

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Vimal Kumar, Judicial Member

ITA No. 1502/Del/2022 : Asstt. Year: 2005-06

FIS Global Business Solutions India Pvt. Ltd., S-405, LGF, Greater Kailash, Part-II, New Delhi-110048 (APPELLANT)	Vs	ACIT, Circle-7(1), New Delhi-110002 (RESPONDENT)
PAN No. AAACH2815H		

**Assessee by : Sh. Himanshu S. Sinha, Adv. &
Sh. Paras Bishwal, Adv.
Revenue by : Sh. Rajesh Kumar, CIT-DR**

Date of Hearing: 02.07.2024

Date of Pronouncement: 21.08.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 30.5.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That the Ld. Assessing Officer ('AO') erred on facts and in law in assessing the income of the Appellant at INR 214,010,130 vide Final Assessment Order dated 30th May 2022, as against the returned income of INR 29,047,030 declared by the Appellant.

2. That on the facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP')/Ld. TPO/ Ld. AO erred in making a transfer pricing adjustment of INR 62,100,644/- in relation to provision of software development services ('SDS segment') on the basis of invalid and cogent reasoning.

Grounds against transfer pricing adjustment in SDS Segment

3. That on the facts and circumstances of the case and in law, the Ld. DRP/ Ld. TPO/ Ld. AO erred in re-computing Appellant after aggregating t of this Hon'ble ITAT's order dated April 11, 2018.

4. That on the facts and circumstances of the case and in law, the Ld. DRP/ Ld. TPO/ Ld. AO erred in selecting comparable companies for provision of SDS segment without appreciating the fact that the same are not comparable by way of functions, assets and risk profile to the Appellant and hence fail Ld. TPO's own filter of rejecting companies which are functionally not comparable to the Appellant.

5. That on the facts and circumstances of the case and in law, the Ld. DRP/ Ld. TPO/ Ld. AO erred in retaining Satyam Computer Services Limited ("Satyam") and Infosys Technologies Limited ("Infosys") as comparables in spite of the fact that both the comparables fails the Ld. TPO's own qualitative filters viz. Satyam having unreliable financial statements and Infosys, being non-comparable, on account of size and scale of operations and difference in functional and risk analysis vis-a-vis the Appellant.

Grounds against transfer pricing adjustment in ITeS Segment

6. That on the facts and circumstances of the case and in law, the Ld. DRP/ Ld. TPO/ Ld. AO erred in re-computing the 'OP/OC' of the Appellant for the ITeS segment without giving effect to this Hon'ble ITAT's order dated April 11, 2018.

Other Grounds

7. That the Ld. AO erred on facts and in law in charging interest under section 234B and 234C of the Act.

8. That the Ld. AO erred on facts and in law in initiating penalty proceedings under, section 271(1)(c) of the Act."

3. Heard the arguments of both the parties and perused the material available on record.

4. The captioned matter is in the second round of litigation before this Income-tax Appellate Tribunal.

5. FIS Global Business Solutions India Private Limited (FIS GBS) (Formerly eFunds international India Private Limited or EFI) was incorporated in July 1997. During F.Y. 2004-05, FIS GBS was engaged in rendering following services to its Associated Enterprises ("AEs"):

- Software development services ("SDS")
- Business Process Outsourcing ("BPO")/IT-enabled services ("ITeS")

6. In provision of these services, the assessee utilizes routine assets and is remunerated on a cost- plus basis and hence, acts as a risk-free service provider.

7. During the first round of litigation, the Respondent had filed an appeal before this ITAT challenging the transfer pricing adjustments made by the Transfer Pricing Officer in both SDS and ITeS segment. The ITAT had remanded the matter providing directions to the AO:

- To include/ exclude certain comparable and verify filters
- To verify the computation of TP adjustment as it was not restricted to international transactions and non-AE revenue and non-AE costs have been considered by the TPO while computing the TP adjustment.

8. Subsequently while giving effect to this ITAT's order, the TPO made certain mistakes while determining the arm's length price of the international transactions in both SDS and ITeS segment.

9. Aggrieved with the said appeal effect passed by the TPO, the assessee filed a rectification application with the TPO dated July 7, 2022. The TPO passed a rectification order dated February 3, 2023, wherein the TPO rectified the mistake w.r.t. ITeS segment and accordingly, the entire addition in respect of the ITeS segment amounting to Rs.12,28,62,456/- stands deleted.

10. However, the TPO failed to rectify its mistake in respect of the SDS segment which is now limited to the adjustment made in respect of SDS segment amounting to Rs.6,21,00,644/-.

11. The TPO has computed the TP adjustment for SDS segment by considering the non-AE revenue and non-AE cost.

Particulars	Reference	As per Ld. TPO (Page 5 of Rectification Order attached as Annexure-1)	Correct Computation as per Assessee (Page 177 of Paper book)	Assessee contentions
Actual Operating Cost	[A]	466,327,000 (both AE and non-AE transactions)	407,102,062 (only AE transactions)	Only AE revenue and AE cost should be considered for computing the TP adjustment
Arm's Length Margin (%)	[B]	19.83%	19.55%	
Arm's Length Price	[ALP=A*B]	92,472,644	79,603,647	
Arm's Length Operating Income	[C=A+ALP]	558,799,644	486,705,709	
Actual Operating Income	[D]	496,699,000 (both AE and non-AE transactions)	467,616,099 (only AE transactions)	
Adjustment	[E=C-D]	62,100,644	19,089,640	

Tolerance Range	[F=E/C]		4.08%	On considering the AE transactions, the margins of FIS GBS for SDS segment fall within the tolerance range of (+/-) 5% as prescribed under proviso to Section 92C(2) of the Act (as it stood on April 1, 2005), hence, TP adjustment has been erroneously computed by the TPO.
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12. Chapter X of the Act, provides that the addition on account of transfer pricing adjustment can be made only in respect of international transactions with the AEs and not the non-AEs: The objective for introducing Chapter X was that there can be no scope for arranging the transactions with non-AEs so as to evade the taxes in India. That is the reason for which the transactions with non-AEs have been excluded from the ambit of Chapter X of the Act.

13. The view of restricting TP adjustments to AE transactions only has been held in the following judgments:

- Thyssen Krupp Industries India Pvt. Ltd [2016] 70 taxmann.com 329 (Bom. HC)
- Syniverse Technologies Services (India) (P.) Ltd. vs. ACIT [2018] 91 taxmann.com 435 (Delhi - Trib.)
- IL Jin Electronics (I) Pvt. Ltd. Vs. Asst. Commissioner of Income Tax [ITA no. 438/Del/2008]
- Genisys Integrating Systems (India) Pvt. Ltd. (2011-TII-96-ITAT-BANG-TP)

- Ratilal Becharlal & Sons [ITA No. 1906/2013] [TS-610-HC-2015(BOM)-TP]
- Lionbridge Technologies Pvt. Ltd., ITA No. 9032/Mum/2010

14. We find that the ITAT directed the TPO to verify the computation of TP adjustment as it was not restricted to international transactions and non-AE revenue and non-AE costs have been considered by the TPO while computing the TP adjustment.

"11. The Ld. DR further submitted as relates to other aspect of Ground No. 2, the CIT(A) recomputed the margin of SDS Segment to 14.86% from 6.51% (as determined by the TPO) on the ground that the computation given by the TPO included domestic transactions as well. This issue was never raised by the assessee before the TPO and the CIT(A) re-computed the margin without providing any opportunity to the TPO especially considering the fact this was not raised by the assessee before TPO. Similarly, the CIT(A) recomputed the margin of ITeS Segment from 14.79% (as computed by the TPO) to 17.87% on the ground that the TPO erroneously included corporate allocation cost of Rs. 3,43,23,659/- pertaining to SDC Segment. This issue was never raised by the assessee before the TPO and the CIT(A) re-computed the margin without providing any opportunity to the TPO, especially considering the fact this was not raised by the assessee before TPO.

12. We have heard both the parties and perused the material available on record. As regards the re-computation from the order of the CIT(A) it cannot be made out that how the computation has been done by the CIT(A) and same needs to be verified at the level of TPO/AO. Therefore, this issue is remanded back to the file of the TPO/AO for consideration and arriving at the proper calculation after verifying all the documents provided by the assessee. Needless to say, that the assessee be given opportunity of hearing by following principals of natural justice. This ground is partly allowed for statistical purpose."

15. The TPO has not followed the ITAT order during the remand proceedings and not verified the computation and has considered the non-AE revenue and non-AE cost for computation of the TP adjustment.

"7. The Hon'ble ITAT has stated that As regards the re-computation from the order of the CIT(A) it cannot be made out that how the computation has been done by the CIT(A) and same needs to be verified at the level of TPO/A.O. The TPO has rightly computed the operating margins of the assessee from the SDC and ITES segment to be at 6.51% and 14.79% respectively."

16. The Id. DRP fairly directed the TPO to verify the computation and pass a speaking order, however the TPO has not commented on the erroneous computation in the TP order.

"4.3.3 In Ground number 4.2 the assessee has challenged the margin computation of the assessee for the respective segments being benchmarked. In this regard the assessee has submitted as under:

"The assessee under its software development segment provided services both to related and unrelated parties. As per the provisions of the law, the assessee only computed the margin of its transactions with related parties (i.e. AE segment) which is 14.96%. However, the TPO in contradiction to assessee's approach aggregated both related and unrelated party segment (AE segment and non AE segment) and worked out the margins to be at 6.51%.

The TPO has incorrectly computed the margins of the ITES segment to be at 14.76%. In computation of the said margin the TPO erroneously considered a cost item twice. The correct margin of ITES segment comes out to be at 17.87%.

Mathematical error; The TPO added wrongly added same cost allocation in SDC as well as ITES segment which resulted in mismatch of amount considered by Ld. TPO and the amount that was reported in audited financial statement of the assessee. The TPO also ignored (loss)/profit on sale of fixed assets while calculating margins of the assessee.

Non AE transactions considered. The TPO while doing so, has overlooked the fact that the segmental disclosure also included the revenue and expenses from providing services to unrelated third party and the same needed to be excluded as the basic intent was to test the net margins earned by the assessee from its international transaction."

4.3.4 The Id. DRP has considered the submission of the assessee. The AO/TPO is directed to verify the margin computations of the assessee as well as the comparable companies, taking into account the factual submissions of the assessee and rectify the computational errors if any. The AO/TPO shall pass a speaking order in this regard."

17. Thus, we find that the TPO has not followed the Id. DRP directions and not commented on the erroneous computation wherein the non-AE revenue and non-AE cost has been considered for the purpose of computing TP addition. The assessee has also filed a rectification application u/s 154 of the Act against the TP appeal effect order issued by the TPO wherein it was submitted that the TPO has made mistakes apparent from record by considering non-AE revenue and non-AE cost in the computation of TP adjustment.

18. We find that the TPO has not followed the directions of the ITAT and Ld. DRP in the second round of litigation and has erroneously considered non-AE revenue and non-AE cost for computation of TP adjustment. This is against the basic principles of transfer pricing regulations and Chapter X of the

Act wherein addition on account of transfer pricing adjustment can be made only in respect of international transactions with the AEs and not the non-AEs. Hence, we direct the AO/TPO to consider transactions between the assessee and the AEs only and rectify accordingly. The AO/TPO shall not circumvent the directions given by the ITAT and the Id. DRP.

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

Order Pronounced in the Open Court on 21/08/2024.

Sd/-

(Vimal Kumar)
Judicial Member

Dated: 21/08/2024

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR