

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND  
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.66/Bang/2017
Assessment Year : 2012-13

M/s. ASM Technologies Ltd., No.80/2, Lusanne Court, Richmond Road, Bengaluru – 560 025. <b>PAN : AABCA 4362 P</b>	Vs.	DCIT, Circle – 1(1)(2), Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri. Suresh Muthukrishnan, CA
Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	23.06.2021
Date of Pronouncement	:	30.06.2021

**ORDER**

*Per N. V. Vasudevan, Vice President*

This is an appeal by the assessee against the final order of assessment dated 18.11.2016 of the DCIT, Circle –1(1)(2), Bengaluru, passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter called ‘the Act’), for Assessment Year 2012-13.

2. The assessee is engaged in the business of providing software development services, manpower supply and training. For Assessment Year 2012-13, the assessee filed the return declaring a total income of Rs.10,21,07,240/-. The assessee entered into transactions with its foreign AE. The transactions with AE were international transactions and in view of the

provisions of section 92 of the Act, the Arms Length Price (ALP) in respect of international transaction had to be determined. The assessee filed a Transfer Pricing study in support of its claim that the transactions with AE were at arm's length. A copy of the transfer pricing analysis by the assessee is at pages 109 to 159 of the assessee's Paper Book. In the Transfer Price Study (TP study), the assessee had only listed out software development services as an international transaction and justified the price by adopting Comparable Uncontrolled Price (CUP) as the Most Appropriate Method (MAM). The breakup of the revenues of the assessee on software development services, manpower supply and training services as per the TP study was as follows:

Particular	Amount in Rs.				Remarks
	Software	Manpower	Training	Total	
Revenue	169,162,021	542,255,226	1,604,560	713,021,807	Training Revenue included in other income
Less: Direct Cost as per the Cost center	96,962,182	424,168,510	853,000	521,983,692	
Management Salary apportioned based on the Turnover	9,922,419	31,806,686	94,118	41,823,222	
Administration cost apportioned based on the Turnover	9,519,086	30,513,788	90,292	40,123,166	
Total Operating Cost	116,403,686	486,488,984	1,037,409	603,930,080	
Operating Profit	52,758,335	55,766,242	567,151	109,091,728	
Operating Profit %	31.19%	10.28%	35.35%	15.30%	

3. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred by the AO u/s.92CA of the Act, adopted the profit margin of the assessee as follows:

Particulars	Amount (in Rs.)
Total Income	72,92,31,734
Less other income	1,78,14,487
Operating Income	71,14,17,247
Total Operating Cost	61,22,85,229
Operating Profit	9,91,32,018
OP/OC	16.19%

Reconciliation with the P& L	
Operating Profit as above	9,91,32,018
Add: Other Income	1,78,14,487
Less: Interest	1,59,38,713
Less: Loss on sales of asset	2,07,417
Less: Donation	5,45,500
Net Profit as per P&L	10,02,54,875

4. The TPO adopted Transaction Net Margin method (TNMM) as the Most Appropriate Method (MAM) as against the claim of the assessee that Comparative Uncontrolled Price Method (CUP) was the MAM. The TPO thereafter chose comparable companies and determined the ALP of the international transactions as follows:

**“12.4 Computation of Arm's Length Price:**

12.4.1 The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure B for details of computation of PLY of the comparables. Based on this, the arm's length price of the services rendered by the taxpayer to its AE(s) is computed as under:

Arm's Length Mean Margin on cost	22.63%
Less: Working Capital Adjustment	-0.43%
(As per Annex. C)	
Adjusted margin	23.06%
Operating Cost (in Rs.)	61,22,85,229
Arm's Length Price(ALP) (in Its.)	75,34,76,203
123.06% of Operating Cost)	
Price Received (in Rs.)	71,14,17,247
<b>Variation between the ALP and price received (in Rs.)</b>	<b>4,20,60,956</b>
5% of price received (in Rs.)	3,55,70,862
Adjustment (in Rs.)	<b>4,20,60,956</b>

<b><i>Since the variation is exceeding 5% of the International Transaction, adjustment is made</i></b>	
--	--

*The above shortfall of Rs. 4,20,60,956/- is treated as transfer pricing adjustment u/s 92CA in respect of software development segment of the taxpayer's international transactions.*

13. *In view of the above order the assessing officer shall enhance the income of the assessee by Rs. 4,20,60,956/- on the issue u/s 92CA.”*

5. The AO passed the draft assessment order incorporating the additions suggested by the TPO. The assessee filed objections before the Disputes Resolution Panel (DRP). The DRP confirmed the order of the TPO. The AO passed the final Order of Assessment as per the directions of the DRP. Against the final Order of Assessment, the assessee has preferred the present appeal before the Tribunal.

6. The assessee has raised many grounds of appeal challenging the comparables chosen by the TPO and the selection as the MAM. However, at the time of hearing, the learned Counsel submitted that the ground Nos.6 and 12 are decided and other grounds would not be pressed.

7. Ground No.6 raised by the assessee reads as follows:

*“6. Without prejudice to the above, the authorities below while adopting the TNMM Method have erred by making an adjustment u/s. 92CA of the Act on the whole Operating Cost incurred by the eligible Assessee without making a bifurcation between the Related Party transactions and non-related party transactions, failing to appreciate that the same is contrary to the directions of the Hon'ble ITAT in the assessee's own case for the assmt year 2009-10.”*

8. As far as ground No.6 raised by the assessee is concerned, the factual aspect that requires to be seen is that the assessee addressed a letter to the TPO dated 04.01.2016 in which the assessee gave details of segmentwise break-up of operating margins of the various segments as follows:

- (a) A detailed statement showing segment-wise break-up of turnover and operating margin without bifurcating between related and unrelated parties.
- (b) A statement showing operating margin from sales to unrelated parties.
- (c) Statement showing the operating margin on the related parties transactions (Sales).
- (d) Statement showing the operating margin on the related parties transactions (Purchases)

These statements have been set out in the subsequent paragraphs of this order. The plea of the assessee was that it made transactions in 3 segments, Viz., (a) Software Development (b) Manpower Supply and (c) Training. The operating margin as a whole was 31.19% in case of Software Development, 10.28% in case of Manpower Supply and 35.35% in case of Training. In case of unrelated parties the transfer the segmentwise margin was as under:

- (i) 31.19% in case of Software Development
- (ii) 7.00% in case of Manpower Supply and
- (iii) 35.00% in case of Training

The assessee also pointed out that it had common transactions with related and unrelated parties only in the segment of Manpower Supply. The assessee pointed out that its operating margin was 20% with related parties which is much higher than the margin with unrelated parties i.e., 7%. The assessee submitted that it had transactions with related and unrelated parties and margin can be compared within the company transactions.

9. Along with the letter, following breakup of transaction with unrelated parties and related parties was given by the assessee.

**Operating profit – Unrelated party**

Particular	Amount In Rs.		
	Software development	Manpower Supply	Training
Revenue	169,162,021	187,677,822.15	1,604,560.00
Less: Direct Cost as per the cost center	96,962,182	152,639,736.85	853,000.00
Management Salary apportioned based on the Turnover	9,922,419	11,008,486.89	94,117.55
Administration cost apportioned based on the Turnover	9,519,086	10,561,007.21	90,291.81
Total Operating Cost	116,403,686	174,209,231	1,037,409.36
Operating Profit	52,758,335	13,468,591	567,150.64
Operating Profit %	31.19%	7%	35%

**Operating profit – Sales to Related party transaction**

Particular	Amount in Rs.		
	Software development	Manpower Supply	Training
Revenue	-	79,829,404	-
Less: Direct Cost as per the cost center	-	54,477,853	-
Management Salary apportioned based on the Turnover	-	4,682,498	-
Administration cost apportioned based on the Turnover	-	4,492,161	-
Total Operating Cost	-	63,652,511	-
Operating Profit	-	16,176,893	-
Operating Profit %	-	20%	-

**Operating profit – Related party purchase**

Particular	Amount in Rs.		
	Software development	Manpower Supply	Training
Revenue	-	274,748,000	-
Less: Direct Cost as per the cost center	-	217,050,920	-
Management Salary apportioned based on the Turnover	-	16,115,701	-
Administration cost apportioned based on the Turnover	-	15,460,621	-
Total Operating Cost	-	248,627,242	-
Operating Profit	-	26,120,758	-
Operating Profit %	-	9.51%	-

10. The TPO's order is also dated 04.01.2016 and he has not taken cognizance of this letter which was filed only on 4.10.2016 by the Assessee.

11. In the objections filed by the assessee before the DRP, the assessee had taken specific objections that the Transfer Pricing Officer has erred on facts and in law in evaluating the international transactions applying TNMM at entity level by comparing the net operating profit margin of the taxpayer with uncontrolled net operating profit margin of uncontrolled enterprises engaged in the business of Offshore Software development which activities are significantly different from those of the eligible assessee who is primarily engaged in and deriving revenue from Onsite software services. Without prejudice to the above, the Assessee also submitted that the TPO while adopting the TNMM Method has erred by ignoring the segmental results of the onsite and offshore business segments as submitted by the eligible assessee and treating the entire business of the eligible assessee as Software development service when the eligible assessee has significant income from provision of Onsite software services, the margins of which are significantly lower than offshore software development activity. Without prejudice to the above, the Assessee further submitted that the TPO has failed to appreciate that the eligible assessee did not have any related party transactions in the Software development segment.

12. The DRP dealt with the aforesaid objections in the following manner:

*“Having considered the submissions, is noticed by us that the assessee has not maintained separate segmental details for the onsite operations in its annual reports and only now claimed, based on its internal reports that too without any certificate from an auditor, that the comparison should be made in respect of AE segment only and further, in the absence of similar details of segmental information for the comparable companies, it would not be possible to adopt such a comparison at micro*

*level. Further, the assessee failed to substantiate before us that the company is predominantly engaged in Onsite development of software abroad(outside India), further, the comparables selected by the TPO are also having the companies which have onsite and off-shore revenues. Thus, the above objection is not: found acceptable, however, the objections with regard to specific comparables selected by the TPO are discussed and decided subsequent paragraphs.”*

13. Learned Counsel for the assessee submitted that the addition can be made only in respect of transactions with AE and not with unrelated parties and in this regard, he placed reliance on the decision of the ITAT in assessee’s own case for Assessment Year 2009-10 in IT(TP)A No.158/Bang/2014 order dated 30.09.2014. The relevant portion of the observations of the Tribunal were as follows:

*“As far as this ground is concerned, the value of the international transaction between the assessee and its AE- PTI is a sum of Rs.20,07,38,607/-. The TPO however applied the AM of the comparables on the total turnover of the assessee which includes transactions with non-AE also. The adjustment have been clone by taking transactions at the entity of transaction with the AE. The adjustment done by the TPO are as follows :*

<i>Particulars</i>	<i>(in Lakhs)</i>
<i>Amount on which Adjustment Made ie Total Operating Cost</i>	<i>4,083.00</i>
<i>Margin worked out by Learned TPO</i>	<i>24.32%</i>
<i>Shortfall as Computed by TPO on Total OC</i>	<i>452.00</i>
<i>Amount Paid for Services received from Pinnacle Talent Inc</i>	<i>2,007.00</i>
<i>Margin worked out by Learned TPO</i>	<i>24.32%</i>
<i>Transfer Price</i>	<i>2,495.10</i>
<i>Actual Price Received</i>	<i>2,342.70</i>
<i>Actual Adjustment ought to have been made by Learned TPO</i>	<i>152.40</i>



*The learned counsel for the assessee submitted that in the following decisions, whereas the Tribunal have taken the view that determination Of ALP has to be restricted to only transactions with AE and not the total revenue of the assessee:*

- *Tyson Kruppp (2013) 55 SOT) 497 ; and*
  - *Phoenix Mecano (India) Pvt. Ltd., - ITA.7361/Mum/2012 [A. Y 200809]*
- In the aforesaid decisions it has been held that TP adjustment can only be applied to international transactions of the assessee with AE and it cannot be applied at entity level. Following the decisions of the Tribunal referred to above, we allow ground no.3 raised by the assessee.”*

14. He also brought to our notice that the Hon'ble Karnataka High Court in the appeal filed against the aforesaid order, dismissed the same holding no question of law arose for consideration from the order of the Tribunal vide order dated 13.07.2018 in ITA No.86/2018. He also submitted that the AO/TPO should be directed to make the adjustment only in respect of international transaction and not on the turnover of the assessee at the entity level. The learned DR relied on the directions of the DRP.

15. We have considered the rival submissions. The contention of the assessee is primarily acceptable and the decision cited by the learned AR in respect of the assessee's contention is supportive of such conclusion. However, the learned DRP has given a finding that the figures as given by the assessee needs to be verified. According to the DRP, the assessee has not maintained separate segmental details and the claim has been based only on internal reports without any certificate from the auditor. In such an event the DRP should have called upon the Assessee to furnish the required details. When in principle adjustment cannot be made in respect of transaction with unrelated parties u/s.92 of the Act, the DRP should have called for the required details, rather than not adjudicating even on the principle. We are therefore of the view that in principle we agree to the proposition put forward by the assessee in ground No.6. We, however, remand the issue to the AO/TPO to call upon the assessee to given the correct

figures based on certificate from the auditor and thereafter make adjustment in respect of ALP only in respect of transactions with AE. Thus, the ground of appeal is treated as allowed for statistical purposes.

16. The next ground that requires adjudication is ground No.12. The issue raised in Gr.No.12 is that the TPO has erred in treating the Exchange fluctuation gain amounting to Rs.1,34,61,664 as non-operating in nature and excluded the same from computation of Operating margins of the eligible Assessee while computing the arm's length price of the international transactions. As far as ground No.12 is concerned, the plea of the assessee was raised in the form of additional ground before the DRP and the DRP dealt with the same in the following manner.

### ***“12.3 Additional Ground of Objection***

*The learned TPO has erred in treating the Exchange fluctuation gain amounting to Rs.1,34,61,664 as non-operating in nature and excluded the same from computation of Operating margins of the eligible assessee while computing the arm's length price of the international transactions.*

*The assessee has raised an additional ground of Objection for admission by the DRP during the course of hearing. This being more of a question of Law, the same is admitted for adjudication and directions*

**Decision:** *We are of the view that, as per Section 144C(2), the assessee is required to file it's/his objections within 30 days of receipt of the draft assessment order. It is noticed by us that neither was the above issue raised before the TPO during the proceedings under section 92CA(3) nor before the Assessing Officer during the proceedings under section 143(3). As per sub-section (6) of Section 144C, the DRP is required to issue directions after considering the draft order and the objections filed by the assessee under section 144C(2). Further, as per sub section (11) of Section 144C, directions prejudicial to the interest of revenue cannot be issued unless an opportunity of being heard is given to the Assessing Officer. In the*

*case of the assessee, the objections under section 144C(2) were filed on 05.10.2016. The additional ground is filed after 249 days from the date of receipt of the draft assessment order. Considering the delay in filing the above objection without giving any justification for the delay, also considering the fact that there is a strict time limit for issuing the directions under section 144C(12), the provisions of section 144C(6) and 144C(11), we are not inclined to admit the above additional ground, the same is accordingly rejected.*

*Even otherwise, it is noticed by us that the assessee itself in its TP Documentation considered the Foreign exchange fluctuation as non operating. Further, it is noticed by us from the order passed by the TPO under Section 92CA(3) of the Act for Asst Year 2009-10 that the TPO has considered the Forex Fluctuation as non operating in nature and assessee has not raised any objection against such treatment. Therefore, for the comparability analysis, in our view the consistency needs to be maintained. Accordingly, the objection is otherwise non maintainable.”*

17. Aggrieved by the aforesaid direction of the DRP, the assessee has raised ground No.12 before the Tribunal.

18. We have heard the rival submissions. The reasons given by the DRP for not accepting the plea of the Assessee raised in Gr.No.12 in our view are not acceptable. Under section 144C(5) and( 6) of the Act, the DRP is competent to entertain an additional ground. The admitted position of law is that the additional ground has been raised well within the time within which the DRP is expected to give its direction. As far as the merits of the claim made by the assessee is concerned, the legal position with regard to considering foreign exchange fluctuation as a part of the operating profit is well settled and it has been held in the following cases:

- SAP LABS India(P.) Ltd., vs ACIT - 44 SOT 156 (Bang..)
- M/s.Electronics for Imaging India Pvt. Ltd. vs DCIT - IT(TP)A No.212/Bang/2015
- M/s. KHF Components Pvt.Ltd vs ITO - IT(TP)A No.1748/Bang/2013
- Amba Research India (P.) Ltd. vs DOT - IT(TP)A No.1376/Bang/2014

19. In the aforesaid decisions, foreign exchange has been treated as the part of the operating profits, if they are integral to the process of the export of the software or if they arise out of operating income of the assessee. In view of the aforesaid decision, we are of the view that the foreign exchange gain has to be treated as part of the operating profit of the assessee. We hold and direct accordingly.

20. In the result, appeal of the assessee is treated as partly allowed.

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

Sd/-  
**(B. R. BASKARAN)**  
**Accountant Member**

Sd/-  
**(N. V. VASUDEVAN)**  
**Vice President**

Bangalore.  
Dated: 30<sup>th</sup> June, 2021.  
/NS/\*

Copy to:

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

By order  
Assistant Registrar,  
ITAT, Bangalore.