

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"J" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No. 6585/Mum./2019**  
**(Assessment Year : 2004-05)**

Trigyn Technologies Ltd.  
Unit no.27, SDF-1, Seepz-SEZ  
Andheri (East), Mumbai 400 096  
PAN - AAACL2065K

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-11(3)(1), Mumbai

..... Respondent

Assessee by : Shri Vijay Mehta  
Revenue by : Shri Tejinder Pal Singh

Date of Hearing - 03.02.2022

Date of Order - 04.03.2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been preferred by the assessee challenging the impugned order dated 09.08.2019, passed by the Commissioner of Income Tax (Appeals)-58, Mumbai [hereinafter referred to as "*the CIT(A)*"] under section 250(6) of the Income-tax Act, 1961 (hereinafter referred to as "*the Act*") for the assessment year 2004-05.

2. The assessee has filed the present appeal on the following grounds:-

"1. *The learned CIT (A) has erred in law and on facts in upholding the order passed by the Assessing Officer u/s. 143(3) r.w.s. 254 of the Income-tax Act, 1961, which is illegal and bad in law.*

2. *The learned CIT (A) has erred in law and on facts in upholding the transfer pricing adjustment made by the TPO.*

3. *The learned CIT(A) ought to have held that the provision for doubtful debts written back is operating income and hence has to be included while computing the operating margin of the assessee.*

4. *The learned CIT(A) ought to have held that the sundry balances written back and miscellaneous income is operating income and hence has to be included while computing the operating margin of the assessee.*

5. *The learned CIT(A) has erred in law and on facts in holding that the loss on sale of fixed assets is operating expenditure and hence has to be included while computing the operating margin of the assessee*

6. *The learned CIT(A) has erred in law and on facts in upholding the action of the TPO/AO in excluding M/s. I Gate Global Solutions and M/s Sofisol India Ltd from the final list of comparables.*

7. *The learned CIT(A) ought to have held that companies M/s Bodhtree Consulting Ltd and M/s Tata Elxsi Ltd are not comparable with the assessee and hence should have been excluded from the final list of comparables as determined by the TPO*

8. *The learned CIT (A) has erred in law and in facts in upholding the action of the TPO/AO in including M/s Akshay Software Technologies Ltd in the final list of comparables.*

9. *The learned CIT(A) ought to have held that the assessee is eligible for standard deduction of +/- 5% in computing the transfer pricing adjustment as determined by the TPO."*

3. Shri Vijay Mehta, learned Authorised Representative (hereinafter referred to as "*learned A.R.*") appearing for the assessee at the outset submitted that the only relief sought in the present appeal is with regard to restricting the transfer pricing adjustment to the revenue retained by the Associated Enterprise (hereinafter referred to as "*A.E.*") from the customers and if the said relief is granted then the other grounds of appeal raised by the assessee will become academic in nature.

4. The brief facts of the case pertaining to this issue, as emanating from the record are: The assessee is a public limited company. For the year under consideration, the assessee filed its return of income on 29.10.2004 declaring Nil income. The assessee is primarily engaged in the development of software for customised applications and client server custom engineered solutions. The assessee is primarily a contract service provider which renders service to subsidiary network abroad. The subsidiary network directly enters into contracts with customers abroad and certain software development and service work are outsourced to the assessee which are provided by the assessee from its off-shore facilities in addition to on-shore service provided by it.

5. During the year under consideration, the assessee entered into following international transactions as per Form no.3CEB, details of which are as under:-

<i>Sr. no.</i>	<i>Nature of Service</i>	<i>Amount (Rs.)</i>
1.	<i>Software Consulting Services</i>	<i>6,88,01,068</i>
2.	<i>Reimbursement of travel and other expenses reimbursed at actual basis by TT Inc.</i>	<i>90,62,835</i>

6. The assessee received following payments for software consultancy services provided to different A.Es., during the year under consideration:

<i>Name of the A.E.</i>	<i>Amount (Rs.)</i>
<i>Trigyn Technologies Inc.</i>	<i>6,82,77,694</i>
<i>Applisoft Inc.</i>	<i>2,33,332</i>
<i>Trigyn Technologies Europe, GmbH</i>	<i>2,90,052</i>

7. Pursuant to the reference made by the Assessing Officer (hereinafter referred to as "*the AO*"), the Transfer Pricing Officer (hereinafter referred to as "*the TPO*"), vide order dated 04.12.2006, passed under section 92CA(3) of the Act, in the first round of proceedings proposed an adjustment of Rs.73,92,756/- to the international transactions entered into by the assessee. The AO passed the assessment order under section 143(3) of the Act, inter-alia, on the basis of adjustment proposed by the TPO.

8. In appeal, the learned CIT(A) vide order dated 29.04.2009, in the first round of proceedings, inter-alia, deleted the transfer pricing adjustment proposed by the A.O./TPO.

9. In appeal by the Revenue against the relief granted by the CIT(A), the Tribunal, vide order dated 21.08.2013, passed under section 254 of the Act, inter-alia, restored the matter to the file of the A.O./TPO for fresh determination of arm's length price of international transactions entered into by the assessee with its A.E.

10. The AO made a reference to the TPO, pursuant to the directions of the Tribunal. The TPO, vide order dated 08.01.2015, passed under section 92CA(3) r/w section 254 of the Act benchmarked the international transaction pertaining to 'Provisions of Software Consultancy Services' by applying Transaction Net Margin Method (TNMM) as a most appropriate method with Profit Level Indicator (PLI) of Operating Profit / Operating Expenditure. Accordingly, the TPO proposed an adjustment of

Rs.2,66,56,724, in respect of international transaction pertaining to 'Provisions of Software Consulting Services'. The AO passed the assessment order dated 13.02.2015 under section 143(3) r/w section 254 of the Act, inter-alia, on the basis of adjustment proposed by the TPO

11. In appeal against the aforesaid assessment order, the learned CIT(A), inter-alia, rejected the ground of the assessee that the transfer pricing adjustment should be restricted to the amount retained by the A.E. Being aggrieved by the aforesaid order of the CIT(A), the assessee is in appeal before us.

12. During the course of hearing, the learned A.R. submitted that the assessee is in the business of developing and exporting software services. The assessee has entered into consultancy agreement with its A.E. wherein the A.E. provides marketing and other service to the assessee. The customer is charged for consultancy services on gross basis. The A.E. retained the share of revenue as provided in the agreement and the balance is remitted to the assessee.

13. The learned A.R., during the course of hearing, submitted following revenue sharing arrangement between the assessee and the A.E.

Chart showing revenue sharing arrangement between the assessee and the A.E.

Sr. no.	Name of A.E.	Total revenue charged to independent customer (Rs.)	Retained by A.E.	Retained by assessee	Basis of sharing
1.	Trigyn Technologies, USA	7,91,00,030	1,08,22,336	6,82,77,694	A.E. retains 10% of the total revenue in case the

					<i>independent customer is Credit Suisse First Boston and 20% of the total revenue in case of other independent customers.</i>
2.	<i>Trigyn Technologies, Europe</i>	<i>3,62,565</i>	<i>72,513</i>	<i>2,90,052</i>	<i>A.E. retains 20% of total revenue earned from independent customers.</i>
3.	<i>Applisoft Inc.</i>	<i>2,91,652</i>	<i>58,330</i>	<i>2,33,322</i>	
	<i>Total</i>	<i>7,97,54,247</i>	<i>1,09,53,179</i>	<i>6,88,01,068</i>	<i>Average 13.73% is retained by A.E.</i>

14. The learned A.R. submitted that during the year under consideration, the assessee received major portion of its revenue from the transaction with its U.S.A. based A.E. By referring to the details of revenue sharing arrangement between the assessee and the A.E., the learned A.R. submitted that during the year under consideration, a total of Rs.7,97,54,247, was charged to the customers out of which, as per agreement, the assessee received Rs.6,88,01,068, and the balance amount of Rs.1,09,53,179, was retained by the A.E. for services rendered by it. The learned A.R. further submitted that the adjustment Rs.2,66,56,724, made by the TPO is substantially higher than the amount retained by the A.E. for the services rendered. The learned A.R. submitted that if the shortfall in arm's length price i.e., the adjustment proposed by the TPO is added to the amount received by the assessee, the resultant revenue [i.e., Rs. 2,66,56,724 (+) Rs.6,88,01,068 = Rs.9,54,57,792] will be much higher than the actual amount billed to the customers. It was further submitted that the excess amount proposed to be added amounting to Rs.1,57,03,545, was neither received by the assessee nor by the A.E. in the present case and thus may be directed to be deleted.

15. On the other hand, Shri Tejender Pal Singh, the learned Departmental Representative, appearing for the Revenue, vehemently relied upon the orders passed by the TPO/A.O. and the CIT(A).

16. We have considered the rival submissions and perused the material available on record. We find that on identical issue, the Co-ordinate Bench of the Tribunal in ITO v/s M/s. Ominiglobe Information Technologies India Pvt. Ltd., ITA no.1380/Del./2016, vide order dated 15.04.2019, restricted the transfer pricing adjustment to the amount of margin retained by the A.E., by observing as under:-

*"18. Ld. DRP reached the conclusion that TP adjustment cannot exceed the amount of margin retained by the AE. Ld. AR for the taxpayer contended that this issue is covered in favour of the taxpayer by the decision rendered by the coordinate Bench of the Tribunal in the case of HCL Technologies BPO Ltd. vs. ACIT - ITA No.3547/Del/2010 which is confirmed by Hon'ble Delhi High Court and Hon'ble Supreme Court. Operative part of which is as under :-*

