entity as tested party. However, the comparables were chosen pertaining to Asia Pacific Region. Therefore, the learned Transfer Pricing Officer rejected the transfer pricing study report of the assessee as no relevant data were available. The assessee was asked to provide Indian comparables. When assessee provided such comparables, out of the five comparables four comparables were rejected. The only comparable accepted was the quadrant communications limited, which was providing advertisement services. comparables rejected as it was held by learned Transfer Pricing Officer as functionally not comparable. With respect to the Sporting and Outdoor Ad-agency Pvt. Ltd., the respective data was not available in public domain. However, after rejecting the TP study report of the assessee, rejecting four comparables out of the five Indian comparables submitted by the assessee, The learned Transfer Pricing Officer reached at a conclusion that Assessee Company is engaged in high end knowledge process outsourcing services i.e. Advertisement services. He referred to the Transfer pricing integration (TPI) research report and consequently held that four entities which are providing high end KPO services are comparable to the functions provided by the assessee. The learned Transfer Pricing Officer held that the assessee company is performing KPO services which are high end value added work done by employing resources, efforts are people intensive and the end product is derived through rigorous methodologies. Therefore, according to the learned Transfer Pricing Officer these services performed by the assessee are comparable with knowledge process

services. Hence, the comparability analysis should be made by selecting comparable companies providing KPO services. Accordingly, the adjustment was made. The learned Dispute Resolution Panel vide deciding the objection no. 4, rejected the contention of the assessee giving a reason that even otherwise Transactional Net Margin Method is fairly tolerant to minor differences in the functions performed.

019. The functional analysis which is not disputed by the lower authorities as per the transfer pricing study report of the assessee is as under:-

4.1 Publicis India provides creative advertisement services to its clients. A typical advertising service involves the following functions:

- Initially, a client brief is undertaken by the 'Client service team' of Publicis India. The team prepares internal briefs for all advertising-related activities and communicates the briefs to the 'Creative team.'*
- The Creative team decides on the approach to be adopted, the matter, visuals to be used, presentation style, etc. and the job is conceptualized. The publicity strategies and the marketing ideas are developed at this stage. The plan for the type of media to be used is also determined at this stage, with client's approval.*
- A substantial portion of the creative work is done in the Studio under the technical supervision of the*



Creative team. Outside purchases such as blocks, phototypesetting matter, etc. are assembled into an 'art work' for use in various media.

- *The entire concept or idea of the particular campaign or advertisement is approved by the client and then the production (execution) phase begins - a critical phase of converting ideas into reality. The printing and processing job is supervised by the 'Printing and production team' and film production is supervised by 'Film production team'.*

The various media of advertising catered to by Publicis India include television, films, radio, hoardings, press, bus shelters, audio visuals, point of purchase (e.g. shopping bags), road shows, and events, among others.

Publicis India is also engaged in rendering non-media services to its clients. These non-media services are akin to sales promotion strategies like development of booklets, leaflets, and art work. It offers advertisements, point-of-sale material, and reference documents.

Publicis India plans to set up an outsourcing division to tap the offshoring opportunities in the creative sector. The outsourcing units will consist of a 24x7 studio or a set of studios that will deliver content with a faster turnaround time at comparatively lesser cost. During FY 2008-09, Publicis India has paid its associated enterprises advisory

service fees, fees for creative services and client co-ordination fees.

The various media of advertising catered to by Publicis India include television, films, radio, hoardings, press, bus shelters, audio visuals, point of purchase (e.g. shopping bags), road shows, and events, among others.

To perform the aforesaid functions Publicis India avails of the following services from its AEs

The management services received by Publicis India include, inter alia, the following:

- Assistance and advice in commercial and creative development;*
- Assistance in media and research;*
- Assistance in finance and administration; and*
- Assistance in general management and strategy.*

The creative services received by Publicis India include, inter alia, the following.

- Development of advertising concept,*
- Development of layout of advertisement, story-boards for television and cinema, radio spots and texts and graphics;*
- Artistic development of concepts of texts and graphics; and*

- *Supply of creative material*

The co-ordination services received by Publicis India include, inter alia, the following:

- *Advice and aid development of specific media projects as well as any modification to these projects;*
- *Co-ordinate necessary contacts on a European level;*
- *Organize methods for treating International budgets and process necessary analyses as to the positioning of products on European markets,*
- *Co-ordinate meetings and discussions with local and regional management as regards strategic recommendations; and*
- *Necessary assistance in obtaining contacts with a view to acquiring new International budgets or expanding existing budgets.*

4.2 Assets

Any business requires sets (tangible or intangible) without which it cannot carry its activities. Intangibles play a significant role in the functioning of a business and are accordingly more important. An understanding of the assets employed and owned by Publicis India and its AEs provides an insight into the resources deployed by them.

and their contribution to the business processes economic activities.

Publicis India has used the services of its specially trained and experienced personnel to provide the aforementioned services to its associated enterprise. In addition to the above, Publicis India has employed the following assets as on 31 March 2009

Table 3: Comparative Summary of Assets employed

| Particulars | Amount in INR (000's) |
|-----------------------|-----------------------------|
| Fixed Assets | 37,440 |
| Net Current Assets | 303,637 |
| Total | 341,077 |

4.3 Risks

4.3.1 Credit Risk

A firm faces customer credit risk when it supplies products to a customer and the customer fails to make payment or the payment is deferred. This is the risk arising from non-payment of dues by customers. Credit risks are borne by Publicis India in respect of its contracts with unrelated third parties. In respect of contracts with its group companies, the credit risk is limited.

4.3.2 Contract risk

Publicis India enters into contracts with its customers in its own name and hence the primary contract risk is borne by Publicis India.

4.3.3 Price Risk

Price risk is the risk that future income streams are sensitive to market prices. In other words, the risk that a vendor may not be able to sell its services for the price originally envisaged. The price risk is primarily borne by Publicis India as market forces determine its revenues.

4.3.4 Personnel Risk

Any enters, which is largely segment, for its quality personnel with superior technical knowledge is faced with the risk, Competitive market forces expose such an enterprise to the risk of losing its trained personnel.

Publicis India bears the risk of recruitment and retention of appropriately skilled staff. The available skill sets need to match the ever changing demand for professionals. Failure to do so would result in a loss of revenue and clients.

4.3.5 Cost Overrun Risk

Some of the services contracts are on fixed-price basis. Any cost failure to estimate accurately the resources and time required for a project, future rates of wage inflation and currency exchange rates or its failure to complete its contractual obligations within the time frame committed

could have an adverse impact on the profitability of the fixed price contracts of Publicis India.

4.3.6 Idle Capacity Risk

Idle time risk arises when, due to lack in demand for the services provided by the firm, the resources are not utilized fully. This results in loss of time and capacity. Thus, idle capacity risk would include the risk that employees do not have sufficient work.

Publicis India has to maintain the necessary infrastructure and manpower in anticipation of assignments. It therefore, bears the risks arising on account of idle capacity.

4.3.7 Foreign Exchange Fluctuation Risk

Foreign exchange risk means the risk associated with the adverse fluctuation in the rate of currencies in which entity is dealing. Publicis India's expenses and receipts are in foreign currency and hence it bears the foreign exchange risk.

The following table provides a comparative summary of the various functions, as discussed above, which are performed by Publicis India and its associated enterprise, Publicis B.V. along with other group entities:

Table -4: Comparative Summary of risk undertaken

| Risks | Publicis India | AEs |
|-------|----------------|-----|
|-------|----------------|-----|

| | | |
|--------------------------------------|---|---|
| Credit Risk | | √ |
| Contract Risk | √ | |
| Price Risk | √ | |
| Personnel Risk | √ | √ |
| Cost Overrun Risk | √ | |
| Idle Capacity Risk | √ | |
| Foreign Exchange Fluctuation Risk | √ | |

4.4 To summarize, based on the FAR analysis as presented above, in relation to transactions with subsidiaries, Publicis India is overall responsible for the provision of advertising support services. Further, it bears market risk, manpower attrition risk, technology obsolescence risk, credit risk, foreign exchange risk and quality risk. In contrast, AEs of Publicis India can be categorized as low risk service providers since they bear insignificant risks for the functions they perform.

020. We find that assessee is providing the management services and co-ordination services. These two services are not at all comparable with KPO services. However, with respect to the creative services there is a creation of advertisement concept and artistic development. Therefore, the creative services may be to some extent people centric and having value addition. However, the comparison of the functions of the assessee with the KPO entities providing software services is not proper. This is also for the reason that the learned Transfer Pricing Officer himself has accepted the quadrant communications limited, which is a company providing advertisement activity. The learned Transfer Pricing Officer has accepted it as a good comparable. Quadrant communications limited

is not stated by the learned Transfer Pricing Officer to be a knowledgeable process company. Therefore, there is an inherent contradiction in the comparability analysis by the learned Transfer Pricing Officer. He accepted one comparable i.e. quadrant communications limited, admittedly i.e. not the KPO and introduced four new comparables which are said to be the KPO. Furthermore, the learned Dispute Resolution Panel held that Transactional Net Margin Method is fairly tolerant about the comparability analysis. However, we are of the view that it is not so tolerant to include KPO companies with assessee company providing advertisement services of marketing communications and coordination etc. Due to this inherent inconsistency in the comparability analysis, we direct the assessee to first substantiate the comparability analysis by selecting the comparables first in advertisement industry itself providing similar functions. If such comparables are not available, then broader search of comparables may be carried out. The learned Transfer Pricing Officer may examine the same and then decide about computation of Arm's Length Price of the international transaction after giving assessee opportunity of hearing. Accordingly, ground no.1 of the appeal is restored to the file of the learned Transfer Pricing Officer.

021. The second ground of appeal is on adjustment on account of recovery and reimbursement of expenses of ₹67,10,045/- which is only for the reason that the assessee did not produce details of the complete expenses but only on sample basis. The learned Dispute Resolution Panel directed the learned Transfer Pricing Officer to give opportunity to assessee to produce complete invoices, verify the same and then decide the adjustment. We find that there is no such

opportunity given by the learned Transfer Pricing Officer. In view of this, we direct the learned Transfer Pricing Officer to give effect to the direction no. 12 of the Dispute Resolution Panel. The assessee is directed to produce the complete details of the reimbursement of expenditure before the learned Transfer Pricing Officer. Accordingly, ground no.2 of the appeal is also resorted to the file of the learned Transfer Pricing Officer.

022. Ground no.3 and ground no.4 are with respect to depreciation on goodwill. The learned Assessing Officer disallowed the deprecation on goodwill amounting to ₹11,73,198/-. The learned Assessing Officer made the above disallowances on protective assessment manner. The assessee company entered into business transfer agreement with M/s Ambience Advertisement Pvt. Ltd. for ₹6.25 crores. This sum was capitalized by the assessee as goodwill and claimed deprecation there on at the rate of 25%. The first claim of deprecation was made in A.Y. 2000-01. For that assessment year the assessee approached ITAT and ITAT, has set aside the issue to the file of the learned Assessing Officer. Therefore, unless the issue of deprecation decided in that year, this ground of appeal cannot be decided. Accordingly, ground no.3 and 4 of the appeal are also restored back to the file of the learned Assessing Officer to decide it in accordance with the decision for A.Y. 2000-01 and to consider whether assessee has acquired intangible assets eligible for depreciation.
023. Ground no.5 is with respect to short grant of TDS to the assessee. On hearing both the parties, we direct the learned Assessing Officer to examine the claim of the assessee and grant appropriate credit for tax deduction at source certificates in accordance with law.



024. In the result, the appeal filed by the assessee in ITA No. 1994/Mum/2014 for A.Y. 2009-10 is allowed for statistical purposes.

ITA No. 7523/Mum/2016
A.Y. 2010-11

025. ITA No. 7523/Mum/2016 is filed by the assessee for A.Y. 2010-11 against the order passed by the Commissioner of Income-tax (Appeals)-13, Mumbai dated 29th September, 2016, wherein the only issue is with respect to the disallowance of depreciation of intangible asset of ₹7,32,991/-.

026. The fact shows that the assessee filed its return of income on 14th October, 2010 at ₹7,05,42,9990/-. The assessment order under Section 143(3) of the Income-tax Act, 1961 (the Act) was passed on 28th March, 2013, wherein depreciation on goodwill of ₹7,32,991/- was disallowed. The reasons for disallowance were identical to ground nos.3 and 4 of the appeal of the assessee for A.Y. 2009-10. Both the parties confirmed that the facts are identical. As we have already set aside those two grounds of appeal back to the file of the learned Assessing Officer with direction, we also set aside this solitary ground of appeal to the file of the learned Assessing Officer with similar direction.

027. Accordingly, ITA No. 7523/Mum/2016 for A.Y. 2010-11 is also allowed for statistical purposes.

ITA No. 462/Mum/2016
A.Y. 2011-12

028. ITA No. 462/Mum/2016 is filed by the assessee for A.Y. 2011-12, wherein adjustment of ₹59,05,186/- on account of provisioning of

advertisement services are made to the international transaction holding that assessee is having functions comparable with knowledge process outsourcing companies.

029. The assessee for this year filed its return of income on 25th November, 2011, declaring total income of ₹2,26,99,018/-. The assessment order under Section 143(3) read with section 144C was passed on 30th November, 2015, wherein the only adjustment is the transfer pricing adjustment of ₹59,05,186/-. The adjustment made by the learned Transfer Pricing Officer is with respect to the receipt of commission, various fees. The assessee selected Transactional Net Margin Method, assessee selected it as a tested party, selected seven comparables having three year weighted average margin of 4.79%. Margin of assessee was computed at 11.69% and therefore, it was stated to be at Arm's Length Price. The learned Transfer Pricing Officer directed the assessee to compute margin for F.Y. 2010-11, which was found at 8.94%. Out of seven comparables selected by the assessee, five comparables were rejected. Therefore, only quadrant communications limited and marketing consulting agency limited was retained. The learned Transfer Pricing Officer introduced three more comparables considering the functions of the assessee as KPO, determined the Arm's Length Price and made an adjustment of ₹ 76,33,437/-.
030. On objections before the learned Dispute Resolution Panel, it upheld the order of the learned Transfer Pricing Officer subject to the margin computation. The learned Transfer Pricing Officer on verification reduced the adjustment to ₹59,05,186/-.



031. On identical facts in appeal of the assessee for A.Y. 2009-10, while deciding the ground no.1, we have restored the issue back to the file of the learned Transfer Pricing Officer. With similar direction, we restore the ground no.1 of this appeal to the file of the learned Transfer Pricing Officer.
032. Accordingly, the appeal of the assessee for A.Y. 2011-12 is partly allowed.

ITA number 588/M/2017

and

CO number 180/M 2019

For assessment year 2012 – 13

033. ITA number 588/M/2017 is filed for assessment year 2012 – 13 by assessee against the assessment order passed under section 143 (3) read with section 144C (13) of The Income Tax Act 1961 dated 30/11/2016 passed by the learned Deputy Commissioner Of Income Tax – 7 (3) (2), Mumbai assessing the total income of the assessee at ₹ 72,277,598/- against the return filed by the assessee of ₹ 44,898,014/- on 28/11/2012 by making a transfer pricing adjustment of ₹ 6,278,920/- and disallowance of depreciation on goodwill of ₹ 21,100,663/-. The adjustment on account of the transfer pricing was made in view of the order of the learned transfer pricing officer dated 6/1/2016 passed under section 92CA (3) of the act wherein the learned transfer pricing officer has proposed the adjustment of ₹ 9,481,275/- with respect to the availing of services from its associated enterprises which was scaled down to ₹ 6,278,920/- as per the direction of the learned dispute resolution panel recomputed by the learned transfer pricing officer. The learned AO further



disallowed the depreciation on goodwill amounting to ₹ 21,100,663/- being the depreciation on goodwill of acquisition of Capital Advertising Private Limited amounting to ₹ 66,645,000/- on which depreciation is claimed of ₹ 20,605,720/- and on brought forward goodwill based on the past assessment order amounting to ₹ 494,943/-.

034. The assessee has raised solitary ground of appeal with respect to the adjustment of arm's-length price of the international transaction of provision of advertising and availing of services amounting to ₹ 6,278,920/-. The assessee says that assessee has been characterized as knowledge process outsourcing service provider whereas the assessee is merely an advertising service provider. The facts are stated to be identical to the facts in the earlier years precisely for assessment year 2009 – 10.
035. The fact shows that assessee has entered into an international transaction of receipt of advertisement fee of ₹ 3,579,375/-, payment of information technology services of ₹ 15,428,492/- advisory fees received of ₹ 28,239,838/- and client coordination and creative fees paid of ₹ 5,857,657/-. Along with the other transactions the assessee has aggregated, the above transaction applied transactional net margin method as the most appropriate method and stated that its international transactions are at arm's-length. The learned TPO following the direction of the learned dispute resolution panel for assessment year 2009 – 10 concluded that assessee is comparable with the companies engaged in the knowledge process outsourcing. For this year also one of the comparable companies selected by the assessee accepted by the learned transfer-pricing officer is quadrant communications limited. As both the parties agreed that the facts of

the case are identical to the facts of the case of the assessee for assessment year 2009 – 10, we have already decided this issue for that particular year restoring the ground of appeal back to the file of the learned transfer pricing officer with directions to the assessee, we also restore this ground of the appeal back to the file of the learned transfer pricing officer with similar direction. Accordingly, ground number 1 of the appeal is allowed for statistical purposes.

036. This is the solitary issue in the appeal of assessee, therefore appeal of the assessee is allowed for statistical purposes.
037. The learned assessing officer has preferred cross objection and raised following grounds:-

CO 180/MUM/2019
Arising out of ITA 588/MUM/2017

“1. On the facts and in the circumstances of the case and in law, whether the assessee is entitled to claim depreciation on goodwill arising from amalgamation when the written down value of the asset is zero as per Explanation 2 to 32(1) read with Explanation 7 of section 43(1) and Explanation 2 to section 43(6)(c), and no depreciation is allowable on the same.

2. On the facts and in the circumstances of the case and in law, whether the assessee is entitled to claim depreciation on goodwill, when no goodwill was acquired or used for the purpose of business of assessee?”



038. The fact shows that during the year assessee has taken over the business including all the assets and liabilities of one company i.e. capital Advertising Services Limited with effect from the appointed date of 1 April 2011 in terms of the scheme of amalgamation approved by the honourable High Court. The assessee has purchased running business of that company along with all its assets and liabilities for a consideration of ₹ 164,038,000/-. The net tangible asset of the company was found to be at ₹ 86,015,119/-. The claim of the assessee is that assessee has also obtained variety of intangible benefits including reputation, human sources, customer base, customer information etc. Assessee submitted that difference between the total considerations paid in excess of net tangible asset is required to be treated as Goodwill in the books of account of the assessee. Accordingly goodwill of ₹ 82,422,881/- was recorded in the books of account. The claim of the assessee is that the consideration paid in excess of the book value of net asset is treated to be in the nature of goodwill and the assessee has claimed depreciation on such goodwill being 'commercial right of similar nature' in accordance with the provisions of section 32 (1) (ii) of the act. The learned that AO disallowed the claim of the depreciation at the rate of 25% thereon. The learned dispute resolution panel also confirmed the same. The learned AO made the addition/disallowance in the draft assessment order. We do not find any reason for the revenue to be aggrieved with the above direction of the learned dispute resolution panel when the learned dispute resolution panel confirms the addition proposed by the learned assessing officer. In view of this we find that the cross objection filed by the learned assessing officer is infructuous, hence dismissed.



039. In the result, for assessment year 2012 – 13, appeal of the assessee is allowed for statistical purposes whereas the cross objection of the assessing officer is dismissed.

Order pronounced in the open court on 27.04.2023

Sd/-
(KULDIP SINGH)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated 27.04.2023

Sudip Sarkar, Sr.PS /Dragon

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,

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