

**[2023] 156 taxmann.com 201 (Hyderabad - Trib.)[26-10-2023]**

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**TRANSFER PRICING : Turnover is a relevant criteria for choosing companies as comparables in determining ALP in transfer pricing cases and application of tolerance range of turnover of ten times is proper**

**TRANSFER PRICING : Where TPO determined Nil ALP on ground that assessee had not derived any benefit from payment of management fee to its AE, since it is not within TPO's domain to ascertain or apply 'benefit' test and further assessee's AE had in fact made payment to another company on cost-to-cost basis without involving any profit element for said service, matter was restored to TPO**



**[2023] 156 taxmann.com 201 (Hyderabad - Trib.)**

**IN THE ITAT HYDERABAD BENCH 'B'**

**Infor (India) (P.) Ltd.**

**v.**

**Deputy Commissioner of Income-tax\***

**RAMA KANTA PANDA, VICE PRESIDENT  
K. NARASIMHA CHARY, JUDICIAL MEMBER  
IT TP APPEAL NO. 193 (HYD.) OF 2023  
S.A. NO. 58 (HYD.) OF 2023  
[ASSESSMENT YEAR 2018-19]  
OCTOBER 26, 2023**

**I. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparability factors- Turnover filter) - Assessment year 2018-19 - Whether turnover is a relevant criteria for choosing companies as comparables in determining ALP in transfer pricing cases and application of tolerance range of turnover of ten times on both ends is proper - Held, yes - Assessee-company rendered software development services to its AE - Turnover of assessee was Rs. 49 crores - Whether companies having turnover of Rs. 3,061 crores, Rs. 703 crores and Rs. 1,144 crores, respectively, were incomparable to assessee - Held, yes [Paras 13 and 14] [In favour of assessee]**

**II. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of**

**arm's length price (Adjustments - Management fees) - Assessment year 2018-19 - Assessee-company paid management fees to its AE for certain services - TPO determined Nil ALP on ground that assessee had not derived any benefit from said transaction - In earlier year in assessee's own case in similar transaction it was held that it is not within TPO's domain to ascertain or apply 'benefit' test since same has to be ascertained from point of view of an assessee and that further assessee's AE had in fact made payment to another company on cost-to-cost basis without involving any profit element and matter was restored to TPO to re-examine issue - Whether it would be proper to restore issue to TPO to examine issue in light of finding of Tribunal - Held, yes [Para 18] [Matter remanded]**

## **FACTS-I**

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- Assessee-company rendered ITES to its AE.
- TPO suggested upward adjustment by rejecting certain comparables and selecting fresh comparables.
- On appeal; the assessee claimed that the assessee would be within range if some big companies were excluded.

## **HELD-I**

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- Following the foot prints of the Karnataka High Court in the case of *Pr. CIT v. Obopay Mobile Technology India (P.) Ltd.* [IT Appeal No. 586 of 2016, dated 23-7-2018] it is held that the turnover is a relevant criteria for choosing companies as comparables in determining the ALP in transfer pricing cases. [Para 13]
- A consistent view is taken that the application of tolerance range of turnover of ten times on both sides of assessee's turnover is proper. Following the same, the Assessing Officer is directed to adopt the same for a fresh search.
- With this view of the matter, the TPO is directed to take the range of turnover filter at ten times on both the ends. [Para 14]

## **CASE REVIEW**

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*Pr. CIT v. Obopay Mobile Technology India (P.) Ltd.* [IT Appeal No. 586 of 2016, dated 23-7-2018] (para 13) *followed*.

## **CASES REFERRED TO**

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*CIT v. Pentair Water India (P.) Ltd.* [2016] 69 taxmann.com 180/381 ITR 216 (Bom.) (para 9), *Obopay Mobile Technology India (P.) Ltd. v. Dy. CIT* [2016] 66 taxmann.com 119/157 ITD 982 (Bang. - Trib.) (para 9), *Pr. CIT v. Obopay Mobile Technology India (P.) Ltd.* [IT Appeal No. 586 of 2016, dated 23-7-2018] (para 9), *Pr. CIT v. New River Software Services (P.) Ltd.* [2017] 85

taxmann.com 302 (Delhi) (para 9), *Pr. CIT v. Oracle (OFSS) BPO Services (P.) Ltd.* [2018] 90 taxmann.com 388/253 Taxman 498/[2019] 416 ITR 54 (Delhi) (para 9), *TNS India (P.) Ltd. v. Dy. CIT* [2022] 142 taxmann.com 521 (Hyd. - Trib.) (para 9), *S&P Capital IQ (India) (P.) Ltd. v. Dy. CIT* [2022] 142 taxmann.com 568 (Hyd. - Trib.) (para 9), *Acusis Software India (P.) Ltd. v. ITO* [2018] 98 taxmann.com 183 (Kar.) (para 10), *Pr. CIT v. Swiss Re Global Business Solutions India (P.) Ltd.* [2018] 96 taxmann.com 643 (Kar.) (para 10), *iMedx Information Services (P.) Ltd. v. Dy. CIT* [2023] 150 taxmann.com 217 (Hyd. - Trib.) (para 10), *Chriscapital Investment Advisors (India) (P.) Ltd. v. Dy. CIT* [2015] 56 taxmann.com 417/232 Taxman 20/376 ITR 183 (Delhi) (para 11), *Akzonobel India (P.) Ltd. v. Addl. CIT* [2022] 145 taxmann.com 468 (Delhi) (para 16), *Taegu Tec India (P.) Ltd v. Dy. CIT (LTU)* [2017] 83 taxmann.com 81 (Bang. - Trib.) (para 16), *Yanfeng India Automotive Interior Systems (P.) Ltd. v. Jt. CIT (OSD)* [2023] 148 taxmann.com 332 (Ahd. - Trib.) (para 16), *DRHL India Services (P) Ltd. v. Dy. CIT* [2019] 102 taxmann.com 334 (Bang. - Trib.) (para 16), *Safran Engineering Services India (P.) Ltd. v. Asstt. CIT* [2018] 89 taxmann.com 77 (Bang. - Trib.) (para 16), *AB Mauri India (P.) Ltd. v. Dy. CIT* [2023] 147 taxmann.com 214 (Chennai - Trib.) (para 16), *Akzo Nobel India Ltd. v. Addl. CIT* [2022] 137 taxmann.com 369 (Delhi - Trib.) (para 16) and *Infor (India) (P.) Ltd. v. Dy. CIT* [IT Appeal No. 198 (Hyd.) of 2021, dated 6-10-2021] (para 17).

**Sunil Moti Lala**, AR *for the Appellant*. **Jeevan Lal Lavidiya**, CIT-DR *for the Respondent*.

## ORDER

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**K. Narasimha Chary, Judicial Member.** - Aggrieved by the order dated 25/01/2023, passed by the Learned Assessing Officer ("Ld. AO") in the case of M/s. Infor (India) Private Limited, ("the assessee") for the AY.2018-19, under section 143(3) r.w.s. 260 r.w.s. 144B of the Income-tax Act, 1961 (for short "the Act"), consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), assessee filed this appeal along with the Stay Application.

2. Brief facts of the case are that the assessee is a company engaged in distribution of software products and related services in India. It also provides software development and related IT services to the group companies apart from rendering shared support services to them. Assessee has got three segments, namely, software distribution, software development (including IT services) and shared services.

3. For the assessment year 2018-19, they have filed the return of income on 29/11/2018 declaring a total income of Rs. 49,36,15,990/- under normal provisions of the Act and Rs. 46,37,02,427/- under 115JB of the Act. In view of the international transactions entered into by the assessee with Associate Enterprises (AEs), the determination of the Arms Length Price ("ALP") of the international transactions was referred to the learned Transfer Pricing Officer (learned TPO). Learned TPO by order dated 31/07/2021 suggested upward adjustment in respect of the provision of software development services, allocation of management fee, provision of ITeS, interest on receivables, related IT services and purchase of assets and liabilities taken over and goodwill. Learned Assessing Officer, pursuant thereto passed draft assessment order on 02/09/2021 under section 143(3) of the Act determining the income of assessee at Rs. 1,03,55,94,435/-.

4. Aggrieved, the assessee filed objections before the learned DRP. Learned DRP by order dated

09/12/2022 issued certain directions, pursuant to which the learned Assessing Officer revised income of the assessee to Rs. 89,25,91,686/-, by way of order dated 25/01/2023 under section 143(3) read with section 260 and 144B of the Act. Hence the assessee is in appeal before us challenging the final assessment orders pursuant to the directions made by the Learned DRP.

5. Grounds No. 1, 2 and 16 to 18 of this appeal are general in nature. Grounds No. 3 to 8 relate to the Transfer Pricing adjustment on account of provision of IT enabled services (ITeS); Grounds No. 9 to 11 are in respect of interest on receivables; whereas Ground No. 12 is in respect of management fee. Grounds No. 13 and 14 are in respect of corporate issue relating to the ad hoc disallowance at 20% of the foreign outward remittances, short credit of TDS. At the outset, learned AR submitted that the assessee is not pressing the issue relating to the interest on receivables. Recording the same, Grounds No. 9 to 11 are dismissed.

6. Coming to the issue relating to the Transfer Pricing adjustment on account of the benchmarking of ITeS segment, relevant facts are that the turnover of the assessee during the assessment year 2018-19 was at Rs. 49.7 crores and the margin in this segment was at 11.29%. Assessee had chosen nine comparables with a median of 7.54% of margin. Learned TPO rejected certain comparables and on a fresh search, selected 17 comparables with a median of 24.84% and accordingly suggested an adjustment to the tune of Rs. 6.05 crores.

7. Though the assessee has been challenging the inclusion of 11 comparables, and exclusion of 10 comparables, at the outset of the argument, learned AR submitted that the assessee would be within the range if big companies like Infosys BPM Ltd., Tech Mahindra business Services Ltd., and E-Clerks Services Ltd., are excluded. He submitted that it would be necessary to consider other inclusions and exclusions, if only these three entities are found to be comparables to the assessee. Though he addressed arguments in respect of all the entities challenged *vide* Grounds No. 3 to 8, he laid a stress on these two comparables.

8. It is his argument that as compared to the turnover of the assessee at Rs. 49.7 crores, the turnover of Infosys BPM Ltd., Tech Mahindra business Services Ltd., and E-Clerks Services Ltd., is Rs. 3,061 crores, Rs. 703 crores and Rs. 1,144 crores respectively. He submits that in the earlier assessment years in assessee's own case, the hugeness of the turnover and also the value of the big brand of these companies was considered by the Co-ordinate Benches of the Tribunal and were excluded from the list of comparables with the assessee.

9. Basing on the decision of the Hon'ble Bombay High Court in the case of *CIT v. Pentair Water India (P.) Ltd.* [2016] 69 taxmann.com 180/381 ITR 216 followed in the case of *Obopay Mobile Technology India (P.) Ltd. v. Dy. CIT* [2016] 66 taxmann.com 119/157 ITD 982 (Bang. - Trib.)/[TS-20-ITAT-2016 (Bang)-TP] for the assessment year 2010-11, *Pr. CIT v. Obopay Mobile Technology India (P.) Ltd.* [IT Appeal No. 586 of 2016, dated 23-7-2018] and *Pr. CIT v. New River Software Services (P.) Ltd.* [2017] 85 taxmann.com 302 (Delhi), learned AR submitted that the turnover is obviously a relevant factor to consider the comparability. So also, on the basis of the decision of the Hon'ble Delhi High Court in the case of *Pr. CIT v. Oracle (OFSS) BPO Services (P.) Ltd.* [2018] 90 taxmann.com 388/253 Taxman 498/[2019] 416 ITR 54 (Delhi), view of the Co-ordinate Benches of the Tribunal in the cases of *TNS India (P.) Ltd. v. Dy. CIT* [2022] 142 taxmann.com 521 (Hyd. - Trib.) and *S&P Capital IQ (India) (P.) Ltd. v. Dy. CIT* [2022] 142

taxmann.com 568 (Hyd. - Trib.), he submitted that the brand value of an entity has a significant role in its ability to garner profits and negotiate contracts and, thus, although functionally two entities may be similar but brand does play its own role in price or cost determination and they would be incomparable.

10. Nextly, he submitted that the Hon'ble Karnataka High Court in the case of *Acusis Software India (P.) Ltd. v. ITO* [2018] 98 taxmann.com 183 (Kar.), approved the view taken by the Bangalore Bench of the Tribunal that the application of tolerance range of turnover of ten times on both sides of assessee's turnover was proper. Same was the view taken by the Hon'ble Karnataka High Court in the case of *Pr. CIT v. Swiss Re Global Business Solutions India (P) Ltd.* [2018] 96 taxmann.com 643 (Kar.). Consistent with the said view, the Hyderabad Bench of the Tribunal also in the case of *iMedx Information Services (P) Ltd. v. Dy. CIT* [2023] 150 taxmann.com 217 (Hyd. - Trib.) held that the application of tolerance range of turnover of ten times on both ends to fix the turnover filter would meet the ends of justice.

11. Per contra, learned DR vehemently disputed the objection of the assessee basing on the turnover and brand. By inviting our attention to the table relating to the analysis of the impact of turnover over profit margin of Infosys Technology Ltd., at page No. 22 of the learned DRP's order, learned DR submitted that over a period of 20 years, the turnover of this company has increased from Rs. 139 crores to Rs. 61.941 crores, but the OP/OR remained around 25.90% only with small fluctuations here and there. For the sake of completeness, we reproduce the relevant table hereunder:

(Rupees in crores)

Financial Year	Operating Revenues	Operating Cost	Operating Profit	OP/OC%	OP/OR %
2017-18	61,941	46,052	16,155	34,95	25,9
2016-17	59,516	43,640	15,876	36,37	26,68
2015-16	54,153	39,133	15,020	38,18	27,73
2014-15	47,825	34,089	13,736	40,29	28,72
2013-14	44,619	32,741	11,878	36,28	26,62
2012-13	37,022	26,586	10,436	39,25	28,19
2011-12	31,254	21,193	10,061	47,47	32,19
2010-11	25,385	17,703	7,682	43,39	30,26
2009-10	21,140	14,588	6,552	44,91	30,99
2008-09	20,264	14,424	5,840	40,49	28,82
2007-08	15,648	11,213	4,435	39,55	28,34
2006 07	13,149	9,377	3,722	40,23	28,69
2005-06	9,028	6,518	2,510	38,51	27,80

2004-05	6,860	4,802	2,058	42,86	30,00
2003-04	4,760	3,417	1,343	39,10	28,21
2002-03	3,622	2,568	1,054	41,04	29,10
2001-02	2,603	1,725	878	50,90	33,73
2000 01	1,900	1,263	637	50,44	33,53
1999-00	882	595	287	48,24	32,54
1998-99	508	355	153	43,10	30,12
1997-98	257	194	63	32,47	24,51
1996-97	139	103	36	34,95	25,90

He placed reliance on the decision of the Hon'ble Delhi High Court in the case of *Chryscapital Investment Advisors (India) (P.) Ltd. v. Dy. CIT* [2015] 56 taxmann.com 417/232 Taxman 20/376 ITR 183 (Delhi), for the principle that huge profit or a huge turnover, *ipso facto* does not lead to its exclusion.

**12.** We have considered these contentions in the light of the decided case law. Insofar as the turnover filter is concerned, Hon'ble Delhi High Court in the case of *Chryscapital Investment Advisors (India) (P.) Ltd. (supra)*, held that huge profit or a huge turnover, *ipso facto* does not lead to its exclusion; whereas in the case of *Pentair Water India (P.) Ltd. (supra)*, the Hon'ble Bombay High Court held that turnover is a relevant criteria for choosing companies as comparables in determining the ALP in Transfer Pricing cases. Hon'ble Karnataka High Court, however, in the case of *Obopay Mobile Technology India (P.) Ltd. (supra)*, having noticed the view taken by the Hon'ble Delhi High Court in the case *Chryscapital Investment Advisors (India) (P.) Ltd. (supra)*, and also the decision of the Hon'ble Bombay High Court in the case of *Pentair Water India (P.) Ltd. (supra)*, upheld the Tribunal order excluding certain entities from the list of comparables on the ground of huge turnover, while following the principle that where two views are possible on an issue, the view favourable to the assessee has to be adopted.

**13.** In these circumstances, following the foot prints of the Hon'ble Karnataka High Court in the case of *Obopay Mobile Technology India (P.) Ltd., (supra)*, we hold that the turnover is a relevant criteria for choosing companies as comparables in determining the ALP in Transfer Pricing cases.

**14.** Now turning to the next question as to the appropriate turnover filter, in all the decisions relied upon by the learned AR, a consistent view is taken that the application of tolerance range of turnover of ten times on both sides of assessee's turnover was proper. Following the same, we direct the learned Assessing Officer to adopt the same for a fresh search. With this view of the matter, we *set aside* the findings of the authorities below and direct the learned Assessing Officer/learned TPO to take the range of turnover filter at ten times on both the ends and conduct search afresh to take a plausible view. Grounds No. 3 to 8 are accordingly treated as allowed for statistical purposes.

**15.** Coming to Ground No. 12 relating to management fee, learned AR submitted that in the past

two years, this issue has been restored to the file of the learned Assessing Officer and in tune with the same, for this year also, this issue may be restored to the file of the learned Assessing Officer.

**16.** Learned DR submitted that there is a catena of decisions on this aspect and in the cases of *Akzonobel India (P.) Ltd. v. Addl. CIT* [2022] 145 taxmann.com 468 (Delhi), *Taegu Tec India (P.) Ltd v. Dy CIT (LTU)* [2017] 83 taxmann.com 81 (Bang. - Trib.), *Yanfeng India Automotive Interior Systems (P.) Ltd. v. Jt. CIT (OSD)* [2023] 148 taxmann.com 332 (Ahd. - Trib.), *DRHL India Services (P) Ltd. v. Dy. CIT* [2019] 102 taxmann.com 334 (Bang. - Trib.), *Safran Engineering Services India (P.) Ltd. v. Asstt. CIT* [2018] 89 taxmann.com 77 (Bang. - Trib.), *AB Mauri India (P.) Ltd. v. Dy. CIT* [2023] 147 taxmann.com 214 (Chennai - Trib.) and *Akzo Nobel India Ltd. v. Addl. CIT* [2022] 137 taxmann.com 369 (Delhi - Trib.). He, therefore, submitted that if the issue is restored to the file of the learned Assessing Officer/learned TPO, the learned TPO may be directed to take a view in the light of the decisions where it was held that the assessee has to demonstrate that the services were actually rendered by the AE and the assessee had actually received the same. Learned AR reports no objection.

**17.** We have gone through the observations of the Co-ordinate Benches of the Tribunal on the issue relating to the management fee for the assessment year 2016-17 in *Infor (India) (P.) Ltd. v. Dy. CIT* [IT Appeal No. 198 (Hyd.) of 2021, dated 6-10-2021] wherein this issue is covered by Ground No. 14. For the sake of completeness, we refer hereunder the relevant observations,-

"11. Next comes assessee's identical substantive grounds No. 14th and 15th seeking to allow management and consultancy fee involving ALP adjustments of Rs. 3,95,25,970/- and Rs. 1,00,01,279/-; respectively. Learned counsel vehemently contended before us that the lower authorities have erred in law and on facts in making both the impugned adjustments thereby taking "NIL" price as their market rate(s) in issue. And also that they have wrongly applied benefit test as well which is not sustainable in light of *CIT v. Cushman & Wakefield (India) Pvt. Ltd.*, [269 CTR 16] (Del) and *CIT v. EKL Appliances Ltd.* (2012) [345 ITR 241] (Del) that it is not within the TPO's domain to ascertain or apply the "benefit" test since the same has to be ascertained from the point of view of an assessee than questioning its wisdom by departmental authorities.

His next argument is that it is the assessee's AE had in fact made the impugned payments to M/s.KPMG on "cost to cost basis" only without involving any profit element therein. Learned counsel has quoted a catena of case law that such cost to cost arrangement itself forms a valid market comparable which could not be dis-regarded whilst adding the entire price as ALP adjustment.

The Revenue in turn has strongly supported both the impugned adjustment.

11.1 We have given our thoughtful consideration to rival contentions. We are of the view that the learned TPO needs to re-examine the entire issue in light of the assessee's foregoing submissions accordingly pin-pointing; prima-facie, a cost to cost reimbursement arrangement between itself, its AE and the ultimate payee M/s.KPMG *qua* the services in issue. We further wish to quote here the foregoing judicial precedents (*supra*) decision that the benefit test also not to be applied whilst determining "NIL Arm's Length Price" on the ground that the

taxpayer had not in fact derived any benefit from the international transactions in issue. The assessee shall also be at liberty to file its additional evidence; if any, in consequential proceedings as well.

The assessee's instant 14th and 15th substantive grounds are accepted for statistical purposes in above terms therefore."

**18.** On a careful consideration of the above arguments and the observation of the Co-ordinate Benches of the Tribunal, we deem it just and proper to *set aside* the findings and restore the issue to the file of the learned Assessing Officer/learned TPO to re-examine the issue in the light of the findings on this issue in ITA(TP) No. 198/Hyd/2021. We hold and direct so. Ground No. 12 is accordingly treated as allowed for statistical purposes.

**19.** On the aspect of adhoc disallowance of 20% of foreign outward remittances covered by Ground No. 13, learned AR submitted that the learned DRP did not consider the submissions of the assessee. He submitted that the draft assessment order was passed when the assessee was in the process of collating the data and the assessee submitted the same before the learned DRP. At page No. 3 of draft assessment order, it was mentioned that 20% of Rs. 1,36,00,85,339/-, the foreign remittances in the nature of FTS was proposed to be disallowed. Learned DRP took note of the financial statement at Note No. 30 and considered the figure Rs. 66,72,38,249/- at paragraph No. 2.70.9 but failed to comment on this discrepancy. According to the learned AR, learned DRP totally failed to consider the submissions made by the assessee on 20/09/2022. This according to him necessitates the *set aside* of the findings of the learned DRP and restoration of the issue to the file of the learned DRP through the learned Assessing Officer/learned TPO. He further submitted that the management fee of Rs. 6,81,76,677/- has been doubly disallowed as the same forms part of the foreign outward remittances, which issue was restored to the file of the learned Assessing Officer/learned TPO in the preceding years also. Lastly, he submitted that notice mandated under section 144B(1)(xii) of the Act was issued by the learned Assessing Officer. For all these reasons, he prayed that the issue may be restored to the file of the learned Assessing Officer/learned TPO for considering the above discrepancies. Learned DR reports no objection.

**20.** In these circumstances, we find the request of the learned AR reasonable and restore the issue to the file of learned Assessing Officer/learned TPO for considering the above enumerated discrepancies. Ground is accordingly treated as allowed for statistical purposes.

**21.** In respect of Ground No. 14 relating to the non-grant of credit of the tax deducted at sources to the tune of Rs. 80,963/- attributable to the Infor (Bangalore) Pvt. Ltd., which was amalgamated with the assessee with effect from 01/04/2015 and Rs. 48,204/- attributable to the assessee, we direct the learned Assessing Officer to verify the record and allow the same, if it is found to be correct and proper. Appeal of the assessee is accordingly treated as partly allowed for statistical purposes.

**22.** Since we disposed of the appeal on merits, the Stay Application becomes infructuous and the same is accordingly dismissed.

POOJA



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\*Partly in favour of assessee.