

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'A'**

**BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

IT(TP)A No.652/Bang/2016
(Asst. Year 2011-12)

The Dy. Commissioner of Income-tax,
Circle – 2(1)(1),
Bengaluru.

. Appellant

Vs.

M/s Coriant Communication
India Pvt. Ltd. (formerly known
As Tellabs India Pvt. Ltd.,)
No.503, WTC Brigade Gateway,
Malleswaram West,
Bangalore.

. Respondent

PAN No.AAACJ9392B

CO No.32/Bang/2017
(By assessee)

Revenue by : Shri G.R Reddy, CIT
Assessee by : Shri Padam Chand Khincha, CA

Date of Hearing : 29-5-2017

Date of Pronouncement : 02-6-2017

ORDER

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER :

This appeal by the Revenue is directed against the order of the assessment for asst. year 2011-12 passed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (in short 'the Act'). The assessee has also preferred cross objections (CO) in respect of the aforesaid order of assessment.

Revenue appeal in IT(TP)A No.652/Bang.2012 for A.Y 2011-12

2.1 In this appeal, Revenue has raised the following grounds of appeal:

“1. The Hon'ble DRP has erred in facts & Law and holding that M/s I C C International Agencies Ltd is not a comparable company on the ground of non availability of information regarding nature of services, when the primary activity of company involves processing orders including marketing for its principal Products.

2. The Hon'ble DRP has erred in imposing

conditions is beyond the scope of law and business reality by rejecting all close comparables on one or the other ground, without appreciating that not two companies can ever be same.”

2.2 At the outset, the Id AR for the assessee submitted that while on the one hand, in the grounds raised (Supra), Revenue has assailed the directions/orders of the DRP as erroneous in holding that the company M/s ICC International Agencies Ltd., is not a comparable company for some reason or other; on the other hand at para 2.3 of the impugned final order of assessment dated 27/1/2016 the Assessing Officer (AO) records that ‘the DRP’, vide its order dated 29/5/2015 did not give any relief to the assessee on the issue of TP adjustment of Rs.1,06,34,177/- made u/s 92CA of the Act. It was strongly contended that from the above it is amply clear that the AO in the impugned final order of assessment has not given effect to or carried out the directions of the DRP; which is clear violation of the provisions of sec. 144C(10) and (13) of the Act. It is argued that in these factual circumstances, no cause of action arises to Revenue/AO to file an appeal against the impugned final order of assessment, as the

DRP's directions have not been carried out by the AO while passing the final order of assessment and, therefore, Revenue's appeal is not maintainable and is liable to be dismissed in limine.

2.3 Per contra, the ld DR for Revenue contends that when the DRP has issued incorrect directions, the TPO has rightly not followed the same.

2.4.1 We have heard the rival contentions and perused and carefully considered the material on record. An appeal before the Tribunal lies only when the final order is passed framing the assessment in pursuance of and conformity with the directions issued by the DRP. Therefore, before the final order of assessment is so passed, no appeal lies against the directions of the DRP. It is also undisputed position of law that as per the provisions of sec. 144C of the Act, the directions of the DRP are binding on the TPO/AO and, therefore, the cause of action to file the appeal arises only after passing the final order framing the assessment in pursuance to the directions of the DRP. If the final order of assessment passed is not against or prejudicial to the interests of Revenue, then Revenue would have no grievance against the final order as well as the directions of the DRP. Even otherwise,

the interest of Revenue would depend upon the demand raised by the AO as per the final order of assessment being framed in pursuance and conformity with the directions issued by the DRP. Thus, once the TPO/AO has not passed the final order of assessment in accordance with the directions of the DRP, Revenue has no cause of action and consequently has no right to file the appeal against such order as well as the directions of the DRP; as we find the position to be in the case on hand. The directions issued by the DRP being binding, the AO/TPO is bound to give effect to these directions, irrespective of fact whether the same are acceptable or not to the Department. The remedy against the DRP directions is available to the Department to file the appeal, but only when and after the final order of assessment is passed in pursuance to and in accordance with the directions of the DRP which are binding of the TPO/AO. The conduct of the TPO/AO to the contrary is a clear case of defiance and disregard to the binding directions of the higher authorities, i.e, the DRP in the case on hand.

2.4.2 As regards the submissions of the Id DR, (Supra) even if the directions of the DRP are not acceptable to the Department and may be contrary to precedents, the only remedy available to Department is

to challenge the same in appeal and not by refusing to or not giving effect to the same.

2.4.3 In this regard at para 2.3 of the impugned order, the AO has stated that the DRP vide order dated 29/12/2015 has not given the assessee any relief. The said 2.3 is extracted hereunder:-


“2.3 Accordingly, a draft assessment order was passed u/s 143(3) rws 144C(1) of the I.T. 1961 on 02.3.2015 in which addition of Rs. 1,06,34,177/- was made in accordance with the provisions of section 92C(4) and section 92CA(4) of the Income-tax Act, on this issue. The assessee aggrieved by the Draft Assessment order dated 02.03.2015, filed objection before Draft Resolution Panel -2, Bengaluru. The DRP vide their order dated 29/12/2015 did not give any relief to the assessee on this issue.”

2.4.4 A perusal of the said para 2.3 of final asst. order (Supra) indicates that the AO is of the view that the DRP has not given the assessee any relief in respect of the issues on the T.P adjustment of Rs.1,06,34,777/-. Therefore, it is evident that in the circumstances laid out by the AO (Supra) there is no cause of action for Revenue to prefer this appeal and that renders this appeal to be not maintainable.

2.4.5 However, a perusal of the directions issued by the DRP in its order dated 29/12/2015, would go to show that on page 11 and 12 thereof, while dealing with regards to the objections raised to comparables selected by the TPO, the DRP has directed exclusion of the company M/s ICC International Agencies Ltd., holding as under:-

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SN	Company Name	DRP directions
3	I C C International Agencies Ltd.	Having considered the submissions, it is noticed by us from the segmental reporting in the annual report (page 8) in which segment revenue from commission and servicing activity has been shown at ₹ 2,63,83,145/- and the segment profit has been shown at ₹ 1,01,58,702/-, based on which the segmental profit works out to 38.40%, after giving effect to the un-allocable expenses of ₹ 28,98,331/- in ratio of revenue also the segmental margin works out to 30.79%. There is no basis available in the order of the TPO as to how he arrived at the margin of 24.66% , further there is no information available in regard to the nature of the services which is related in

		<p>commission and servicing income to ascertain as to whether the servicing income is also coming from the sales and marketing activity similar to the assessee, in absence of such information, in our view, it will not be appropriate to retain the above company as comparable. Accordingly, we direct the assessing officer to exclude the above company from the comparables.</p>
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2.4.6 It is this direction of the DRP to the TPO/AO to exclude M/s ICC International Agencies Ltd., as a comparable (Supra) that in

our considered view, has triggered Revenue preferring this appeal and the grounds raised challenging the DRP's directions (Supra).

2.4.7 As discussed above at para 2.4.1 to 2.4.6 of this order (Supra), since the AO has not excluded M/s ICC International Agencies Ltd., from the set of comparables, he has evidently not given effect to and passed the impugned final order of assessment for asst. year 2011-12 in pursuance and conformity with the directions issued by the DRP in its order dated 29/12/2015, no cause of action lies with Revenue for filing the present appeal. In coming to this view, we draw support from the decision of a co-ordinate Bench of this tribunal in the case of Lenovo India Pvt. Ltd., in IT(TP)A No.511/Bang/2015 dated 31/3/2017. In this factual and legal view of the matter, we hold the present appeal preferred by Revenue for asst. year 2011-12 in IT(TP)A No.652/Bang/2016 is not maintainable and deserves dismissal in limine.

3. In the result, Revenue's appeal for asst. year 2011-12 is dismissed.

Assessee's cross objection in C.O No.32/Bang/2017

4. In the C.O the assessee has raised the following grounds:

GENERAL GROUNDS

1. The Order passed by the learned Deputy Commissioner of Income Tax, Circle 7(1)(1) [hereinafter referred to as "AO"], learned Deputy Commissioner of Income Tax, Transfer Pricing-2(1)(1), Bangalore (hereinafter referred to as "TPO" for brevity) and Honorable Dispute Resolution Panel-1 (hereinafter referred to as DRP-1) ("AO "TPO" and "DRP" collectively referred to as "lower authorities" for brevity) to the extent prejudicial to the Respondent is bad in law and liable to be quashed.

TP GROUNDS (SALES AND MARKETING SEGMENT)

2. The lower authorities have erred in making TP adjustment at Rs. 1,06,34,177/-.
3. The learned AO/TPO has erred in determining TP adjustment in final assessment order at Rs. 1,06,34,177/- without giving basis of computation and without following any of the directions of the DRP.
4. The DRP has erred in confirming the action of the TPO in:
 - a. Rejecting the comparables selected, additional comparables proposed and TP analysis undertaken by the Respondent on unjustifiable grounds;
 - b. Conducting a fresh transfer pricing analysis despite absence of any defects in the transfer pricing analysis submitted by the Respondent;
 - c. Adopting inappropriate filters in the process of selecting comparables;
 - d. Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, assets utilized, size, turnover, unusual circumstances etc;
 - e. Not appropriately computing the operating margin of the comparables;
 - f. Not making any adjustments for qualitative and quantitative difference between the business of the Respondent and those of the comparable companies; and
 - g. Not recognizing that the Respondent was insulated from risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account.

5. The DRP has erred in confirming the selection of Asian Business Exhibitions and Conferences Ltd as a comparable, even though it is functionally different from the Respondent.

GROUND RELATING TO 5% RANGE

6. Assuming without admitting adjustment is to be made, the lower income tax authorities have erred in not allowing the benefit of the +/-5% range prescribed in the proviso to section 92C(2).

CORPORATE TAX GROUNDS

7. The lower authorities have erred in disallowing business promotion expenses on the ground that commercial expediency of the same is unsubstantiated.

OTHER GROUNDS

8. The lower authorities have erred in, levying a sum of Rs. 40,13,994/- as interest under section 234B and Rs.10,16,236/- as interest u/s 234C of act. On the facts and in the circumstances of the case, interest under section 234B and 234C is excessive. The Respondent denies its liability to pay the excessive interest.

5. In view of our holding that Revenue's appeal in IT(TP)A No.652/Bang/2016 for asst. year 2011-12 is not maintainable and dismissing the same in limine, We are of the considered view that this C.O filed by the assessee in respect of the said appeal would also not be maintainable. The dismissal of the C.O in no way impinges on the right of the assessee to file an appeal against the impugned final order of assessment for asst. year 2011-12, if otherwise maintainable and it

wishes to do so. In that view of the matter, we also dismiss the assessee's C.O for asst. year 2011-12 as not maintainable.

6. In the result, both Revenue's appeal and the assessee's cross-objection for asst. year 2011-12 are dismissed.

Order pronounced in the open court on **2nd June, 2017.**

**Sd/-
(VIJAYPAL RAO)
JUDICIAL MEMBER**

**Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER**

Bangalore
Dated : 2/6/2017
Vms

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Asst. Registrar, ITAT, Bangalore.