*"11. Without prejudice to the assessee company's contention that the adjustment made by the TPO is not sustainable, it was submitted that the adjustment at best could be made only to the extent of Rs. 11,960,457, being the amount which has been retained by the associated enterprise.*

*12. The Ld. CIT(A) in his order restricted the Transfer Pricing adjustment to Rs. 1.19 crores holding as under:*

*"The Transfer Pricing Officer has computed an adjustment of Rs.17.04 crores while the value of international transactions is Rs.13,00,89,632. The total revenue received by the associated enterprises in respect of BPO services rendered by the appellant amounting to Rs.13,00,89,632 is Rs.14,20,50,089. In other words, the associated enterprise has retained Rs. 1,19,60,457 out of the total proceeds received from the customers. The adjustment computed by the TPO in the order passed under section 92CA(3) of the Act at best cannot exceed the net amount retained by the associated enterprises in respect 'of international transactions, i.e., gross revenue' received from the end customers less amount paid' to the appellant and, other operating expenses. It is observed that the gross revenue received from the end customers in respect of various contracts, the associated enterprise have retained only Rs.*

1,19,60,457 at their end and the balance has been passed on to the appellant."

12.3 The issue has been considered in the recent decision of Delhi Bench of the Tribunal in the case of DCIT vs. Global Vantage P. Ltd., wherein, the Tribunal held that adjustment on account of arm's length price of international transactions cannot exceed the maximum arm's length price, i.e., the amount received by the associated enterprise from the customer and the actual value of international transactions, i.e., the amount received by the assessee in respect of international transactions.

12.4 In view of the same I am of the considered view that the adjustment to the income of the appellant has to be restricted to Rs.1,19,60,457- being the amount retained by the associated enterprises."

13. Aggrieved with this order, the Revenue had come up in the present appeal. Ld. D.R. placed reliance on the order of Ld. CIT(A) and had prayed for quashing of CIT(A)'s order on this issue. On the other hand, Ld. Sr. Counsel submitted that the appellant could not have expected to receive from the customers of the AEs of the appellant, anything more than the amount paid by some customer to the AE, if the appellant were to be obtain the contracts for services from the customers directly, i.e., without the involvement of the AEs of the appellant. Thus, at the most the consideration received by the appellant from the AEs may be replaced by the consideration received by the AEs from its customers, for the services provided by the appellant; the price charged by AEs to the customers being the CUP. Reliance is placed in this regard on the decision of the Hon'ble Delhi High Court in the case of Sony India P. Ltd. vs. CBDT (Delhi) ; 288 ITR 52 has at pages 61-62, observed as under:

"The concept of transfer pricing leading to tax avoidance has been acknowledged in the Act only recently. It is a concomitant of the operations of multinational corporations (MNCs) that set up base by incorporating a local subsidiary in a country where they seek to operate. It is often seen that the MNC transfers goods and services to its local subsidiary at a price not reflective of the market price (or arm's length price as if is referred to in the present context) and in turn the subsidiary is able to avoid, partly or wholly, payment of the local tax, Although the expression "transfer price" has not been defined in the Act,' it is 'understood to mean "that price which is arrived at when two associated or related' enterprises deal with each other".

14. Reference was made to the Finance Minister's Budget Speech for the year 2001 that the presence of multinational enterprises in India and their ability to allocate profits in different jurisdictions by controlling prices in intra-group transactions has made the issue of transfer pricing a matter of serious concern. The purpose of inserting these provisions is therefore to determine the arm's length price (ALP) of an international transaction involving an MNC and its local associate."

15. Reliance is placed on the decision of Delhi Bench of the Tribunal in the case of DCIT vs Global Vantage P. Ltd., (ITA No. 1432 & 2321/Del/2009 and 116/Del/2011), wherein, the Hon'ble Tribunal held that adjustment on account of arm's length price of international transactions cannot exceed



*the amount received by the associated enterprise from the customer and the actual value of international transactions, i.e., the amount received by the assessee in respect of international transactions. The Hon'ble Jurisdictional High Court vide order dated 14-03-2013 (in ITA Nos. 1828/2010, 1829/2010 & 1254/2011) had dismissed the Revenue's appeal against the said order of the Tribunal. The Special Leave Petition (SLP) of the Revenue against the said order has also been dismissed by the Supreme Court vide order dated 02-01-2014 (CC No. 22166 of 2013).*

*16. Further reliance in this regard is placed on the following observation of the Hon'ble Delhi bench of the Tribunal in the case of Li & Fung (India) Pvt. Ltd. vs. DC IT (ITA No 5156/DeI/2010):*

*17. The Hon'ble Delhi High Court recently vide order dated 16-12-2013 (in ITA No.306/2012), while adjudicating on the said decision of the Tribunal, held in paragraph 40 of the order that "the approach of the TPO and the tax authorities in essence imputes notional adjustment / income in the assessee's hands on the basis of a fixed percentage of the free on board value of export made by unrelated party vendors. " .....*

*18. Reliance in this regard is also placed on the recent decision of Delhi Bench of the Tribunal in the case of Hyper Quality India Pvt. Ltd. vs. ACIT (ITA No. 5630/Oell2011 ), wherein, it has been held as under:*

*"7. Ld. TPO erred in evaluating FAR (Functions performed, Assets employed and Risk assumed) analysis which has been summarily confirmed by DRP. To support its case, assessee furnished split financials of the appellant and its AE. Whereas the appellant has been able to earn profit in India its counterpart the AE has continuously sustained losses. There being no element of profit in the hands of the AE, there is no case of shifting of profits, practicable or probable. Invoking a higher ALP on the appellant is only anticipatory and complete ignorance of fact. The facts and figures produced before the Ld. TPO establish that there is no commercial profit available in the hands of the AE. In absence of profit availability, the any enhancement of the ALP results in artificial profit anticipated by the Ld. TPO and not earned by the Appellant. The order of the LD, TPO in enhancing the ALP offered by the appellant is in ignorance of valid FAR and factual considerations and is bad in law and facts."*

*19. Reliance in this regard is placed on the recent decision of Delhi High Court in case of Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT III (ITA No. 16/2014) where in it has been held that the arm's length seeks to correct distortion and shifting of profits of tax the actual income earned by a resident. The Hon'ble Delhi High Court held as under:*

*'77. As a concept and principle Chapter X does not artificially broaden, expand or deviate from the concept of "real income". "Real income", as held by the Supreme Court in Poona Electricity Supply Company Limited versus CIT, [1965] 57 ITR 521 (SC), means profits arrived at on commercial principles, subject to the provisions of the Act. Profits and gains should be true and correct profits and gains, neither under nor over stated. Arm's length price seeks to correct distortion and shifting of profits to tax the actual income earned by a resident/domestic AE. The profit which would have accrued had arm's length conditions prevailed is brought to*

*tax. Misreporting, if any, on account of non-arm's length conditions resulting in lower profits, is corrected.*

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*(xii) When segmentation or segregation of a bundled transaction is required, the question of set off and apportionment must be examined realistically and with a pragmatic approach. Transfer pricing is an income allocating exercise to prevent artificial shifting of net incomes of controlled taxpayers and to place them on parity with uncontrolled, unrelated taxpayers. The exercise undertaken should not result in over or double taxation. Thus, the Assessing Officer/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessed, and examining and giving benefit of set off. Section 92(3) does not bar or prohibit set off."*

*20. In view of the aforesaid, it is respectfully submitted that the adjustment shall be restricted to Rs. 1.19 crores.*

*21. We have had rival submissions and perused the material on record. Ld. CIT(A) had followed the ratio laid down in the case of Global Ventedge P. Ltd. (supra) (in I.T.A. No. 1432 & 2321 / Del/2009 and 116/Del/2011). This decision was affirmed by both Hon'ble High Court and Hon'ble Supreme Court and his ratio was followed in subsequent decisions as submitted earlier and, therefore, the order of Ld. CIT(A) on this issue is reasonable and we do not find any reason to interfere with this finding of Ld. CIT(A) and hence, the grounds of appeal filed by revenue are dismissed. Accordingly, appeal filed by revenue is dismissed."*

*19. So, following the decision rendered by the coordinate Bench of the Tribunal in HCL Technologies BPO Ltd. vs. ACIT (supra, affirmed by Hon'ble Delhi High Court and Hon'ble Supreme Court, we are of the considered view that Id. DRP has rightly held that transfer pricing adjustment should not exceed the amount of margin retained by the AE. Consequently, findings returned by the Id. DRP are hereby confirmed. So, ground no.2 is determined against the Revenue."*

17. Similar view was also expressed by another Co-ordinate Bench of the Tribunal in Fortune Infotech Ltd. v/s ACIT, ITA no.274/Ahd./2013, vide order dated 03.02.2016. Thus, respectfully following the aforesaid judicial precedence of the Co-ordinate Benches of the Tribunal, we direct the TPO/A.O. to restrict the transfer pricing adjustment to the amount retained by the A.E and compute the total income of the assessee in accordance with law. Since the issue relating to restricting the transfer pricing adjustment to

the revenue retained by the A.E. from the customers is decided in favour of the assessee and against the Revenue, resultantly, the other grounds of appeal raised by the assessee in this appeal become academic in nature.

18. In the result, assessee's appeal is partly allowed in terms indicated above.

Order pronounced in the open court on 04.03.2022

**Sd/-**  
**PRASHANT MAHARISHI**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 04.03.2022**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai