

**IN THE INCOME TAX APPELLATE TRIBUNAL
 [DELHI BENCH: 'I' NEW DELHI]**

**BEFORE SHRI G. S. PANNU, PRESIDENT
AND
 SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 702/DEL/2022 (A.Y. 2017-18)

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| Avaya India Pvt. Ltd., 202, Platina, 2 nd Floor, Plot No. C-59, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051. PAN No. AAECA3592N | Vs. | National Faceless Assessment Centre, ACIT, Circle : 1 (1), New Delhi. |
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AND

STAY No. 111/DEL/2022

[in I.T.A. No. 702/DEL/2022 (A.Y. 2017-18)]

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| Avaya India Pvt. Ltd., 202, Platina, 2 nd Floor, Plot No. C-59, G-Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051. PAN No. AAECA3592N (APPELLANTS) | Vs. | National Faceless Assessment Centre, ACIT, Circle : 1 (1), New Delhi. (RESPONDENTS) |
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| Assessee by : | S/Shri Nageshwar Rao; & Advocate; Sh. Akshay Uppal, Advocate |
| Department by: | Shri Vivek Verma, [CIT] D. R.; & Sh. Mahesh Shah, CIT (DR) |

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| Date of Hearing | 26.09.2023 |
| Date of Pronouncement | 18.10.2023 |

ORDER**PER YOGESH KUMAR U.S., JM**

The present appeal and the Stay Application have been preferred by the assessee for assessment year 2017-18 against the final Assessment Order dated 25/03/2022 passed by the A.O u/s 143(3) read with Section 144C (13) read with Section 144B of the Act.

2. The assessee has raised the following grounds of appeal:-

“ General Grounds of Appeal

1. That, the final assessment order framed by National Faceless Assessment Centre, Delhi (hereinafter referred to as “the Ld. AO”) pursuant to the directions of the Hon’ble Dispute, [Resolution Panel - I (hereinafter referred to as “the Hon’ble DRP”) under section 143(3) read with section 144C(13) and read with sections 144B of the Income-tax Act, 1961 (“the Act”), is a vitiated order having been passed in violation of principles of natural justice and is otherwise arbitrary and is thus bad in law and is void ab-initio.

TP adjustment in relation to availing of technical services segment (“TSS”) [INR 11.86.43.290]

2.1 That on the facts of the case and in law, the Ld. AO / Ld. TPO have erred, in recharacterizing the functional profile of the Appellant as technical support service provider instead of re-seller of services/ solutions as characterized by the Appellant in the TP documentation.

While doing so, the Ld. AO / Ld. TPO has not taken cognizance of intercompany agreement and analysis undertaken under TP documentation wherein it is established that Appellant is a re-seller of services/ solutions in respect of availing of technical services. That on the facts of the case and in law, the Hon'ble DRP have erred, in not adjudicating on characterization of functional profile of the Appellant under TSS. That on the facts of the case and in law, the Ld. AO / Ld. TPO / Hon'ble DRP have erred, by applying employee cost greater than 25 percent of revenue as a comparability criterion for availing of technical services.

2.4 That on the facts of the case and in law, the Ld. AO / Ld. TPO / Hon'ble DRP have erred, by wrongfully rejecting certain comparable companies from the final set of comparable companies for the purpose of determining the ALP of the subject international transaction on an ad-hoc basis, thereby resorting to cherry picking of comparable companies. That on the facts of the case and in law, the Ld. TPO, in particular, erred in not complying with the directions of Hon'ble DRP and rejecting Empower India Private Limited ("Empower") as comparable company to the Appellant without verifying the persistent loss filter as applied by the Ld. TPO. That on the facts of the case and in law, the Ld. TPO, in particular, erred in not complying with the directions of Hon'ble DRP and rejecting Avance Technologies Limited ("Avance") as comparable company to the Appellant without verifying the persistent loss filter as applied by the Ld. TPO. That on the facts of the case and in law, the Ld. TPO, in particular, erred in not complying with the directions of Hon'ble DRP and rejecting JMD Ventures Limited ("JMD") as comparable company to the Appellant without verifying the turnover

*filter as applied by the Ld. TPO. That on the facts of the case and in law, the Ld. TPO, in particular, erred in not complying with the directions of Hon'ble DRP and rejecting Sonata Information Technology Limited ("Sonata") as comparable company to the Appellant without verifying the related party transaction filter as applied by the Ld. TPO. That on the facts of the case and in law, the Ld. TPO, in particular, erred in selecting certain companies namely, Artefact Projects Ltd, Tera Software Ltd, Axis cades Technologies Ltd, Tata Consulting Engineers Ltd, Consulting Engineers Group Ltd, Tech Mahindra Business Services Ltd, Exl Service.com India Pvt. Ltd and Mahindra Consulting Engineers Ltd as comparable companies by erroneously contending these companies are functionally comparable to the Company. That on the facts of the case and in law, the Ld. TPO, in particular, erred in rejecting certain companies namely, Dimension Data India Pvt. Ltd, Informatics Technologies Private Limited, PS IT Infrastructure & Services Ltd, Rashi Peripherals Private Limited and Savex Technologies Private Limited as non-comparable companies by erroneously contending that the data for these companies is not available. **TP adjustment in relation to provision of marketing support services [INR 2.93.34.270]***

3.1 That on the fact of the case and in law, the Ld. AO / TPO / Hon'ble DRP has erred by not/accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 ('the Rules'), and conducting a fresh economic analysis for the determination of the ALP of the Appellant's international transaction pertaining to provision of marketing support services and holding that the said

international transaction is not at an arm's length without sharing the detailed accept reject matrix for selection or rejection of companies evaluated by him.

3.2 That on the facts of the case and in law, the Ld. AO / Ld. TPO / Hon'ble DRP have erred, by wrongfully rejecting comparable companies from the final set of comparable companies for the purpose of determining the ALP of the subject international transaction on an ad- hoc basis, thereby resorting to cherry picking of comparable companies.

3.2.1 That on the facts of the case and in law, the Ld. TPO, in particular, erred in non-complying with the directions of Hon'ble DRP and rejecting Cyber Media Research & Services Limited ("Cyber Media") as comparable company to the Appellant without verifying the persistent loss filter as applied by the Ld. TPO and without passing a speaking order as directed by Hon'ble DRP.

3.2.2 That on the facts of the case and in law, the Ld. TPO, in particular, erred in non-complying with the directions of Hon'ble DRP and selecting India Exposition Mart Limited ("India Exposition") as comparable company to the Appellant without verifying the employee cost filter as applied by the Ld. TPO and without passing a speaking order as directed by Hon'ble DRP.

3.2.3 That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred, by not following the order of Hon'ble Tribunal for AY 2016-17 (ITA No. 466/Del/2021) in Appellant's own case wherein Interactive Manpower Solution Private Limited ("Interactive Manpower") was excluded from the list of final comparable companies for the purpose of determining the ALP of the

subject international transaction.

TP adjustment in relation to notional interest on overdue receivables [INR 1.74.43.115]

4.1 *That on the fact of the case and in law, the Ld. TPO / Hon'ble DRP have erred, in making an adjustment of INR 1,74,43,115 to the total income of the Appellant in respect of notional interest on overdue receivables.*

4.2 *That on the facts of the case and in law, the Ld. TPO/ Hon'ble DRP have erred in making the said adjustment despite Appellant being a debt free company and no TP adjustment can be made for overdue receivables as upheld in Appellant's ITAT case for AY 2014-15 (ITA No. 7290/Del/2018), AY 2015-16 (ITA No. 9131/Del/2019) and AY 2016-17 (ITA No. 466/Del/2021).*

4.3 *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred in recharacterizing the inter-company receivables as a separate international transaction of an unsecured loan and imputing interest on such transaction.*

4.4 *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred in not appreciating that inter-company receivables arising out of provision of services by the Appellant to its AE is closely linked to such transaction and no separate TP adjustment is warranted.*

4.5 *That on the facts of the case and in law, the Ld. TPO/ Hon'ble DRP have erred in not appreciating the fact that the Appellant has*

provided services to non-AEs wherein no interest is charged on overdue receivable by the Appellant.

4.6 *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred in determining the arm's length interest rate for inter-company receivables at LIBOR plus 400 basis points on an arbitrary basis without any cogent reasons.*

4.7 *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred in granting the credit of period of 60 days instead of 90 days having regard to the provisions of Section 92CE of the Act.*

4.8 *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred, by not appreciating that Appellant has earned more than arm's length return in its other segments, and such excess remuneration should be "set off" with the proposed adjustment.*

Other Grounds

5. *That on the facts of the case and in law, the Ld. TPO / Hon'ble DRP have erred, by treating foreign exchange gain/ loss as non-operating item while determining the ALP of the international transactions.*

Initiation of penalty proceedings

6. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act.*

The above grounds and/ or sub-grounds are without prejudice to

each other.

The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the above grounds of appeal and the facts and circumstances of the case. “

3. The assessee company is engaged in the business of software services. The assessee filed its original return of income for the AY.2018-19 on 30/11/2018 declaring total income at Rs. 96,48,16,330. The return was processed u/s 143(1) of the Act by CPC. Subsequently, the case was selected for scrutiny under CASS. Accordingly, Notice u/s. 143(2) of the Income Tax Act, 1961(“Act” for short) dated 22/09/2019 was issued and the same was served upon/delivered to the assessee. Further, Notice u/s. 142(1) of the Act was issued from time to time for calling for information. In response to the same, the assessee has submitted the details / information as called for. During year under consideration, the assessee entered into International Transactions with Associated Enterprises within the meaning of section 92 B of the Act. The details of the said transactions were mentioned in Form 3 CEB filed by the assessee. The case was referred to the Transfer Pricing Officer as per the provisions of section 92 CA(1) of the Income tax Act for computation of Arm’s length price in relation to the International transactions. Subsequently,

an order u/s 92 CA(3) of the Act was passed by the Transfer Pricing Officer on 30/07/2021 wherein an adjustment of Rs 43,01,79,268 attributable to difference in Arm's length price has been made. Accordingly a draft order u/s 143(3) dated 22/09/2021 was passed making TP adjustment of Rs. 43,01,79,268, determining the taxable income at Rs 139,49,95,600/-. The assessee filed objections against the draft assessment order before the DRP. The DRP passed order u/s 144 C(5) of the Act on 14/02/2022 in accordance with the directions of the Hon'ble DRP. Further the TPO vide letter dated 22/03/2022 has given effect to the order of the DRP issued u/s 144 C (5) of the Act.

4. The DRP vide order 08/02/2022 has considered the objection filed by the assessee and directed the Assessing Officer to incorporate the findings of the panel suitably in the final order. In compliance of the direction with the DRP, the Ld. A.O vide order dated 25/03/2022 passed the final assessment order u/s 143 (3) of the Act read with Section 144C (13) of the Act read with Section 144B of the Act by making TP Adjustment of Rs. 16,54,20,675/- by computing the taxable income of the assessee at Rs. 113,02,37,005/- as against the income admitted by the assessee at Rs. 96,48,16,330/-.

5. Aggrieved by the final assessment order dated 25/03/2022, the assessee has preferred the present appeal on the grounds mentioned above.

6. The Ld. Counsel for the assessee submitted that, Ground No. 1 is general in nature, which requires no adjudication. The Ground No. 2.1 & 2.4 are in respect of transfer pricing adjustment in relation to technical support services segment. Further submitted the Ground No. 3.1 & 3.2 are in respect of TP Adjustment in relation to provision of marketing support services segment. The above said impugned additions mentioned in Grounds No. 2.1 & 2.4 and 3.1 & 3.2 have been deleted by the TPO vide rectification order dated 19/04/2022 therefore, submitted that the Grounds No. 2.1 & 2.4 and 3.1 & 3.2 have become in-fructuous. The said rectification order has been found by us at Page 594-600 of the assessee's paper book. Accepting the submission of the assessee, **we dismiss the Grounds No. 2.1 & 2.4 and 3.1 & 3.2 for having rendered infructuous.**

7. The Ld. Counsel for the assessee submitted that the Ground No. 4.1 to 4.8 of the assessee are the only effective grounds to be considered in the present appeal involving solitary issue regarding transfer pricing adjustment relate to notional interest on receivables of Rs.1,74,43,115/-. Further submitted that, the Ld. TPO/DRP have erred in making the said adjustment despite assessee being a 'debt free company' and no TP adjustment could be made for overdue receivables. The Ld. Counsel for the assessee has relied on the order made in Assessee's own case for AY 2014-15 in ITA No. 7290/Del/2018, AY 2015-16 in ITA No. 9139/Del/2019 and AY 2016-17 in ITA No. 466/Del/2021.

8. Per contra, the Ld. DR has relied on the orders of the Lower Authorities but could not dispute the contention of the Ld. Counsel for the assessee regarding the identical issue involved in the present appeal has been already decided in favour of the assessee for AY 2014-15 to 2016-17.

9. We have heard the parties perused the material on record and gave our thoughtful consideration.

10. The solitary dispute involved in the Ground No. 4.1 to 4.8 are regarding the transfer pricing adjustment relating to notional interest on receivable. The Ld. TPO on examining the balance sheet found that assessee has not received payment for the invoices raised by the assessee within the stipulated time as per the serviced agreement with AE's. The TPO held that the delayed payment are being treated as unsecured loan advance to the AE and charged the interest at 12.51% i.e. 6 months labor + 400 basic point for commuting notional interest for the delayed period. The Ld. DRP has also confirmed the order of the TPO by relying on the judgment of the jurisdictional High Court in the case of CIT Vs. Cotton Naturals India Pvt. Ltd. Reported in 55 Taxmann 401 and the order of the Tribunal in the case of the Bechtel India Pvt. Ltd. Vs. ACOT reported in 84 Taxman 421 for the AY 2012-13.

11. The similar issue has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case in ITA No. 466/Del/2021 for AY 2016-17, vide order dated 09/07/2021 it is held as under:-

“7. The other dispute with regard to the Transfer Pricing Adjustment relates to notional interest on receivables.

8. The TPO after examination of the balance sheet found that the assessee has not received the payments for the invoices raised by the assessee within the stipulated time as provided in the service agreement with the AE's. The TPO held that the delayed payments are being treated as unsecured loans advanced to the AE and charged interest @ 12.51% (6 months LIBOR plus 400 basic point for computing notional interest) for the delayed period. The Id. DRP held that the TPO action cannot be faulted with relying on the judgment of Hon'ble Delhi High Court in the case of CIT Vs Cotton Naturals India Pvt. Ltd. 55 Taxman 401 and the order of the ITAT in BECHTEL India Pvt. Ltd. Vs ACOT 84 Taxman 121 for the assessment year 2012-13.

9. Before us, the Id. AR argued that re-characterizing the overdue receivables as unsecured loans extended by the assessee to its AE is an erroneous belief which cannot be held to be correct. He relied on the orders of the Tribunal in assessee's own case for the assessment years 2014-15 and 2015-16.

10. In all these years, the assessee is found to be a debt free company and there is no dispute on these facts. We have considered the judgment of Pr. CIT Vs BECHTEL India Pvt. Ltd. for the

assessment year 2010-11 vide order dated 21.07.2016. The Hon'ble High Court after examining the order in the assessee's own case affirmed that when the assessee is a debt free company, the question of charging any interest on receivables do not arise. The SLP filed by the revenue has been summarily dismissed by the Hon'ble Supreme Court in CC No. 4956/2017. Even on general fundamentals, when the assessee is having their own funds and not paying interest on any loans, then there is no obligation on the assessee to charge interest from the interest free loan given nor any provision of the Act mandate the Assessing Officer to add notional interest received to the total income. Hence, keeping in view the entire factum of the case, the assessee being a debt free company, the action of the revenue making adjustment on account of no on the receivables cannot be held to be legally valid.”

12. By respectfully following the above order of the Co-ordinate Bench in assessee's own case for Y 2016-17 (Supra) we are of the considered opinion that since the assessee found to be 'debt free company', the action of the revenue making adjustment on account of notional interest on the receivable cannot be justified. Consequently, Ground No. 4.1 to 4.8 of the assessee are allowed. Since the other grounds are not pressed by the assessee the same are not adjudicated.

13. In the result, Appeal filed by the assessee in ITA No. 702/Del/2022 is partly allowed.

14. In view of deciding the main appeal, the Stay Application filed along with the Appeal has rendered in-fructuous.

Order pronounced in the open court on : 18th October, 2023

Sd/-
(G. S. PANNU)
PRESIDENT

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

Dated : 18/10/2023

**R.N Sr. PS*

Copy forwarded to :

1. Appellants
2. Respondents
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI