

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

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRI RAHUL CHAUDHARY, JM

**ITA No. 7163/MUM/2016**

(Assessment Year 2011-12)

ACIT CIR 2(3)(1)  
Room No. 552, 5<sup>th</sup> Floor, Aayakar  
Bhavan, M.K. Road,  
Mumbai-400 020

Vs.

Canvas M Technologies Ltd.  
(Now Known As M/s. Tech  
Mahindra Ltd.)  
Gateway Building, Apollo  
Bunder, Mumbai - 400 001

**(Appellant)**

**(Respondent)**

**PAN No. AACCC8665N**

**Assessee by** : Mr. Viral Shah, AR

**Revenue by** : Ms. Samruddhi Hande, DR

**Date of hearing:** 15.02.2023

**Date of pronouncement :** 10.05.2023

**ORDER**

**PER PRASHANT MAHARISHI, AM:**

01. ITA No. 7163/Mum/2016 is filed by the Asst. Commissioner of Income-tax, Circle 2(3)(1), Mumbai [ The Id AO ] for A.Y. 2011-12, against the order passed by the learned Commissioner of Income-tax (Appeals)-58, Mumbai [the learned CIT (A)], wherein the transfer pricing adjustment made by the learned Jt. Commissioner of Income Tax, Transfer pricing 2(2), Mumbai (the learned Transfer Pricing Officer) as per order dated 27<sup>th</sup> January, 2015, passed under Section 92CA(3) of the Income Tax Act [ The Act] treating the Arm's Length Price [ ALP] of fees paid for technical services at ₹nil incorporated in the

assessment order passed by the learned Assessing Officer under Section 143(3) read with section 144C(3) of the Act dated 13<sup>th</sup> April, 2015 was deleted.

02. The learned Assessing Officer is aggrieved with that order and therefore, is in appeal before us raising following grounds of appeal:-

*"1. On the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the adjustment to the extent of ₹ 22.67 crore made by the TPO on account of Arm's length Price without appreciating the fact that the assessee had failed to justify the payment made to the AE.*

*2. On the facts and circumstances of the case and in law, the Id.CIT(A) erred in considering the segment profitability of the assessee which was never furnished by the assessee to the TPO during the relevant proceedings and no opportunity was given by the Id. CIT(A) to the TPO/AO to rebut the assessee's contentions.*

*3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the ALP adjustment made by the TPO to the extent of ₹ 22.67 crore ignoring the fact that CanvasM USA sub-contracts the work it secures from third-party customers in the United States and performs only limited offshore development functions. It was claimed that it retains 5% of the total revenue. Hence, the TPO had rightly asked the assessee to justify the payment of such a huge amount to the AE*

*when the main work of software programming as being carried out by the assessee company and the AE was engaged only in supplementary work of no-site service.”*

03. The only grievance of the Revenue is the deletion of adjustment of ₹22.67 crores on account of determination of Arm's Length Price of the international transaction.
04. The brief fact shows that the assessee was incorporated on 28 July 2006 as joint venture between Tech Mahindra Limited ('TML') holding 80.10% and Motorola Cyprus Holding Limited ('Motorola') holding 19.90%.
05. Assessee is a key player in the mobile VAS space. It developing and deploying VAS solution and applications for media, operators and enterprises across the globe. It specializes in end-to-end enabling of solution with managed services, which bring together content, technology and device expertise for enhancement of digital experience to the customers.
06. Assessee filed its return of income on 28 November 2011 at a total income of ₹7,69,35,266/-. It was picked up for scrutiny. As assessee has entered into international transactions with its Associated Enterprises [AE] and therefore, the reference was made to the learned Transfer Pricing Officer for determination of Arm's Length Price. The only transaction in dispute is of ₹22.67 crores related to reimbursement of expenses paid to its associated enterprises. It is stated that assessee has paid on-site

computer consultancy and programming support services of ₹22.67 crores to its Associated Enterprises. As per the contractual arrangement between the US entity and assessee, US entity sub contracts the work acquired by it from third party customer in US to the assessee in India. US entity is compensated by retaining 5% of the Revenue and remits the balance of 95% of the Revenue to the assessee. US entity also charges all the cost it incurs for the performance of onsite portion software development work to the assessee. As assessee is also entered into other international transactions for provision of software development services, it aggregated them for its transfer pricing study under Rule 10D of the Income Tax Rules, 1962, assessee selected itself as the tested party, most appropriate method of Transactional Net Margin Method [TNMM] adopting the Profit Level Indicator (PLI) of net cost plus markup. The margin of the assessee was 24.19% selecting several comparables whose arithmetic mean of margin was 13.57% and therefore, stated that international transactions are at Arm's Length Price.

07. The learned Transfer Pricing Officer did not disturb other transaction but examined the transaction of reimbursement of expenses paid to Associated Enterprises of ₹22,67,93,314/- being the charge made by the US entity for the cost of Associated Enterprises has incurred for the purpose of onsite portion of software development work sub contracted to the assessee in India. The learned Transfer Pricing Officer held that for the purpose of the above independent transaction of ₹22.67 crores, the most

appropriate method is Comparable Uncontrolled Price (CUP) and aggregation of the services is not acceptable. On verification of details, he held that assessee did not derive any benefit from on-site consultancy and programming support services and therefore, Arm's Length Price of this transaction fails the benefit test and hence Arm's Length Price is determined at ₹nil. The assessee before the learned Transfer Pricing Officer, assessee produced copies of the invoices raised, however, no details regarding the project or the client for which these invoices were raised as well as the name of the persons were given. The learned Transfer Pricing Officer also challenged the basis of allocation of these expenses to the assessee as well as other subsidiary companies. Some of the agreements produced by the assessee were alleged to be entered postdated as an afterthought. The order under Section 92CA (3) of the Act was passed on 27 January 2015. Based on this draft assessment order was passed on 9 March 2015. The assessee did not file any objection before the learned Dispute Resolution Panel but consented for filing the appeal before the learned CIT (A). Therefore, the final assessment order was passed wherein the total income of the assessee was assessed at ₹30,37,46,080/- incorporating the above addition of ₹22.67 crores.

08. Aggrieved, assessee approached the learned CIT (A), the learned CIT (A) held that in the preceding years the Transactional Net Margin Method has been approved as the most appropriate method. It is also held that assessee

is having the transactions of similar nature and services of similar nature which exported to non Associated Enterprises as well as Associated Enterprises. The international transaction with non-Associated Enterprises is deriving 23% profit whereas in transaction with Associated Enterprises assessee has derived profit of 22%. Therefore, internal Transactional Net Margin Method comparability is available. For this year, he also noted that non Associated Enterprises transactions are 47% and Associated Enterprises transactions are 40% of the total turnover and therefore, both are comparable. He further held that assessee has incurred losses and has considerable bad debts therefore; internal TNMM comparability is not suitable. Further, in the end he held that the transfer pricing study report shows that assessee has earned profit of 22% on transaction with Associated Enterprises whereas the profit margin of comparable is only 13.57%, there is no reason to uphold the Transfer Pricing adjustment. Therefore, he held that external comparables are correctly used in TNMM method by the assessee. Accordingly, he deleted the same. Therefore, Revenue is in appeal.

09. The learned Departmental Representative vehemently supported the order of the learned Transfer Pricing Officer stating that the Transfer Pricing Officer has given a categorical finding that the assessee has no benefit and the contracts are post dated, merely an afterthought. Thus, the order of the learned CIT (A) is not sustainable.

010. The learned Authorized Representative submitted a paper book containing 109 pages. He submitted that identical issue arose in the case of the assessee for A.Y. 2008-09, wherein after obtaining the remand report by the learned CIT (A) has deleted the addition. The same was upheld by the ITAT. There is no change in the fact and circumstances. Therefore, the issue is squarely covered in favor of the assessee.
011. We have carefully considered the rival contentions and perused the orders of the lower authorities. Undisputed international transaction is, reimbursement of expenses paid to Associated Enterprises in US for the performance of on-site services provided by it in relation to the sub-contract work undertaken by the assessee. The provision of software development services is of ₹50,64,00,000/ earned by the assessee from the same party. The assessee has reimbursed ₹ 22.67 crores to US entity for the work performed by the US entity. The assessee has considered Transactional Net Margin Method as the most appropriate method selecting operating margin to operating revenue as PLI. It selected the comparable companies from software development industry computed their margin selecting 10 comparables whose average weighted margin of 13.57% against the margin of assessee at 24.97%, hence, stated international transaction is at Arm's Length. The learned Transfer Pricing Officer disturbed it and used the most appropriate method was selected as Comparable Uncontrolled Price. The agreement and evidence produced by the assessee

were not accepted and he held that assessee does not derive any benefit and therefore, made an adjustment of ₹22.67 crores.

012. For A.Y. 2008-09, the co-ordinate Bench has categorically held that the cost incurred by the Associated Enterprises is salaries, travel cost and office rent expenditure for that year, the learned CIT (A) also called for the remand report. Thereafter, co-ordinate bench vide order dated 23<sup>rd</sup> April, 2019, upheld the order of the learned CIT (A) stating that learned Transfer Pricing Officer has not adopted any of the known methods and therefore, addition deserves to be deleted. In that case, learned CIT (A) examined the margins of the assessee and held that when the earnings of the assessee from the Associated Enterprises and non Associated Enterprises are comparable, the addition deserves to be deleted.

013. However, the order of the learned CIT (A) before us is on different reasoning and rejected the earlier internal comparable in the Transactional Net Margin Method. In the present case, he upheld the external comparables in Transactional Net Margin Method. Further, when the learned Transfer Pricing Officer has held that benefit derived by the assessee is not demonstrated and therefore, the Arm's Length Price of the international transaction is nil, it is clear that learned Transfer Pricing Officer has applied Comparable Uncontrolled Price, whereas no third party would have paid such sum to its Associated Enterprises. Thus, it is clear case of

Comparable Uncontrolled Price applied by the learned Transfer Pricing Officer. Hence, it cannot be said that LD TPO did not apply any method. Therefore the order of the coordinate bench in AY 2008-09 is on different reasoning as in this case the Id CIT (A) himself has held that internal TNMM comparability is not proper.

014. As the learned CIT (A) in the present case has deviated from the orders of the earlier years and rejected the argument that margin earned by the assessee are comparable with Associated Enterprises vis-à-vis non-Associated Enterprises transactions on internal comparability under TNMM method, he has categorically held that those are not comparable for this year for the simple reason that there are substantial bad debts and losses. This fact is not controverted or challenged by the assessee. Specific reference is to paragraph no.4.8 of the order of the learned CIT (A). Therefore, those observations are final.

015. However, the Transactional Net Margin Method was held to be most appropriate method by the learned CIT (A) and there is no challenge to the same by the Revenue. Therefore, the only option left is testing the margin of the assessee adopting the Transactional Net Margin Method and ignoring internal Transactional Net Margin Method therefore, to only compare with the external comparable. We find that assessee has furnished a segmented transfer pricing study report where the margin of the assessee is 22% and the margins of comparable was found to be



13.57%. Therefore, the addition was deleted. In appeal of the LD AO ground no.1 is general in nature. Ground no.2 is stating that segmental profitability of the assessee was never furnished. However, we find that it was available with the learned Transfer Pricing Officer vide letter dated 9 December 2014, therefore, this ground deserves to be dismissed. Ground no.3 challenged the deletion of the addition. However, we find that there is no challenge to the most appropriate method, functional comparability of the comparables to the segmented profit of the assessee and substantially higher margin i.e. 22% against 13.57% is not disputed. Ld DR could not show any infirmity in the order of the Id CIT (A) so as to say that The most appropriate method should not be TNMM and thereafter the comparables selected by assessee and also accepted by the Id CIT (A) are required to be excluded or the margins of comparable or assessee is incorrectly computed. Therefore, we confirm the order of the learned CIT (A) on this ground.

016. Accordingly, the appeal filed by the learned Assessing Officer is dismissed.

Order pronounced in the open court on 10.05.2023.

Sd/-  
(RAHUL CHAUDHARY)  
(JUDICIAL MEMBER)

Sd/-  
(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 10.05.2023

*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