

IT/ILT : Where authorities below had not made any distinction between 'USA' transactions and 'non-USA' transactions, mark-up in MAP proceedings, determined at 18.82 per cent for USA transactions, in ITES segment adopted for 92.86 per cent of total transactions done with AEs shall be adopted for 7.14 per cent of non-USA transactions also

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**[2018] 93 taxmann.com 30 (Bangalore - Trib.)
IN THE ITAT BANGALORE BENCH ' A '
Amazon Development Centre (India) (P.) Ltd.**

v.

**Income Tax Officer, Ward 11(1), Bangalore
SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND JASON P. BOAZ, ACCOUNTANT MEMBER
IT (TP) APPEAL NOS. 76,78 AND 1387 (BANG.) OF 2014
APRIL 27, 2018**

K.R. Vasudevan, Adv. for the Appellant. C.H. Sundar Rao for the Respondent.

ORDER

Jason P. Boaz, Accountant Member - These are a set of three appeals; cross appeals by the assessee and revenue for Assessment Year 2008-09 directed against the order of the Commissioner of Income Tax (Appeals)-IV, Bangalore dt.19.12.2013 and the assessee's appeal directed against the order of the CIT (Appeals) – IV, Bangalore dt.15.12.2014 for the Assessment Year 2009-10. Since common issues and arguments put forth were similar for both these assessment years, these appeals were heard together and we therefore deem it appropriate to dispose these appeals off by way of this consolidated order.

Assessment Year : 2008-09.

2. Briefly stated, the facts of the case are as under :-

2.1 The assessee company, is a wholly owned subsidiary of Amazon.com Inc., USA and is engaged in the business of rendering Software Development Services (SWD) and IT Enabled Services (ITES) to its Associated Enterprises (AE) located in USA as well as in other countries. The assessee filed its return for Assessment Year 2008-09 on 26.9.2008 declaring total income of Rs.26,059 after claiming deduction of Rs.2,73,40,440 under Section 10A of the Income Tax Act, 1961 (in short 'the Act'). In view of the international transactions entered into by the assessee in the year under consideration, a reference was made to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of its international transactions. The TPO passed an order under Section 92CA of the Act dt.31.10.2011 proposing the following Transfer Pricing Adjustments :-

(i) Software development services segment :	Rs.4,44,90,888.
(ii) ITES segment :	Rs.3,42,26,973.
Total :	Rs.7,87,17,861

The order of assessment was concluded under Section 143(3) r.w.s. 92CA of the Act vide order dt.17.2.2011, wherein the assessee's income was determined at Rs.8,46,69,607; in view of addition on account of Transfer Pricing Adjustment of Rs.7,87,17,861 and disallowance of the assessee's claim for

deduction under Section 10A of the Act to the extent of Rs.59,25,686.

2.2 Aggrieved by the order of assessment dt.17.2.2011 for Assessment Year 2008-09, the assessee filed an appeal before the CIT (Appeals) –IV, Bangalore. The CIT (Appeals) vide the impugned order dt.19.12.2013, allowed the assessee partial relief by (i) upholding the contention of the assessee on the issue of application of turnover filter and (ii) granting relief in the matter of computation of deduction under Section 10A of the Act.

Assessment Year : 2009-10

3. For Assessment Year 2009-10, the assessee filed its return of income on 30.09.2009 declaring income of Rs.3,07,24,633. The case was selected for scrutiny and in view of the international transactions entered into by the assessee in this year, a reference was made to the TPO for determining the ALP of this international transactions. The TPO vide order under Section 92CA of the Act dt.29.1.2013 proposing the following Transfer Pricing Adjustments :

(i) Software development services segment :	Rs.5,90,21,801.
(ii) ITES segment :	Rs.2,60,38,856.
Total :	Rs.8,50,60,657

The order of assessment was concluded under Section 143(3) r.w.s. 144C of the Act vide order dt.30.04.2013, wherein the assessee's income was determined at Rs.9,46,17,689; in view of addition of Rs.8,50,60,657 on account of Transfer Pricing Adjustment and (ii) disallowance of the assessee's claim for deduction u/s.10A of the Act to the extent of Rs.59,72,945.

3.2 Aggrieved by the order of assessment dt.30.4.2013 for Assessment Year 2009-10, the assessee preferred an appeal before the CIT (Appeals) – IV, Bangalore, who allowed the assessee partial relief vide the impugned order dt.15.9.2014.

Assessee's appeal for A.Y. 2008-09 – IT(TP)A No.76/Bang/2014.

4.1 Aggrieved by the order of the learned CIT (Appeals) dt.19.12.2013 for Assessment Year 2008-09, both the assessee and revenue preferred cross appeals before the Tribunal. The assessee also filed an appeal before the Tribunal directed against the order of the CIT (Appeals) dt.15.9.2014 for Assessment Year 2009-10.

4.2 Simultaneously, apart from the appellate proceedings, the assessee had filed application for Mutual Agreement Procedure (MAP) proceedings under Article 27 of the India-USA DTAA with respect to the Transfer Pricing Adjustments made by the Department of the revenue earned from the SWD/IT and ITES segments from its USA resident AEs. The MAP proceedings were concluded and the decisions on the margins to be adopted was conveyed by CBDT's letter in F.No.480/10/2011-FTD-1 dt.28.10.2015. Pursuant to this, the assessee filed revised grounds of appeals vide letter dt.6.6.2016. In the revised grounds of appeal, the assessee has withdrawn the grounds of appeal related to the USA transactions and has retained the grounds of appeal related to the non-USA transactions.

4.3.1 Before us, the learned Authorised Representative for the assessee submitted the CBDT letter dt.28.10.2015 and written submissions on the issue. The learned Authorised Representative drew the attention of the Bench to the submissions made in the Revised Grounds of appeal filed pursuant to the MAP Resolution, wherein the assessee has submitted that the agreed mark-up applied in the MAP Resolution for USA transactions may also be applied for non-USA transactions as well.

4.3.2 The learned Authorised Representative took us through the order of the CBDT conveying the MAP Resolution and submitted that the assessee has international transactions in both the IT / SWD Services Segment as well as the ITES Segment and that the assessee has gone in for MAP Resolution in respect of both these segments for its USA transactions. It was submitted that all transactions in the IT /

SWD Services Segment were USA transactions only and since MAP Resolution had been carried out for USA transactions, the transactions related to the IT / SWD Services Segment stand resolved and the appeal filed on this issue stands withdrawn.

4.3.3 As far as the ITES Segment is concerned, the learned Authorised Representative submitted that the USA transactions are to the tune of Rs.35,70,26,829 and the non-USA transactions are Rs.2,74,51,772 and therefore the non-USA transactions constitute 7.14% of the total transactions. While the USA transactions stand resolved pursuant to MAP Resolution, the appeal survives only to the extent of adjustment related to non-USA transactions in the ITES Segment, which is only Rs.24,43,806 based on the ALP of 18.82% as determined by the MAP authorities. It was submitted that the margin of 18.82% determined by the MAP authorities for USA transactions may be applied for non-USA transactions also, as neither the assessee nor the TPO had made any distinction between USA transactions and non-USA transactions and treated the entire turnover as 'one'. Considering that the non-USA transactions constitute only 7.14%, the margin adopted by MAP authorities for USA transactions may be applied to non-USA transactions as well.

4.3.4 In support of this contention, the learned Authorised Representative placed reliance on (i) the decision of the ITAT, Mumbai Bench in the case of *J.P. Morgan Services Pvt. Ltd. v. DCIT* in ITA No.8987/Mum/2010 dt.30.11.2015 (ii) of the co-ordinate bench of this Tribunal in the case of *CGI Information Systems & Management Consultants Pvt. Ltd. v. DCIT* in IT(TP)A No.439 & 452/Bang/2011 dt.21.4.2017. It was submitted that the facts of the assessee in the case on hand are similar; in the sense that, in those cases, the non-USA transactions constituted only 4% and therefore, the Tribunal has applied the margin decided by the MAP authorities for USA transactions and to non-USA transactions as well.

4.3.5 The learned Authorised Representative also submitted that in another decision, the co-ordinate bench of this Tribunal in the case of *Global e-Business Operations Pvt. Ltd.*, in its order in IT(TP)A No.297/Bang/2014, where the Tribunal did not agree for applying MAP margin for non-USA transactions and remanded the issue back to the TPO to compute the margin for non-USA transactions. It was submitted that in the above case, the facts are different, since therein, no plea was made for applying the USA margins to non-USA transactions and further, the non-USA transactions were about 1/3 rd the total transactions. Therefore, it was deemed appropriate to remand the matter to the file of the CIT (Appeals) to examine the issue as to whether the margin decided for USA transactions can be applied for non-USA transactions as well.

4.3.6 It was submitted that in the case on hand, however, the non-USA transactions constituted only 7.14% of the assessee's turnover in the ITES Segment and further a specific plea has been made before the Tribunal for adopting the same margins for non-USA transactions. Therefore, the decision of the ITAT, Mumbai Bench in the case of *J.P. Morgan Services Pvt. Ltd.* (supra) which was followed by the co-ordinate bench in the case of *CGI Information Systems & Management Consultants Pvt. Ltd.* (supra) is squarely applicable to the assessee in the case on hand.

4.4 Per contra, the learned Departmental Representative vehemently opposed the proposal of the learned Authorised Representative and submitted that the matter ought to go back to the file of the TPO for a decision as to whether the margin adopted for USA transactions can be adopted for non-USA transactions.

4.5.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. Before us, the main argument / contention of the learned Authorised Representative for the assessee was that since the mark-up in MAP proceedings, determined at 18.82% for USA transactions apply for 92.86% of the total transactions done with the AEs, then without prejudice to the other submissions, for the remaining 7.14% of the transactions also, the same

treatment should be given, same bench marking should be done and ALP mark up of 18.82% should be applied; more particularly due to the fact that the authorities below have not made any distinction between 'USA' transactions and 'non-USA' transactions. According to the learned Authorised Representative, although the assessee can contest these adjustments, but in order to end the litigation, the assessee has made this submission notwithstanding the fact that no adjustment should have been made at all. In this regard, our attention was also drawn to the Annual Report / Accounts of the assessee, TP Study submitted to the TPO and the orders of the authorities below to show that no distinction has been made between the USA and non-USA transactions.

4.5.2 We have carefully perused and considered the arguments urged by both sides and the material on record. We observe that the CBDT letter in F.No.480/10/2011-FTD-1 dt.28.10.2015 has been issued in the case on hand in respect of the resolution of MAP proceedings for Assessment Years 2007-08 to 2009-10 on behalf of the Foreign Tax & Tax Research Division - I, APA-1, CBDT, New Delhi wherein it has been confirmed that for Assessment Year 2008-09, for USA transactions under the ITES Segment, the margin has been determined at 18.82% as against a margin of 24.47% determined by the TPO. It has been further clarified by way of 'Note' in the said letter that apportionment between US and non-US ALP and Transfer Pricing Adjustment has been carried out by the APA-1 section of FT and TR Division of CBDT on the basis of 'US' and 'non-US' revenue. It is further noted that in the annual accounts of the assessee, no distinction has been made between 'US' and 'non-US' transactions. Similarly, in the orders passed by the authorities below also no distinction has ever been made between 'US' and 'non-US' transactions. Even before us, no distinction in facts or nature of transactions has been brought on record. In these factual circumstances of the case on hand, in our considered view, whatever margin has been determined for 92.86% of the transactions, the same should be determined / applied for the remaining 7.14% transactions as well.

4.5.3 This proposition finds support in the decisions of the ITAT, Mumbai Bench in the case of *JP Morgan Services Pvt. Ltd. (supra)* which has been followed by the co-ordinate bench of this Tribunal in the case of *CGI Information System Management Consultants Pvt. Ltd. (supra)*. In this regard, the relevant portion at para 3.6 of the order in the case of J P Morgan Services Pvt. Ltd. is extracted hereunder :-

" 3.6 We have gone through the arguments made by both the sides and also the material placed before us for our consideration. It is noted that letter dated 9th April 2015 in Fno.480/13/2010-FTD-1 has been issued in the case of the assessee company under MAP proceedings for A.Y.2006-07 to 2010-11 by the DCIT(OSD), APA-I on behalf of the Foreign Tax and Tax Research Division -I, Central Board of Direct Taxes, New Delhi wherein it has been confirmed that for A.Y.2006-07, for US related transactions, the margin has been determined at 14.38% as against margin of 21.58%, as was determined by the Transfer pricing officer (TPO). It has been further clarified by way of note in the said letter that apportionment between 'US' and 'non-US' ALP and TP adjustment had been margined out by the APA section (of FT and TR Division) on the basis of 'US' and 'non-US' revenue. It is further noted from the perusal of the annual accounts of the assessee company that aggregate turnover has been shown at Rs.47,30,521/-, and no distinction has been made between the 'US' and 'non-US' transactions. Similarly in the orders passed by the lower authorities also no such distinction as ever been made by any of the authorities. Under these circumstances, in our considered view, whatever margin has been determined for the 96% of the transactions, same margin should be determined for the remaining 4% transactions as well. It is worth noting that, even before us, no distinction in facts or nature of transactions has been brought out on record. Therefore, in our considerate view, mark-up of 14.38% should be determined for the remaining 4% transactions pertaining to 'non-US' entities as well. The assessee gets part relief accordingly."

Following the above decision of the ITAT, Mumbai Bench in the case of *J P Morgn Services Pvt. Ltd. (supra)*, we hold that the margin adopted for US transactions, in ITES Segment, as was decided in the MAP Resolution, shall be adopted for non-US transactions as well. The TPO/A.O. is directed accordingly.

5. In the result, the assessee's appeal for Assessment Year 2008-09 is partly allowed for statistical purposes.

Revenue's appeal - A.Y. 2008-09 - IT(TP)A No.78/Bang/2014

6. Revenue has raised the following grounds in its appeal :-

1. The order of the Learned CIT (Appeals) is opposed to law and the facts and circumstances of the case.
2. The CIT(A) erred in directing the AO to follow the ratio laid down by the Hon'ble Court in the case of *Tata Elxsi Limited 349 ITR 98* and exclude Rs 2,09,56,789 being Internet charges and Rs. 1,12,12,383 being expenses incurred on foreign travel in foreign currency from the total turnover also while computing the deduction u/s 10A of the I.T. Act as the decision of the High Court is binding, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to section 10A provides that such expenses are to be reduced only from the export turnover.
3. The CIT(A) erred in not appreciating the fact that the jurisdictional High Court's decision in the case of *Tata Elxsi Limited 349 ITR 98* has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.
4. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.
5. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.

7. **Grounds 1, 4 & 5**, being general in nature, no adjudication is called for thereon.

8. Ground Nos.2 & 3 – Deduction u/s.10A of the Act.

8.1 The only issue for adjudication before us in Revenue's appeal is in respect of the exclusion of certain expenses, incurred in foreign currency on account of internet charges and foreign travel in connection with the delivery of services abroad, both from export turnover as well as total turnover while computing the deduction under Section 10A of the Act. This issue is no longer *res integra*, and is squarely covered by the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd. (349 ITR 98) (Kar)* in which it has been held that if certain expenses are excluded from export turnover, then the same should also be excluded from the total turnover. Since the learned CIT (Appeals) has decided this issue following the judgment rendered in the case of *Tata Elxsi Ltd. (supra)*, we find no infirmity in the order of the learned CIT (Appeals) on this issue and accordingly uphold the same. Consequently Grounds 2 & 3 raised by Revenue on this issue are dismissed.

9. In the result, Revenue's appeal for Assessment Year 2008-09 is dismissed.

Assessee's appeal for A.Y. 2009-10 in IT(TP)A No.1387/Bang/2014.

10.1 The only issue for consideration in this appeal before us is whether the margin adopted by the authorities in MAP Resolution, in this year, for USA transactions can be applied to non-USA transactions also. The facts of the case on hand on this issue are also similar to that of A.Y. 2008-09, which has been discussed, considered and adjudicated by us in the earlier part of this order. In this year i.e. A.Y. 2009-10, also, these were no non-USA transactions in the IT/SWD Segment and the entire transactions in the IT/SWD Segment, being only USA transactions have been resolved under MAP.

10.2 However, as regards the ITES Segment, there were non-USA transactions also, which constituted 7.72% of the total transactions. Also as per MAP Resolution, a margin of 15.27% has been accepted under MAP for US transactions in the ITES Segment for Assessment Year 2009-10. For the reasons discussed in detail for Assessment Year 2008-09 at paras 4.1 to 4.5.3 of this order (supra), we hold and direct that the margin adopted under MAP for US transactions shall be adopted for non-US transactions as well. The TPO/A.O. are accordingly directed.

11. In the result, the assessee's appeal for Assessment Year 2009-10 is partly allowed for statistical purposes.

12. To sum up, Assessee's appeals for Assessment Year 2008-09 and 2009-10 are partly allowed for statistical purposes and Revenue's cross appeal for Assessment Year 2008-09 is dismissed.

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