

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'I': NEW DELHI)**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

**ITA No:- 2026/Del/2022
(Assessment Year: 2018-19)**

Orange Business Services Indian Solutions Private Limited (formerly known as Equant Solutions India Private Limited)	Vs.	Assistant Commissioner of Income Tax, Circle 3(1), Gurgaon.
APPELLANT		RESPONDENT
PAN No: AABCE4540P		

Assessee By : Shri Rishabh Malhotra, AR
Revenue By : Shri Rajesh Kumar, CIT(DR)

Date of Hearing : 23.05.2023
Date of Pronouncement : 30.05.2023

ORDER

PER SHAMIM YAHYA, A.M.

This appeal by the Assessee is directed against the Assessment Order dated 30.06.2022 passed by Assessing Officer under Section 143(3) r.w.s. 144C(13) of the Income Tax Act. The Grounds of appeal are as under:-

"1. *On the facts and circumstances of the case and in law, the Learned*

Assessing Officer ("Ld.AO) / Ld. DRP has erred on facts and in law in enhancing the income of the Appellant by Rs. 59,86,80,506/- without appreciating the facts and circumstances of the case;

2. *On the facts and circumstances of the case and in law, the assessment order, dated 30 June, 2022, passed u/s 143(3) read with section 144C of the Income Tax Act, 1961 ('the Act') proposing an addition of Rs. 59,86,80,506/- is bad in law and void-ab-initio, by barred by limitation u/s 144C(13) of the Act;*
3. *On the facts and circumstances of the case and in law, the Ld. AO has erred in passing the impugned assessment order against the provisions of section 144B of the Act and therefore the same is bad in law and void-ab-initio;*
4. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in aggregating the international transaction pertaining to: (i) Network Services, (ii) Customer Experience and Excellence, (iii) Orange Cloud for Business, (iv) Orange Lab Services, (v) Orange Global solutions for Business, and (vi) IT enabled services, and (vi) IT enabled services, and carrying out a fresh benchmarking analysis;*
5. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in including companies having high margin /volatile operating profit margins as comparable to the Appellant without appreciating that it is a low risk captive service provider;*
6. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in including functionally incomparable companies including ASM Technologies Ltd., Exilant Technologies Pvt. Ltd, Larsen & Toubro Infotech Ltd., Mindtree Ltd. X S Cad India Pvt. Ltd., Eclerx Services Ltd., E – Infochips Ltd, ICRA Ltd & Infosys Ltd. in the final set of comparable companies without appreciating that the functions performed, assets employed and risks assumed by the Appellant are different;*
7. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in including companies with non-routine intangibles and presence of brand value including Exilant Technologies Pvt. Ltd., Larsen & Tourbro Infotech Ltd., Mindtree Ltd., Wipro Ltd. And Infosys Ltd;*
8. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in including companies that lack segmental data including Larsen & Tourbro Infotech Ltd. and Mindtree Ltd;*
9. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in including companies that are engaged in dissimilar activities including Larsen & Toubro Infotech Ltd., Mindtree Ltd., X S Cad India Pvt. Ltd., E- Infochips Ltd and ICRA Ltd;*

10. *On the facts and circumstances of the case and in law, the Ld. TPO has erred in excluding certain companies on arbitrary / Frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed.*
11. *On the facts and circumstances of the case and in law, the TPO has erred by committing factual / computational errors in computing operating profit mark-ups of the comparables;*
12. *On the facts and circumstances of the case and in law, the TPO has erred in making an adjustment on account of interest on outstanding receivable to the extent of Rs. 24,57,22,921/- without appreciating that the same does not constitute a separate international transaction within the meaning of sec 92B of the Act;*
13. *On the facts and circumstances of the case and in law, Ld. TPO has erred by not appreciating that continuing debit balances do not constitute an 'international transactions' within provisions of section 92B of the Act;*
14. *On the facts and circumstances of the case and in law, the Ld. TPO has erred by charging interest on outstanding receivables, despite the fact that the Appellant had carried out working capital adjustment. The impact of outstanding receivables was subsumed in it and hence, no further adjustment on account of interest on outstanding receivables was warranted;*
15. *On the facts and circumstances o the case and in law, the Ld. AO has grossly erred in computing interest under section 234A and 234B of the Act;*
16. *On the facts and circumstances of the case and in law, the Ld. AO has grossly erred in initiating penalty under section 270A of the Act mechanically and without recording any satisfaction for its initiation.*

The above grounds are without prejudice to each other."

2. Brief facts of the case are that the Orange Business Services India Solution Private Limited, a company incorporated under the laws of India, is a subsidiary of EGN BV, Netherlands. The Assessee is primarily engaged in providing, services in nature of IT enabled network management / technical support and other back-office support primarily including services like remote monitoring and maintenance of Orange's Global

network platform and services, co-ordination, remote configuration and implementation of quality customers networking solutions. It also provides contract software development services in relation to development and maintenance of applications used within the Group like Resources, According etc.

2.1 Further in this case a reference under section 92 CA(1) of the Income Tax Act, 1961 was made to the Transfer Pricing Officer with the prior approval of the Pr. Commissioner of Income Tax, for determining the Arm's Length Price under section 92CA(3) of the Income Tax Act, 1961 in respect of the International Transactions entered into by the assessee company with its associated enterprises during the financial year 2017-18 relevant to the Assessment Year 2018-19. Accordingly, an order u/s 92 CA(3) of the Income-tax Act 1961 was passed by the TPO and the TPO proposed the adjustments as under:

"8. Accordingly, cumulative adjustment in this case is as under:

PARTICULARS	AMOUNT(IN INR)
Interest On receivables	24,57,22,921/-
SDS and ITES segment	27,57,90,223/-
Total	52,15,13,144/-

9. The Assessing Officer shall accordingly enhance income of the taxpayer by Rs. 52,15,13,144/-. The Assessing Officer may examine issue of initiation of penalty u/s 270A of the Act"

3. Against above order, the assessee has filed appeal before ITAT. At the outset on the issue of computation of Transfer Pricing for the SDS and ITES segment, the Ld. Counsel for the assessee submitted that both the issues have been dealt with by the ITAT in earlier assessment year. Order of Hon'ble ITAT for Assessment Year 2016-17 dated 18th November, 2021 read as under:

5.7 Both the parties agreed that there is no change in functional profile of the assessee and nature of transactions in the year under consideration as compared to AY 2013-14, therefore following the finding of the Tribunal (supra), we set aside the finding of lower authorities and remit the matter back to the Learned AO/TPO for determining arm's-length price of international transaction of Contract Software Development services (CSD) and ITes in segregated manner complying the direction of the Tribunal (supra) in assessment year 2013-14. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds No. 3 to 3.9 of the appeal are accordingly allowed for statistical purposes.

3.2 Further, the ITAT's order for Assessment Year 2013-14 passed in pursuance to the order of Hon'ble High Court dated 15th July, 2021 is as under:

17. When we examine this evidence in the light of the order passed by the AO/TPO in AYs 2010-11 & 2011-12, there is no change in the functional profile of the taxpayer company and likewise, there is no change in the international transactions as well as functions performed by the taxpayer. The TPO/DRP/Tribunal have reached the conclusion that because of paucity of evidence the taxpayer has failed to substantiate that it is carrying out activities in two segments viz. CSDS and ITES.

18. So, when Revenue has been accepting and benchmarking such international transactions in segregated manner in earlier years in taxpayer's own case and there is no change in the nature of international transactions as well as functional profile of the taxpayer during the year under assessment vis-à-vis earlier assessment years,

following the "rule of consistency" as has been held by Hon'ble Supreme Court in Radhaswami Satsang vs. CIT (1992) 193 ITR 321 (S.C.), we are of the considered view that both the segments viz. CSDS and ITES are required to be benchmarked independently/in segregated manner

3.3 The Tribunal has concluded as under:

22. In the first round of litigation, Id. TPO in this case had proceeded to benchmark international transactions qua CSDS and ITES segment by adopting aggregated approach. Now, as per our findings returned in the preceding paras, both the segments i.e. CSDS and ITES are required to be benchmarked independently. Ld. AR for the taxpayer as well as Id. DR for the Revenue have contended in one voice that the issue of benchmarking both the segments independently is required to be remanded back to the Id. TPO as the entire exercise of benchmarking international transactions are to be redone.

4. On the other hand, the Ld. DR did not dispute the submissions. Hence, following above precedents, we set aside the findings of the lower authorities and remit the matter back to the Ld. TPO for determining arm's length price of international transaction of Contract Software Development Services (CSD) and ITes in segregated manner complying the direction of the ITAT in Assessment Year. Needless to say, that the assessee shall be provided adequate opportunity of being heard.

4.1 Appropos interest on receivables; the Transfer Pricing Officer noted that the examination of balance sheet reveals outstanding receivables thereby implying that the payment for the invoices raised by the assessee which have not been received during stipulated time as provided in the service agreement with the AE. The TPO proposed to treat the delayed payments as unsecured loan advance to the AEs. Further, the AO

charged interest rate of SBI @ 3% through the year. The assessee challenged to the above before the DRP. But the same was dismissed by the Dispute Resolution Panel. Against this order, the assessee is in appeal before us.

5. We have heard both the parties and perused the record.

5.1 The Ld. Counsel for the assessee submitted that the assessee 's appeal is squarely covered in assessee's own case as under:

Covered in favour of the Appellant by own orders as under:

1. Consolidated order passed by Hon'ble ITAT for AY 2012-13 & 2013-14 dated 10 May, 2022
2. Hon'ble ITAT's order for AY 2015-16 dated 17 February 2020

6. Per contra, the Ld. DR relied upon the following case laws read as under:

- i. *Bechtel India (P.) Ltd. vs ACIT 4(2), 85 Taxmann.com 121 (Delhi Tribunal 2017)*
- ii. *Bharti Airtel Services Pvt. Ltd. v. DCIT 126 TAXmann.com 315 (2021) (Delhi Tribunal)*
- iii. *Apache Footwear India Pvt. Ltd. v. ACIT (2023) 148 taxmann.com371 (Hyderabad-Trib.)*

6.1 Upon careful consideration, we note that ITAT vide consolidated order dated 10th May, 2022 for Assessment Year 2012-13 & 2013-14 in ITA Nos.1098/Del/2021 and 1099/Del/2021, the ITAT has dealt with this issue as under:

19. In view of the aforesaid sequence of events, it would be noted that the decision of Hon'ble Delhi High Court in the case of Kusum Healthcare is still the binding precedent on the issue of interest on outstanding receivables.

Needless to mention that the law laid down by the Hon'ble High Court in the case of Kusum Healthcare was followed by the ITAT in case of Global Logic India Ltd. for the assessment year 2010-11 (ITA No. 1104/Del/2015), A.Y. 2012-13 (ITA No. 1115/Del/2017), A.Y. 2013-14 [ITA No. 7621/De 1/2017], A.Y. 2015-16 [ITA No. 8726/Del/2019] and A.Y. 2016-17 [ITA No. 868/Del/2021]. Hence, keeping in view, the established position, we hereby deleted the addition made by the Assessing Officer.

6.2 Further in ITAT in assessee's own case for Assessment Year 2015-16 vide order dated 17.02.2020 in ITA No.- 7364/Del/2019 reads as under:

12. Having heard the rival submissions, we are of the considered opinion that since no disturbance has been made in so far as OP margin of the assessee is concerned the OPN has been arrived after making working capital adjustment. Operating mark up of the appellant company is 16.19% whereas the comparables working capital adjustment mark up comes to 15.72%. This shows that the profit margin of the appellant company is higher than that of the comparables. The ratio laid down by the Tribunal in the case of Kusum Healthcare Pvt Ltd 6814/DEL/2014 squarely applies. The relevant findings of the coordinate bench read as under:

"From the above analysis, it is clear that assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricable connected is in accordance with established TP principles as well as ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericsson Mobile Communication India (P.) Ltd. (supra). For the aforesaid reasons, we allow the appeal of the assessee. It ordered accordingly. "

13. This decision of the coordinate bench has been affirmed by the Hon'ble High Court of Delhi in ITA No. 765/2016 vide order dated 24.04.2017. The relevant findings of the Hon'ble High Court read as under:

11. The court finds that the entire focus of the AO was on just one AY and of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing /profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by the court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241(Del)."

14. The Id. DR pointed out that the Revenue has preferred SLP before the Hon'ble Supreme Court against the judgment of the Honble High Court of Delhi. In our understanding, since the operation of the judgment of the Hon'ble High Court is not stayed by the Hon'ble Supreme Court, the same is binding on us and, therefore, respectfully following the decision of the coordinate Bench, affirmed by the Hon'ble High Court (supra) we direct the Assessing officer /TPO to delete the addition of Rs. 1,45,27,731/-.

4. Since similar facts are permeating in this year also and already direction or working capital adjustment has been given by DRP, therefore, we hold that no Transfer Pricing Adjustment on Account of interest on payment of receivables can be made separately. Thus, the Transfer Pricing Adjustment on account of interest on receivable is deleted."

6.3 Upon careful consideration, we note that ITAT's orders in assessee's own case have decided the issue in favour of the assessee. Though the Ld. DR has cited case

laws from other Tribunal which are contrary to these orders, we hold that since the orders in the assessee's own case have not yet been reversed by Hon'ble High Court, these orders prevail in assessee's own case. Hence, respectfully following the above precedents; we hold that no transfer pricing adjusting needs to be done in this regard.

7. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 30-5-2023.

Sd/-
(YOGESH KUMAR US)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Dated: 30.05.2023
(Pooja)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	23.05.2023
Date on which the typed draft is placed before the dictating Member	25 .05.2023
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	