

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
(Through Video Conferencing)**

**BEFORE
SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 7696/Del/2017
Asstt. Year 2013-14

BT GLOBAL COMMUNICATIONS INDIA PVT. LTD. 11 th Floor, Eros Corporate Tower, Opp. International Trade Tower, Nehru Place, New Delhi Delhi Pin 110 019 PAN AAACG1534A (Appellant)	Vs.	ADDL. CIT SPECIAL RANGE-2 NEW DELHI. (Respondent)
---	-----	--

Assessee by:	Shri Nageswar Rao, Adv. & Ms. Sherry Goyal, Adv.
Department by :	Shri Surender Pal, CIT(DR)
Date of Hearing	03/09/2020
Date of pronouncement	08/09/2020

ORDER

PER R.K. PANDA, AM

This appeal filed by the assessee is directed against the order passed u/s 143(3) r.w.s 144C of the Income Tax Act 1961 for the assessment year 2013-14.

2. The grounds raised by the assessee are as under :-

“Based upon the facts and circumstances of the case and in law, the learned Assessing Officer (‘AO’) has erred, in passing the assessment order under section 143(3) read with section 144C of the Income-tax Act, 1961 (‘the Act’) after considering the adjustments proposed by the learned Transfer Pricing Officer (‘TPO’) in his order passed under section 92CA(3) of the Act and subsequently confirmed by the Hon’ble Dispute Resolution Panel (‘DRP’).

Each of the ground is referred to separately, which may kindly be considered independent of each other and without prejudice to each other.

That on the facts and circumstances of the case and in law,

1. *The TPO/AO/DRP have erred, in law and on facts and circumstances of the case in making an adjustment of INR 1,00,69,37,657 to the total income of the appellant, without the existence of an international transaction under section 92B of the Act requiring determination of arm’s length price (‘ALP’) thereof.*
2. *The TPO/AO/DRP have erred, in law and on facts and circumstances of the case, in making an upward adjustment on ‘protective basis’, without appreciating*
 - 2.1 *that the substantive adjustment (including adjustment for all future years) alleging business restructuring has already been made in AY 2010-11; and*
 - 2.2 *that a similar protective adjustment has been deleted by the Hon’ble DRP in AY 2011-12*
3. *The TPO/AO/DRP have erred by not adopting a consistent approach as adopted by their office in AY 2011-12, since a similar protective adjustment has been deleted by the Hon’ble DRP in AY 2011-12*
4. *The TPO/AO/DRP have erred, in law, by not prescribing any method for the purpose of re-determination of ALP, thereby rendering the order under section 92CA(3) of the Act passed by the TPO as illegal, null and void.*
5. *The TPO/ AO/ DRP have erred in computing the ALP by applying a hypothetical price that would have been charged between related enterprises in controlled circumstances, as the ALP and thereby proposing an adjustment to the appellant’s income.*
6. *The TPO/AO/DRP have erred in holding in rejecting the functions, assets and risks analysis (‘FAR’) for the year under consideration by the appellant in accordance with provisions of the Act read with the Income-tax Rules, 1962 (‘the Rules’) and modifying the same for determination of ALP of the alleged inter-company transaction, to hold that the same is not at arm’s length*
7. *The TPO/AO/DRP have erred in proposing the adjustment to the income of the appellant for AY 2013-14, by arbitrarily*
 - 7.1 *rejecting the economic analysis undertaken by the appellant as part of its Transfer Pricing documentation;*

- 7.2 *not appreciating the fact that appellant's economic analysis and determination of ALP of its international transactions is consistent with its FAR profile; and*
- 7.3 *Not appreciating the fact that the applicant, even after allegedly being characterized as a risk bearing entity, is earning a higher operating margin in comparison with the comparable companies bearing routine risks, as demonstrated in the economic analysis.*
8. *The TPO/AO/DRP have erred, in law and on facts and circumstances of the case, by relying on the contentions and approach adopted by his predecessor in AY 2010-11, without undertaking any analysis on his own account, thereby ignoring the fact that principles of res judicata do not apply to tax assessment proceedings.*
9. *The TPO/AO/DRP have erred, in law and facts and circumstances of the case, by erroneously making a protective assessment in the case of the appellant without appreciating that there is no ambiguity as regards the ownership of the income.*
10. *The TPO/AO/DRP have erred, in law and facts and circumstances of the case, by violating of the principle of double jeopardy and proposing an addition on the transaction of business restructuring on which the taxpayer has already been penalized in AY 2010-11.*
11. *The TPO/AO/DRP have made certain arithmetical errors while computing the impugned adjustment to the total income of the appellant.*
12. *The AO/DRP has erred on facts and in law, in initiating penalty proceedings under section 271(1) (c) of the Act.*

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of providing telecom services under ILD,ISP and Voice Mail/Audiotex Services license and earns service revenues from provision of such services. It filed its return of income on 29th November 2013 declaring total income of Rs. 42,98,91,290/-. Since the assessee had entered into certain international transactions, the AO referred the matter to the TPO for determination of ALP of the international transactions. The TPO during the TP assessment proceedings noted that the

assessee has entered into the following international transactions:-

Sr. No.	Name of Transaction	Amount
1	Purchase of Fixed Assets	649,169
2	Provision of network connectivity services	2,369,310,891
3	Availing of network connectivity services	2,957,877,426
4	Cost reimbursement paid/payable	6,646,305
5	Interest Received/ receivable on overdue receivables	48,114,854

4. The TPO noted that BTGC India, incorporated on 8th October 1992 acquired a license to act as an international telecom carrier operating in India. The assessee carries international telecom traffic in and out of India. BTGC India provides Multiprotocol Label Switching (‘MPLS’) and other telecom connectivity services. For providing network connectivity services to its customers, BTGC India also avails network connectivity services from its Associated Enterprises (“AEs”). Similarly for providing network connectivity services to its customers, AEs of BTGC India avail network connectivity services from BTGC India.

5. Rejecting the various explanations given by the assessee, the TPO proposed an upward adjustment of Rs. 1006937657/- to the total income of the assessee. The AO accordingly, in the draft assessment order, passed on 20th December 2016 added the same to the total income of the assessee.

6. The assessee approached the DRP who upheld the action of the AO/TPO by observing as under :-

“In this case, the substantive adjustment has been made by the TPO in assessment year 2010-11 due to change in transfer pricing policy Pertaining to the BT Global Services ("BTGS") division and introduction of the new Standard Transfer Pricing Policy ("STPP") which was implemented from 1 August 2009. The TPO has used the Discounted Cash Flow (DCF) of subsequent years till assessment year 2013-14 and terminal value in assessment year 2014-15 considering it as a perpetuity from this year onward and assessed the difference in total value (explicit +terminal) at Rs.723.16 Cr. In assessment year 2010-11, this matter is sub-judice. During the year under consideration the undiscounted value of profit pre-restructuring has been worked at Rs.153.94 Cr in the working of TPO given in the order for assessment year 2010-11. This undiscounted value of pre-restructuring profit has been considered as the ALP by the TPO for this year. The assessee has shown the income of Rs.53.24 Cr. in AY 2013-14. The difference of these two figures amounting to Rs.100.69 Cr. has been proposed as adjustment u/s 92CA for the relevant year under consideration on protective basis. Since, the addition on substantive basis by considering the discounted cash flows of this year in AY 2010-11 is sub- judice, to protect the interest of revenue, the protective adjustment on the basis of undiscounted prerestructuring profits made by the TPO is justified. DRP is not inclined to interfere with the order of TPO.”

7. The AO accordingly in the final assessment order dated 27th October 2017 added the same to the total income of the assessee on protective basis.

8. Aggrieved with such order of the AO/TPO/DRP the assessee is in appeal before the Tribunal.

9. Ld. Counsel for the assessee submitted that the only issue involved in the present appeal related to protective adjustment on account of business restructuring that has take place in asstt. Year 2010-11.He submitted that the TPO/DRP have made adjustment on substantive basis for the assessment year 2010-11. However, since proceedings in assessment year 2010-11 were subjudice, protective adjustment was made for assessment year 2013-14. He submitted that similar protective adjustments were also made for the assessment years 2011-12, 2012-13 and 2014-15.

10. Ld. Counsel submitted that in MAP for the assessment years 2010-11, 2011-12, 2012-13 the issue of business restructuring was decided. Accordingly assessee was to receive one time compensation from its AE in assessment year 2010-11. He submitted that for assessment year 2011-12 and 2012-13, the

protective adjustment made by the TPO was to be withdrawn in toto i.e there would not be any adjustment in assessment years 2011-12 and 2012-13 on protective basis. For the above proposition he relied on the MAP resolution dated 29th January, 2018. He submitted that in assessment year 2014-15 the DRP in assessee's own case vide order dated 27th August 2018 held that since the transactions under consideration has already been brought to tax on substantive basis in MAP resolution dated 29th January, 2018 there is no basis for protective adjustment. Accordingly, the addition was deleted. He accordingly submitted that for the present assessment year also, the protective addition made by the AO / TPO which has been upheld by the DRP should be deleted.

10.1 Ld. DR on the other hand submitted that the MAP resolution came after the orders passed by the AO/TPO/DRP. He accordingly submitted that he has no objection if the matter is restored to the file of the AO/TPO for determination of the issue afresh in the light of the MAP resolution dated 29th January, 2018.

11. We have considered the rival arguments by both sides, perused the orders of the AO/TPO/DRP and the paper book filed

on behalf of the assessee. The only issue to be decided in the present appeal relates to protective adjustment on account of business restructuring that has taken place in assessment year 2010-11. We find that TPO/DRP have made adjustment on substantive basis in assessment year 2010-11. However, since the proceedings in assessment year 2010-11 were subjudice, protective adjustment was made in the impugned assessment order making an addition of Rs. 100,69,37,657/- which is in line with similar addition for assessment year 2011-12, 2012-13 and 2014-15. We find the MAP resolution was passed on 29th January, 2018 which is much after the order passed by the AO/TPO/DRP. Under these circumstances we deem it appropriate to restore the issue to the file of the AO/TPO for deciding the issue afresh in the light of the MAP resolution dated 29th January, 2018 and the order passed by the DRP in assessee's own case for assessment year 2014-15 vide order dated 7th August, 2018. The AO/TPO shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

12. In the result the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on 8th September, 2020.

sd/-

sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 08/09/2020

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi