

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'I' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
and  
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**ITA No.8469/Del./2019  
(ASSESSMENT YEAR : 2014-15)**

Dassault Systems India Pvt. Ltd.,  
12<sup>th</sup> Floor, Building No.10-C,  
DLF Cyber City Phase – 2,  
Gurgaon – 122 002 (Haryana).

vs. Addl. CIT, Spl. Range 3,  
New Delhi.

**(PAN : AACCD7672A)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Vishal Kalra, Advocate  
Shri Ankit Sahani, Advocate  
Shri Yishu Goel, AR

REVENUE BY : Shri Mrinal Kumar Das, Sr. DR

Date of Hearing : 31.05.2023  
Date of Order : 20.06.2023

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER :**

This appeal filed by the assessee is directed against the order of Id.

CIT (Appeals)-44, New Delhi for the assessment year 2014-15.

2. The grounds of appeal taken by the assessee read as under :-

“That on the facts and circumstances of the case and in law:

1. The Hon'ble CIT(A)t Ld. AO/TPO failed to appreciate the facts of the case in correct perspective and erred in confirming transfer pricing adjustment of INR 9,37,96,038

made by the Ld. AOITPO in respect of the international transaction pertaining to payment of royalty.

2. The Hon'ble CIT(A) erred in confirming the orders passed by the Ld. AO/TPO which are not in accordance with law and contrary to the facts and circumstances of the present case and in violation of the principle of equity and natural justice.

3. The Hon'ble CIT(A) erred in passing a non-speaking order on each of the grounds, thereby ignoring the detailed objections and evidences placed on record by the Appellant. The Hon'ble CIT(A) also erred in resorting to upholding the findings of AO/TPO without even examining them in light of the contentions of the Appellant.

4. The Hon'ble CIT(A)/ Ld. AO/ TPO have erred, by disregarding the Transfer Pricing documentation prepared and maintained under Section 92D of the Act, read with Rule 100 of the Income Tax Rules, 1962 ("Rules") by the Appellant.

5. The Hon'ble CIT(A) erred in upholding the Ld. AO/ TPO's approach of rejecting the multiple year data used by the Appellant in its transfer pricing documentation.

6. The Hon'ble CIT(A) erred in confirming the Ld. AO/ TPO's ad-hoc approach of rejecting the detailed segmental accounts submitted by the Appellant, & by doing so the Hon'ble CIT(A) erred in confirming the Ld. AO/ TPO's approach of:

- (i) Rejecting the basis of allocating the expenses among operating segments in the segment profitability maintained by the Appellant;
- (ii) Re-drawing the Appellant's segmental accounts by using revenue ratio as an ad-hoc allocation key.
- (iii) Questioning the credibility of the Appellant's segmental accounts, and not considering the certified segmental accounts submitted by the Appellant.
- (iv) Adopting a contrary approach by disregarding the segmental accounts prepared under AS-17 in the

audited financial statements in case of the Appellant while considering the same in case of comparable companies.

- (v) Not allocating the other non-operating income into various segments while re-drawing segmental accounts, while at the same time AO/ TPO allocated the non-operating expenses into various segments.

7. The Hon'ble CIT(A)/ Ld. AO/ TPO erred in not appreciating the comprehensive functional, asset and risk analysis undertaken in respect of international transactions pertaining to payment of royalty and the business model of the Appellant pertaining to software distribution activity.

8. The Hon'ble CIT(A) erred in not adjudicating upon the contention of the Appellant that value of adjustment of INR 9,37,96,038 should be restricted in proportion to the value of international transaction under question.

9. The Hon'ble CIT(A) erred in confirming the observations and findings made by the Ld. AO/ TPO which are contrary to the facts of the case and based on incorrect interpretation of law.

10. The Hon'ble CIT(A)/ Ld. TPO erred by not taking into consideration the Appellant's assessment history and that the transfer pricing documentation including segmental profitability, maintained by the Appellant has been accepted in all prior assessment years without drawing any adverse inference.

11. The CIT(A)/Ld. AO/TPO erred in comparing the operating margins of comparable companies with the Appellant's operating margin, without providing any economic adjustments, viz. on account of working capital adjustment and on account of difference in risk profile of the Appellant, as required under Rule 10B(1)(e)(iii) of the Income Tax Rules, 1962 ("Rules").

Other Grounds

12. That on the facts and circumstances of the case and law, the Hon'ble CIT(A) erred in not adjudicating the Ld. AO's approach of initiating penalty proceedings against the Appellant under section 271 (1)(c) of the Act.”

3. Brief facts of the case are that the assessee is engaged in the business of software distribution after purchasing software products from associated enterprises ("AEs") to third party customers in India. DSIPL is also engaged in providing business support services to its AEs. For the AY 2014-15, the assessee had filed its return of income under section 139(1) of the Income-tax Act, 1961 (for short 'the Act') on November 29, 2014 declaring a tax loss of INR 21,796,527. The TPO passed Transfer pricing order dated October 30, 2017 and made an addition of INR 134,367,524 to the income of the assessee on account of variation to the arm's length price ("ALP") of international transactions. The AO completed the assessment proceedings and passed the draft assessment order under section 144C (1) of the Act dated December 19, 2017. The AO passed the final assessment order dated February 15, 2018 under section 143(3) read with section 92CA (3) of the Act confirming the addition made in draft assessment order. The assessee's business is segregated into the following three operating segments from transfer pricing standpoint :-

- (i) Trading of software;
- (ii) Provision of business support services; and
- (iii) Provision of software related professional services.

4. Aggrieved by the adjustment, the assessee filed an appeal before the Id. CIT (A). Ld. CIT (A) confirmed the same.

5. Against this order, assessee is in appeal before us. We have heard both the parties and perused the records.

6. Ld. Counsel of the assessee at the threshold submitted that TPO has not provided adequate opportunity to the assessee. He submitted that in the show-cause notice, TPO has stated that assessee has not provided any basis of allocation for bifurcation of expenses into various segments as maintained by the assessee. Assessee vide reply dated 13<sup>th</sup> October, 2017 provided the basis for allocation of expenses into various segments. Further submissions of the Id. Counsel of the assessee is summarized as under :-

“3.2 The Appellant's business vertical of distribution of software is not straight forward and includes several cost bifurcations. First of all, the Appellant identifies costs which are directly attributable to a particular segment. For example, payment of royalty is on account of purchase of software licenses for further distribution and therefore entire royalty expense should be allocated to Software trading segment only. Similarly, the directly identifiable employee cost in terms of salary & other emoluments for various segments is carved out to respective segments at first. While, in case of indirect expenses, the Appellant has used the following allocation keys to allocate the expenses into various segments:

- Facility expenses - Headcount by Operating Unit -FiDept (w/o ADMIN FA/IS)
- IT expenses - Headcount by Operating Unit -FiDept (w/o ADMIN FA/IS)

- Marketing expenses - Based on Channel Marketing FiDept
- Finance - Headcount by Operating Unit -FiDept (w/o ADMIN)
- HR- Headcount by Operating Unit -FiDept (w/o ADMIN)
- G&A- Revenue by brand
- Geo MD- Revenue by channel

3.3 However, the TPO, nowhere in the show cause notice or the in-person hearings had asked for the workings of such allocation keys. Though the percentage between various segments was provided to the TPO. During the assessment proceedings, the Appellant not only submitted the details of allocation keys for various expenses (Refer pages 105- 106 of the Paperbook), however also discussed the same at length during the detailed hearing before the TPO dated October 13, 2017.

3.4. The TPO on page 15 of his order dated October 30, 2017, has mentioned that the reply of the Appellant had not been found to be satisfactory because even though the Appellant had provided the basis of allocation, no evidence in support of the same or any rationale/ justification of using different allocation keys had been submitted by the Appellant. (Refer page 85 of appeal set)

3.5. The TPOs comment that the Appellant did not submit details of allocation keys is baseless since the same were never asked specifically by the TPO. The TPO nowhere in the oral discussions or the show cause notice had asked for such information. The TPO himself in the prior two AYs, i.e. AY 2012-13 and AY 2013-14 accepted the said segmental statements prepared on the same basis as in the instant AY (Refer pages 436-439 of the Paperbook). Therefore, the Appellant by no stretch of imagination could assume that the TPO requires further clarification regarding allocation keys.

3.6 Further, the Appellant in its software trading segment operates at an assured net margin of 4 percent, i.e. after all the expenses incurred by the Appellant, the AEs have assured the Appellant of providing a new margin of 4 percent on revenue.

Any shortfall in Appellant's margin at the year-end is adjusted through true-up invoices to again ensure that Appellant's margin remain intact. This fact pattern clearly signifies that Appellant's margin is fixed for distribution of software products (i.e. 4 percent on sales) and by no stretch of imagination can this be turned into loss in any given scenario. This fact pattern has not been challenged by the TPO in any of the past or subsequent AYs (refer compilation of TP orders for subsequent years).

Accordingly, the TPO's act of computing the margins of Appellant from said segment using an ad-hoc formula to distribute the expenses and arrive at segment loss is completely untenable in law and liable to be set aside.

3.7. Reliance is placed in the case of *B.D. Gupta v. State of Haryana* (AIR 1972 SC 2472) in which the Hon'ble Supreme Court has stated that the show cause notice should be effective and indicate the precise scope of the notice and also indicate the points on which the person concerned is expected to give a reply. It is not an empty formality. It is to give a reasonable and fair opportunity to represent his case, to correct or contradict the material information or document sought to be relied against him. Such an opportunity should be real and not ritualistic, effective or illusory.

Further, the Appellant wishes to place reliance on following rulings wherein it has been held that an assessee should be given an adequate opportunity of being heard and the principle of natural justice has also been upheld:

- *Trilogy E-Business Software (India) Pvt Ltd vs DCIT*; [2011]47 SOT 45 (Bangalore) affirmed by Hon'ble High Court of Karnataka in ITA 403/2011
- *Toyota Kirloskar Motor (P) Ltd*: 197 Taxman 477 (Karnataka); and
- *Airtech Pvt Ltd vs. DCIT, New Delhi*: (ITA No. 3591/Del/2010)"

7. Per contra, ld. DR for the Revenue relied upon the orders of the authorities below.

8. Upon careful consideration, we find ourselves in agreement with the submissions of the assessee. AO has not asked the assessee for the working of allocation, hence drawing adverse inference without giving the assessee a chance to explain is violation of interest justice. Ld. Counsel of the assessee agreed that the issue may be remanded to the TPO to give fresh opportunity to the assessee to explain all the facts. Upon careful consideration, we find ourselves in agreement with the submissions as above. Hence, in the interest of justice, we remit the issue to the file of TPO. The TPO shall decide the issue afresh after giving the assessee proper and reasonable opportunity of being heard.

9. Other aspects of the grounds are not being adjudicated as the issue is being remitted to the TPO on the touchstone of principles of natural justice.

10. In the result, this appeal of the assessee is allowed for statistical purposes.

**Order pronounced in the open court on this 20<sup>th</sup> day of June, 2023.**

**Sd/-  
(CHALLA NAGENDRA PRASAD)  
JUDICIAL MEMBER**

**sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Dated the 20<sup>th</sup> day of June, 2023  
TS**



Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A).
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
NEW DELHI.

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