

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
I.T.A. No. 5015/Del/2010 AND
STAY APPLICATION NO. 107/DEL/2010
A.Y. : 2006-07

1096

M/s Cincom Systems India Pvt. Ltd.,
D-74, Himalaya House,
23, KG Marg,
New Delhi - 110 001
(PAN/GIR NO. : AAACC8712E)
(Appellant)

vs. DCIT, CIRCLE 3(1),
New Delhi

(Respondent)

Assessee by : Ms. Rano Jain and Sh. V. Mohan,
CA
Department by : Mr. Stephen George, C.I.T.(D.R.)

ORDER

PER SHAMIM YAHYA: AM

This appeal by the Assessee and Stay Application by the assessee are directed with respect to the order of the Assessing Officer dated 21.9.2010 and pertains to assessment year 2006-07.

2. Draft order of the Assessing Officer was passed pursuant to direction u/s 144C by the Dispute Resolution Panel dated 30.8.2010.

3. At the outset, Id. counsel of the assessee assailed that the Dispute Resolution Panel (DRP) has not at all considered the assessee's submissions and passed a very laconic and non-speaking direction. In this regard, Id. counsel of the assessee also referred to the order sheet noting dated 23.12.2006 by this tribunal in assessee's



own case pertaining to stay. In the said order sheet, it was observed that order of the DRP is not a speaking order. Assessee vide its ground has also raised that direction given by the DRP are not valid and bad in law as the same has been given without considering the arguments, evidence and factual error pointed out by the assessee and without giving any reason for not accepting the same.

4. In this case, the DRP's adjudication regarding Arm's Length Price is as under:-

"2. Arm's Length Price u/s. 92C(3):

2.1 The assessee company has raised eight grounds of objection with respect to Transfer Pricing related issues. The assessee company has contended namely that

- (a) The statutory onus to establish that assessee's case is covered under any of the clauses u/s 92C(3) has not been discharged by Id. TPO.
- (b) Ld. TPO did not apply comparability criterion judicially and disregarded comparables identified by the assessee.
- (c) The TPO failed to make appropriate adjustments for varying risk profiles of the assessee vis-a-vis the comparables.
- (d) The TPO rejected the assessee's claim to use multiple year data for computing the arms length price and has used single year updated data.



- (e) TPO has failed to make appropriate adjustment to account for differences in the working capital employed by the assessee vis a vis the comparables.
- (f) TPO has disregarded transfer pricing regulations and judicial precedence and order passed is bad in law.
- (g) TPO has failed to allow the appellant the benefit of downward variation of 5% in determining the arms length price.
- (h) The TPO has not included the software testing services in computation of arms length price.

2.2 The DRP has considered the objections raised by the assessee company and has also gone through the submissions filed. No merit is seen in the objections of the assessee on the issue of initial reference to the TPO by the Assessing Officer. This matter is settled by the Courts and the reference made by the Assessing Officer is valid. The order of the TPO is abundantly clear that the assessee was given sufficient opportunity of being heard.

2.3 Regarding the choosing of comparables, the DRP has considered the companies selected by the TPO. The view of the DRP is that Satyam Computers should be removed from the list of comparable companies chosen by the TPO as comparables and the order be modified accordingly.

2.4 The TPO has taken the current year data which is again objected by the assessee. As per the provisions of law, it is



mandated that only the current year data is to be used
the TPO has done so.

2.5 The objections of risk adjustment and functional comparability were raised by the assessee company before the TPO also and have been examined in detail by the TPO in his order; therefore we decline to interfere on this issue."

5. We have heard both the counsel and perused the records. We find that Section 144C envisages following on the part of the DRP:-

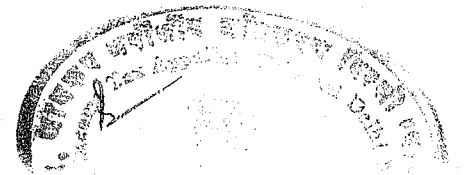
"(5) The Disputes Resolution Panel shall, in case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely :-

- (a) draft order;
- (b) objections filed by the assessee;
- (c) evidence furnished by the assessee;
- (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
- (e) records relating to the draft order;



- (f) evidence collected by, or caused to be collected by, it; and
- (g) result of any enquiry made by, or caused to be made by, it.
- (7) The Dispute Resolution panel may, before issuing any directions referred to in sub-section (5), -
- (a) make such further enquiry, as it thinks fit; or
- (b) cause any further enquiry to be made by any income tax authority and report the result of the same to it.
- (8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.
- (9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.
- (10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.
- (11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.



(12) No direction under sub-section (5) shall be issued a nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received."

6. As against the above provisions of the Act here the DRP has passed a very laconic order. Ld. counsel of the assessee contended that voluminous submissions have been made before the DRP against the draft assessment order. But the DRP has brushed aside everything without even a whisper of the assessee's objections and the submissions of the assessee. Under the circumstances, in our opinion, the directions of the DRP are too laconic to be left uncommented. The directions given by the DRP almost tantamounts to supervising the Assessing Officer's draft order and in that sense it can be equated that appellate jurisdiction being exercised. We find that Hon'ble Apex Court in the case M/s Sahara India (Farms) Vs. CIT & Anr. in [2008] 300 ITR 403 has held that even "an administrative order has to be consistent with the rules of natural justice".

7. In this regard, we also note that Hon'ble Jurisdictional High Court in the case of Vodafone Essar Ltd. vs. Disputes Resolution Panel vide order dated 2.12.2010 the Hon'ble Court has held that when a quasi judicial authority deals



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the lis, it is obligatory on its part to ascribe cogent and germane reason as the same is a heart and soul of the matter and further the same also facilitates appreciation when the order is called in question before the superior forum. Accordingly, the Hon'ble Court has remanded the matter for fresh adjudication.

8. Under the circumstances, in the background of the aforesaid discussion and precedent above, we find that considerable cogency in the assessee's counsel submission that the assessee's submission has been brushed aside without giving proper consideration by the DRP.

9. Ld. Departmental Representative could not controvert this proposition.

10. Under the circumstances, in our considered opinion, the issue is remitted to the files of the DRP to consider the issue once again to pass a proper and speaking direction u/s 144C of the IT Act. Since we are remitting the matter to the files of the DRP for passing a fresh direction, merits of the case are not being adjudicated. Needless to add that the assessee should be given adequate opportunity of being heard.

Assessee's Stay Application No. 107/Del/2010

11. Since we have already remitted the matter to the files of the DRP. The said stay application by the assessee has become infructuous and hence, dismissed as such.



12. In the result, the appeal filed by the Assessee is allowed for statistical purposes and Stay Application filed by the assessee is dismissed as infructuous.

Order pronounced in the open court on 11/02/2011.

[RAJPAL YADAV]
JUDICIAL MEMBER

Date 11/02/2011

SRB

Copy forwarded to: -

- ✓ 1. Appellant 2. Respondent
5. DR, ITAT

[SHAMIM YAHYA]
ACCOUNTANT MEMBER

TRUE COPY

By Order,

सहायक पंजीकार
Deputy Registrar
ITAT Delhi Benches
Income Tax Appellate Tribunal
नई दिल्ली / New Delhi

