

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I-2', NEW DELHI
BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER
ITA No. 2380/Del/2010
AY: 2003-04**

DCIT, Circle 13(1) New Delhi	vs.	M/s Nokia India (P) Ltd. 1 & 2 Floor, Tower A SP Infocity Industrial Plot no.243 Udyog Vihar Ph I, Dundahera Gurgaon 122 016 PAN: AAACN21790R
(Appellant)		(Respondent)

Appellant by	Sh. Vikash Srivastava, Adv.
Respondent by	Sh. HK Choudhary, CIT, DR
Date of Hearing	29.11.2017
Date of Pronouncement	06.12.17

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present appeal has been filed by revenue against order dated 25/03/10 passed by Ld.CIT(A)-XX, New Delhi for assessment year 2003-04 on following grounds of appeal:

- “1. That on the facts and circumstances of the case and in law the Ld.CIT(A) erred in deleting the disallowance of Rs.57,23,201/- out of foreign travelling expenses made by the AO.*
- 2. That on the facts and circumstances of the case and in law the Ld.CIT(A) erred in restricting the comparables to 11 companies, and in rejecting the remaining 39 comparables selected by the TPO for the*

purpose of comparability analysis to determine the Arm's length price in assessee's case.

3. That on the facts and circumstances of the case and in law the Ld.CIT(A) erred in allowing relief to assessee company on the issue of NET R&D segment amounting to Rs.51,62,628/- and in the NIC R&D segment amounting to Rs.38,68,161/- (thereby allowing total relief of Rs.90,30,789/- on issue of arm's length pricing).

4. The appellant craves to be allowed to add, delete or amend any other grounds of appeal."

2. Brief facts of the case are as under:

The assessee filed its return of income on 02/12/03 declaring total income of Rs.70,62,48,750/-. The case was selected for scrutiny and notices under section 142(1) were issued. In response to the statutory notices, representative of assessee appeared and filed necessary details as called for and the case was discussed with Ld. AO.

2.1. During the assessment proceedings Ld.AO observed that assessee is 100% subsidiary of corporation, Finland and is incorporated under Companies Act, 1956. It was observed that assessee has its registered office at Delhi and branches at Bangalore, Mumbai, Hyderabad and Ahmadabad. Ld.AO observed that assessee is engaged in trading of mobile phones and their accessories and installation of network equipments. In addition to this, assessee also has research and development centre at Hyderabad and Bangalore. Ld.AO after considering the submissions and details advanced by assessee, passed assessment order making following additions/disallowances:

Sl. No.	Particulars	Amount in Rs.
1.	Addition on account of Foreign Travelling Expenses	57,23,201
2.	Addition on account of provisions for warranty	5,48,86,377
3.	Addition on account of marketing expenses	39,98,939

As there were international transactions entered into by assessee with its AE's Ld. AO referred them to Transfer Pricing Officer (TPO). Ld. TPO observed that assessee during the year under consideration had entered into following international transactions with its associated enterprises which was reported in form 3 CEB filed along with return of income:

Sl. No.	International Transaction	Method	Value (In Rs.)
1.	Purchase of phones and accessories	RPM	6,49,91,49,131
2.	Purchase of telecom equipment	TNMM	2,24,25,631
3.	Services rendered by NIC Hyderabad	TNMM	9,41,99,186
4.	Services rendered by Net R&D	TNMM	12,58,01,989

In respect of the transaction referred at serial No. 1 and 2 in the above table, Ld.TPO accepted arm's length price determined by assessee.

2.2. However, he disputed transactions at serial No. 3 and 4, which were subjected to TP adjustments. It has further been submitted that there is no dispute regarding profile of assessee and method adopted for computing arm's length price. Assessee in the TP

documentation carried out comparables search and determined arm's length price, using PLI as OP/TC in the set of comparable finalised which had average margin of 10%. Assessee was of the opinion that in respect of the transactions at serial numbers 3 and 4, the margins obtained by assessee in its case was at 5.2% and therefore fell within the +/-5% range, as compared to comparables. However Ld.TPO rejected the comparables selected by assessee and introduced a set of 52 comparables by way of fresh search. Ld.TPO recommended adjustment of Rs.23,640,603/-.

2.3. Aggrieved by the draft assessment order, assessee preferred appeal before the Ld. CIT (A).

2.4. The Ld. CIT (A) while deciding the corporate issue deleted the addition made by assessing officer on behalf of foreign travel expenses. Further in respect of transfer pricing issues Ld. CIT (A) restricted comparables to 11 companies for determining the arms length price of assessee.

3. Aggrieved by the order of Ld. CIT (A) revenue is in appeal before us now.

4. Ground No. 1

This ground has been raised by revenue against the deletion of foreign travel expenses made by Ld. AO.

4.1. At the outset Ld.Counsel submitted that the issue stands settled by various decisions of this Tribunal in assessee's own case from assessment year 1998-99, 1999-00, 2000-01, 2001-02 and 2002-03. He also submitted that, consistent view taken by this Tribunal for assessment year 2000-01 and 2001-02 has been

upheld by Hon'ble jurisdictional High Court. The Ld.Counsel referred to the orders for the above referred assessment years which are placed in paper book volume 2, the details of which are as under:

S. No.	Asst.Yr.	Covered by	Paper book /Page NO./Volume number
1.	1998-99	ITAT in ITA no.2146/Del/10 vide order dated 16/12/00 followed High Court order dated 14/07/09 in ITA No. 841 of 2009 and 842 of 2009, for assessment year 2000-2001 and 2001-02	ITAT order at page 593-595, volume 2 High Court order at page 578 of volume 2
2.	2000-01 & 2001-02	ITAT order in as well as High Court order dated 14/07/09 in ITA No. 841 of 2009 and 842 of 2009	ITAT order at page 558-559 of volume 2 High Court order at page 578 para 4 & page 573 and 575 of volume 2
4.	2002-03	ITAT order in ITA No. 242/del/2010 with CO No. 77/del/2010 and ITA No. 178/del/2010 vide order dated 31/10/14.	Page 932-933 of volume 3

4.2. On the contrary Ld. CIT DR placed reliance upon the order passed by Ld. AO.

4.3. We have perused the submissions advanced by both the sides in the light of the records and decisions relied upon by Ld. Counsel in assessee's own case for various assessment years placed in the paper book before us.

4.4. Ld.AO disallowed 20% of total foreign travel expenses during the year under consideration. Ld.CIT(A) recorded that for assessment year 2000-01 and 2001-02 the disallowance was restricted to 10% of the total expenses incurred for foreign travel, against which Revenue preferred appeal to this Tribunal. This Tribunal observed as under:

“15. We have heard both the parties and perused record placed on record. Apropos ground no.1, we are of the view that assessee had filed sufficient evidence in the form of foreign travel expenses incurred by the assessee on its employees who went abroad to carry out business activities of the assessee in respect of various services relatable to software, maintenance etc. Apart from expenditure incurred on foreign tours of employees. CIT(A) has observed duration of stay, purpose of visit etc. In our considered view, assessee filed sufficient compliance to establish its claim that the foreign travel expenditure incurred on employees was in relation to business. CIT(A) has held that AO’s action was not proper. However, at the end of his order, without giving any reason has retained 10% by observation supra. Hence, an addition of 10% out of foreign travel expenses appears to be reasonable. Once, the AO’s findings are not found to be incorrect, then CIT(A) was under obligation to explain what he means by reasonableness. In our view, once the assessee discharged its burden and revenue does not rebut, the same in factual terms no disallowance called for. Hon’ble High Court in the case of SA Builders (supra) has held that the expression purpose of business has provided connotation and includes expenditure incurred

for commercial expediency. In our view, assessee has established that the expenditure on foreign travel of employees was in the realm of commercial expediency. In view thereof, we hold that the assessee is entitled to the claim of travelling expenditure, 10% retained by CIT(A) is deleted. This ground of the assessee is allowed and revenue's sole ground in this behalf is dismissed."

Hon'ble High Court upheld the findings of this Tribunal by observing as under:

"We find from the order of CIT as well as ITAT that the explanation given by assessee was that this provision was made on the basis of past experience and other relevant consideration. The very fact that the provision for lesser amount is made in spite of the fact that as well as had indicates in this issue would itself demonstrate that there was a proper application of mind on the part of the assessee in making this provision. Merely on this ground, the AO could not have disallowed the provision to the extent of 25% and thus the ITAT rightly allowed the entire provision towards warranty. We may also observe here that such provision has been made in preceding as well as subsequent AYs and has been allowed in full by the ITAT and affirmed by this Court. Therefore, no question of law arises."

4.5. Ld. Counsel submitted that, for the year under consideration, there has been no change in factual position in so far as foreign travel expenses are concerned. He submitted that for the year under consideration foreign travel expenses incurred were Rs.2,86,16,007/-. Further Ld.CIT(A) categorically observed that these expenses have been incurred in accordance with international

travel policy of Nokia group, which regulates and facilitates the movement of personnel of the assessee across international locations, and there is no expenses which could be termed as not incurred for purposes of assessee company. From the submissions made by assessee before the authorities below, it appears that assessee has filed all the relevant details in respect of travelers and their status of employment with Nokia.

4.6. We therefore do not find any reason to interfere with the consistent approach followed by Ld.CIT(A) which is supported by various orders of this Tribunal for various assessment years and which have been affirmed by Hon'ble jurisdictional High Court in appeal filed for Assessment Year 2000-2001 and 2001-02.

4.7. Accordingly this ground raised by revenue stands dismissed.

5. Ground No. 2 & 3

These grounds raised by revenue are in respect of comparables deleted by Ld.CIT (A), in respect of NET R&D segment and NIC R&D segment.

5.1. The Ld.AR submitted that assessee renders contract services to Nokia Internet communication research Centre, Hyderabad, where research on network security appliances and network management solutions are carried out.

Assessee had earned margins of 5.2% and 5.1% respectively from its NIC Hyderabad and Net R&D divisions. Ld. AR submitted that this very well fell within last/-5% range by taking OP/TC as PLI. The most appropriate method used for computing ALP was TNMM. Ld.TPO during the proceedings raised apprehensions regarding

comparables selected by assessee for determining the ALP for NIC R&D division and NET R&D division. Ld.TPO was therefore of opinion that assessee being a high-end service provider cannot be compared with comparables that has significant controlled party transactions and are engaged in functionally diverse area of activities. He therefore rejected the comparables selected by assessee and on the basis of fresh search selected, new set of comparables containing 52 companies having mean margin of 21% being OP/TC. Ld.TPO after allowing 5% adjustments for differential working capital, determined arm's length ratio to be at 16%, thereby making an adjustment of Rs. 23,640,603/- in the hands of assessee.

5.2. In case of NET R&D segment, Ld. CIT (A) relied upon order passed by his predecessor officer for assessment year 2002-03. Ld. CIT (A) observed that his predecessor for assessment year 2002-03 had adopted a threshold of 25% for detecting companies having RPT. Accordingly Ld. CIT(A) on the present facts of the case also rejected the company is having RPT more than 25% and revised the list of comparables and computed the margin at 12.13% by applying OP/TC.

5.3. So far as NIC R&D segment is concerned, as the remuneration from the segment was exceeding plus/-5% range, the difference was confirmed by the him thereby restricting adjustment at Rs.6,202,876/-.

5.4. Aggrieved by the action of Ld. CIT (A) revenue is in appeal before us now.

5.5. Ld. CIT DR submitted that Ld. TPO applied a lower turnover filter for the purpose of comparability analysis, whereas Ld. CIT (A) directed this filter and applied a new filter of having upper sales. He submitted that Ld. CIT (A) has merely followed the order of his predecessor for assessment year 2002-03 without remanding the issue back to ld.TPO. He submitted that Ld. CIT (A) while changing the filter did not give an opportunity to ld.TPO.

5.6. He submitted that while applying RPT filter Ld. CIT (A) has not analysed the financial data of comparables vis-a-vis assessee, for the year under consideration and has merely blindly followed the decision of his predecessor for assessment year 2002-03.

5.7. Ld.CIT.DR vehemently argued that assessee had not even chose identical comparables for assessment year 2002-03 in order to consider the facts similarly. He submitted that Ld.CIT (A) while deleting the comparables for assessment year 2002-03 had remanded the issue to ld.TPO for his comments. Ld. CIT DR submitted that no proper opportunity was granted by Ld. CIT (A) while excluding companies from the list of comparables. He submitted that this ground may be set aside to ld.TPO for proper verification of facts as per law.

5.8. On the contrary Ld.AR submitted that identical issue decided for assessment year 2002-03 has been upheld by Hon'ble High Court, which is placed in paper book volume 3 at page 1050. He therefore argued that the issue stands covered in favour of assessee by the decision of this Tribunal in ITA No. 242 and 178/del/2010 and CO No. 77/del/2010 vide order dated 31/10/14, as well as by

jurisdictional High Court in ITA No. 676/2015 vide order dated 04/09/2015 for assessment year 2002-03.

5.9. We have perused the submissions advanced by both the sides in the light of records placed before us as well as the orders passed by this Tribunal and Hon'ble Jurisdictional High Court in assessee's own case for assessment year 2002-03.

5.10. We have perused the categorical findings of this Tribunal in order dated 31.10.2014 passed for Assessment Year 2002-03. It is observed that this Tribunal granted adjustment of +/-5% to margin of comparables, considering the economic downturn experienced during the year owing to the 11th September disaster. It is further observed that for the year under consideration the same principle cannot be applied as there is no economic downfall that has been experienced. Further it is observed that for assessment year 2002-03 Ld. TPO had applied filter to reject certain companies submitted by assessee whose ratio of depreciation to the total cost was less than 5% and more than 50%. However Ld. CIT (A) for that assessment year observed that Ld. TPO did not apply the same filter to the companies selected by him. It was on this reason that a remand was called for from Ld. TPO. This Tribunal for assessment year 2002-03 gave a categorical finding that as the filter has been applied and acted upon by Ld. TPO partially it cannot be applied because the companies favouring the assessee on this filter was already excluded by Ld. TPO which cannot be brought back and therefore upheld the rejection of the balance companies by applying the same filter by Ld. CIT (A). It is further observed that Ld. CIT (A)

for assessment year 2002-03 had obtained a remand report in order to exclude the companies having sales more than 50 crores, as Ld. TPO for that assessment year had rejected the company is having sales less than 5 crores without having any upper.

5.11. Under these circumstances, we do not see any similarity between the facts that existed for the year under consideration, and that with assessment year 2002-03. We refer to certain observations by this Tribunal in its orders dt. 13.10.14 for Assessment Year 2002-03, in respect of turnover filter that has been applied to the comparables which is reproduced hereunder:

“39. After considering the rival submissions and perusing the relevant material on record, we find that the assessee’s turnover under this segment is to the tune of Rs.9.72 crores. The TPO excluded the companies with the turnover of less than Rs.5 crore without applying any upper limit of the turnover. The preliminary question which looms large before us is whether the application of this filter is correct? In this regard, it is relevant to note that the computation of arm’s length price under the Indian transfer pricing provisions is embodied in section 92C of the Act. Sub-section (1) of this section provides that the arm’s length price in relation to an international transaction shall be determined by any of the given methods, being the most appropriate method, having regard to certain factors. Proviso to sub section (2), which assumes significance for the present purpose, states that: ‘where more than one price is determined by the most appropriate method, the arm’s length price shall be taken to be the arithmetical mean of such

prices'. In contrast, some countries have adopted the interquartile range, which is also called the midspread or middle fifty, instead of arithmetic mean of all, as used in India. When arithmetic mean is taken of the all the otherwise comparable companies, it tends to iron out the differences due to higher or lower size of a company or vacillating profitability rates. A company otherwise found to be functionally comparable cannot be excluded either on the ground of higher or lower profit rate or higher or lower turnover. There is no mention in the language of the provisions for the exclusion of potential comparable companies simply on account of high or low turnover or profit rate. The Special bench of the Tribunal in *Maersk Global Centres (India) (P) Ltd. vs. ACIT* (2014) 147 ITD 83 (Mum) (SB) has also held that potential comparables cannot be excluded merely on the ground that their profit is abnormally higher. There can be no justifiable reason to exclude such high or low profit companies unless it is shown that such high or low profit was due to abnormal factors. Same logic applies to the high or low turnover companies also. The mere fact that a company has a high or low turnover can be no reason to justify its exclusion if it is otherwise functionally comparable. The exclusion of companies on such a rationale runs contrary to the express provisions of the Act.

40. At this stage, we consider it our duty to go through the judgment of Hon'ble Jurisdictional High Court in *CIT vs. Agnity India Technologies (P) Ltd.* (2013) 219 Taxman 26 (Del). In that case, the assessee was a captive unit providing software services to its associated enterprises. The Hon'ble High Court directed the

exclusion of Infosys Ltd. from the list of comparables, which list otherwise included several companies with huge turnover. The exclusion was ordered on account of the giantness of this company, which was, in turn, determined by seeing the cumulative effect of several factors, including risk profile, nature of services turnover, ownership of branded/proprietary products, onsite vs. offshore services, expenditure on advertisement and R&D etc. The higher turnover was only one of the criterion and not the sole criteria for exclusion of this company. In view of the above discussion, we hold in principle that no potentially comparable company can be expelled from the list of comparables simply for the reason of high or low turnover.

41. Adverting to the facts of the instant case, it is seen that the assessee's turnover under this segment amounted to less than Rs.10 crore. The TPO has applied the turnover filter by setting a lower limit of turnover at Rs.5 crore without setting any upper ceiling of turnover. We fail to comprehend any legally sustainable reason for applying the filter setting a lower limit of turnover at around half of assessee's turnover and leaving the upper limit uncapped. It is trite that law does not permit a person to both approbate and reprobate. This proposition has sanction of the Hon'ble Supreme Court in *RN Gosain vs Yashpal Dhir* (1992) 4 SCC 683. Under this rule, a person cannot be permitted to blow hot and cold in the same breath. As TPO has himself applied lower limit at half of assessee's turnover, there is justification in applying some upper limit as well. Taking a holistic view of the matter, we approve the view taken by the Ld.CIT(A) in the

present peculiar facts and circumstances by fixing the upper limit of turnover filter at Rs.50 crore. The situation would have been different if the TPO had either set no or a nominal lower limit of the turnover filter, leaving upper limit open. In that situation, there would have been no reason to set any upper turnover filter as well. Ergo, we countenance the conclusion drawn by the Ld.CIT(A) in the present unusual circumstances.”

5.12. We therefore agree with the contentions of Ld. CIT DR and remit this issue back to the file of Ld.TPO for proper verification of the comparables and applying filters as per law.

6. In the light of the above discussion, these grounds raised by the revenue stands allowed for statistical purposes.

7. In the result the appeal filed by the revenue is allowed partly for statistical purposes.

Order pronounced in the open court on 06.12.2017.

Sd/-

(N.K.SAINI)
ACCOUNTANT MEMBER

Sd/-

(BEENA A PILLAI)
JUDICIAL MEMBER

Dt. 06.12.2017

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

S.No.	Details	Date	Initials	Designation
1	Draft dictated on Dragon	29/11/17		Sr. PS/PS
2	Draft placed before author	05/12/17		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			