

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI. N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

ITA No.804/Bang/2018
Assessment Year : 2009 – 10

M/s. Dell International Services India Pvt. Ltd., (for the merged entity Force10 Networks India Pvt. Ltd.), Divyashree Greens Sy No.12/1, 12/1A and 13/A, Challaghatta Village, Varthur, Bengaluru – 560 071. PAN : AAACH 1925 Q	Vs.	Joint Commissioner of Income Tax, LTU, Bengaluru.
APPELLANT		RESPONDENT
Assessee by	:	Shri. T. Suryanarayana, Advocate
Revenue by	:	Dr. Nischal, JCIT (DR)(ITAT), Bengaluru
Date of hearing	:	26.10.2020
Date of Pronouncement	:	28.10.2020

ORDER

PER ARUN KUMAR GARODIA, A. M.:

This appeal is filed by the assessee and the same is directed against the order passed by learned CIT(A)-5, Bengaluru, dated 25.10.2017 for Assessment Year 2009-10.

2. The grounds raised by the assessee are as under:

1. The learned Assessing Officer ('learned AO'), learned Transfer Pricing Officer ('learned TPO') and the Honourable Commissioner of Income Tax (Appeals) ('CIT(A)') grossly erred in determining an adjustment of INR 1,28,44,900/- with respect to the international transactions rendered by the taxpayer u/s 92CA of the Income-tax Act, 1961.
2. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in accepting companies that ought to have been rejected as comparable:
 - Comp-U-Learn Tech India Ltd.
 - CAT Technologies Ltd.
3. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in wrongly computing the margin of the companies which are proposed by the TPO in the final set of comparable companies.
4. The learned AO/ learned TPO/ Hon'ble CIT(A) erred in not allowing appropriate adjustment towards the risk difference between the Appellant vis-a-vis the comparable companies.

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.

2. In the course of hearing, it was submitted by learned AR of the assessee that this is the second ground of appeal before the Tribunal and he submitted that the tribunal order passed in the first round is available on pages 39 to 60 of the Appeal Memo filed by the assessee. He submitted that the dispute in the present appeal is regarding the assessee's request for exclusion of 2 comparables i.e. (1) M/s. Comp-U-Learn Tech India Ltd., and (2) M/s. CAT Technologies Ltd. and there is one more grievance of the assessee regarding not allowing of risk adjustment. He pointed out that for the issue regarding assessee's request for exclusion of first comparable M/s. Comp-U-Learn Tech India Ltd., the Tribunal has discussed in paras 8 and 9 of Tribunal order which is available on page 45 of the Appeal Memo. He also submitted that as per these paras, the Tribunal has directed the TPO to call for information from the said company under section 133(6) of the Income Tax Act, 1961 (hereafter called 'the Act') regarding the segmental income and thereafter to decide the issue afresh. He submitted that in spite of this clear

direction of the Tribunal, as per the order giving effect passed by the TPO on 24.01.2017, copy available on pages 32 to 37 of the Appeal Memo, the TPO has decided the issue again regarding the assessee's request for exclusion of this comparable without calling for information from the said comparable under section 133(6) of the Act as per the direction of the Tribunal. He pointed out that this issue has been decided by the TPO afresh on the basis of Annual Report of that company available in public domain and therefore, the order of TPO on this issue is bad in law because this is not as per the direction of the Tribunal. At this juncture, the Bench wanted to see the finding of learned CIT(A) in this regard and in reply, it was submitted by learned AR of the assessee that this issue was discussed and decided by learned CIT(A) as per para 5.1 of his order and in this para, although this is noted by learned CIT(A) that the Tribunal directed the AO to call data from the concerned party by exercising power under section 133(6) of the Act and decide the issue accordingly but he decided the issue against the assessee by observing in this para that the AO/TPO has decided the issue after considering the direction of the Tribunal whereas no such report was obtained by the AO/TPO from the concerned comparable under section 133(6) of the Act. At this juncture, the Bench made a proposition that under these facts, the matter has to go back to CIT(A) for passing a speaking and reasoned order. In reply, it was submitted by learned AR of the assessee that he has no objection for sending back the matter but instead of sending back the matter to CIT(A), the matter should be restored back to the file of AO/TPO for a fresh decision as per the directions of the Tribunal given in the first round. As against this, learned DR of the Revenue supported the order of CIT(A).

3. Regarding the second comparable i.e. M/s. CAT Technologies Ltd., it was submitted by learned AR of the assessee that in paras 31 to 34 of the Tribunal order in first ground available on pages 54 to 56 of the Appeal Memo, it is noted by the Tribunal in para 34 of the earlier order of the Tribunal that there is force in the

argument of the learned DR of the Revenue that profit margin in respect of software development services was to be considered for the purpose of comparables, for which segmental data is available and the AO shall consider segmental data and compute ALP and after making these observations, the Tribunal held that accordingly, this ground of appeal raised by the Revenue is allowed for statistical purposes. Thereafter, he submitted that as per appeal giving effect order passed by the TPO, the TPO has again adopted the same margin of 47.04% after including forex gain/loss and 45.7% being unadjusted margin without giving effect to the direction of the Tribunal in the first round for adopting segmental margin. At this juncture, the Bench wanted to see the finding of learned CIT(A) on this issue also and in reply, it was submitted by learned AR of the assessee that in para 6 of his order, learned CIT(A) has although noted that the Tribunal has asked the AO to consider the segmental margin, if available and to recompute the ALP but he upheld the action of the AO without noticing this aspect that the AO/TPO has not considered the segmental margin as directed by the Tribunal in the first round. He submitted that on this issue also, the matter may be restored back to the file of AO/TPO for a fresh decision as per direction of the Tribunal in the first round. Learned DR of the Revenue supported the order of CIT(A).

4. Regarding ground No.4 raised by the assessee before the Tribunal in respect of non-granting of appropriate adjustment towards risk difference between the assessee with the comparable company, it was submitted by learned AR of the assessee that in paras 14.1 and 15 of the Tribunal order in first round, the Tribunal held that it is appropriate to consider the risk adjustment while determining the ALP and therefore, the Tribunal directed the TPO to consider the contention of the assessee as per the material brought on record and decide the issue afresh after giving opportunity of hearing to the assessee but in the order giving effect passed by the TPO on 23.02.2017, copy available on pages 24 to 30 of the appeal memo,

this issue regarding granting of risk adjustment is not considered at all by the TPO and therefore, on this issue also, the matter may be restored back to the file of AO/TPO for a fresh decision. He submitted that in ground No.3 raised by the assessee before CIT(A) also, this issue regarding risk adjustment was raised by the assessee before the CIT(A) but learned CIT(A) has decided this ground as per para 7 without noticing this aspect that in the order giving effect passed by the TPO, there is no discussion about granting of risk adjustment. He submitted that on this issue also, the matter should be restored back to the file of AO/TPO. As against this, learned DR of the Revenue supported the order of CIT(A).

5. We have considered the rival submissions. We find that before us, there are 3 grievances of the assessee. The first grievance is regarding assessee's request for exclusion of comparable M/s. Comp-U-Learned Tech India Ltd. The second grievance is regarding assessee's request for exclusion of CAT Technology Ltd. The third grievance of the assessee is regarding grant of risk adjustment. In respect of all these 3 issues, in the first round, the Tribunal restored the matter back to the file of AO/TPO with certain directions as noted above but in the order giving effect passed by the TPO, those directions of the Tribunal in the first round were in fact not given effect to by the TPO and when the assessee raised this issue before learned CIT(A), learned CIT(A) has simply upheld the order of AO/TPO on all these 3 issues in a cryptic manner without giving any valid reasoning. This is settled position of law that any quasi judicial authority should pass a speaking and reasoned order but in the present case, neither the TPO nor the learned CIT(A) has passed a speaking and reasoned order in the light of the direction of the Tribunal in the first round. We do not appreciate this approach of the AO/TPO and CIT(A) and we set aside the order of CIT(A) on all these 3 issues and restore the matter back to the file of AO/TPO for a fresh decision by way of a speaking and reasoned order on all these 3 issues as per the directions of the Tribunal in ITA

No.948/Mds/2014 dated 06.11.2015. In view of this decision, no adjudication on merit is called for at the present stage.

6. In the result, assessee's appeal is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(N. V. VASUDEVAN)

Vice President

Sd/-

(A.K. GARODIA)

Accountant Member

Bangalore,

Dated: 28.10.2020.

/NS/*

Copy to:

- | | | |
|---------------|-------------------------|---------------|
| 1. Appellants | 2. Respondent | 3. CIT |
| 4. CIT(A) | 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.