

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH '1-2' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1118/Del./2014
(ASSESSMENT YEAR : 2009-10)**

Boeing International Corporation vs. ITO, Ward 3 (1),
India Private Limited, New Delhi.
3rd Floor, DLF Centre, Sansad Marg,
New Delhi – 110 001.

(PAN : AACCB3303J)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Kanchan Kaushal, Advocate
REVENUE BY : Shri H K Choudhary, CIT DR

Date of Hearing : 31.05.2018

Date of Order : 07.06.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. Boeing International Corporation India Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 27.01.2014, passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2009-10 on the grounds inter alia that :-

“1. The Ld. AO erred in assessing the income of the appellant at Rs.30,75,37,020/- as against the returned income declared by the appellant at Rs.16,08,18,590/-.

2. The Ld. AO/ Ld. Transfer Pricing Officer ('TPO') has grossly erred on facts and in law in enhancing the income of the appellant by Rs.6,91,66,692 on account of incorrectly characterising the appellant as a technical consultancy service provider without taking cognizance of the fact that there has been no change in the facts and circumstances of the business of the appellant from the immediately preceding year, wherein it has been characterized as a business development, advisory and other support service provider and such characterization has been accepted in the transfer pricing ('TP') order for AY 2008-09;

3. Pursuant to the above erroneous re-characterization the Ld. AO/ Ld. TPO:

3.1 incorrectly rejected the economic analysis and the comparable results contained in the TP report;

3.2 incorrectly rejected comparables as functionally not comparable without taking cognizance of the order received from the Ld. AO's office in the appellant's case for the earlier year (i e. AY 2008-09);

3.3 conducted a fresh search for comparables and in the process incorrectly applied certain filters to select comparable companies;

3.4 arbitrarily selected companies engaged in high end engineering services, construction services, certification and surveys services as comparables, which are functionally different from the business development, advisory and other support service rendered by the appellant;

3.5 incorrectly included the reimbursements received by the appellant as a part of its cost base to arrive at a lower Operating Profit/ Total Cost ('OP / TC') margin of the appellant; and

3.6 erroneously computed the working capital adjustment to arrive at an inflated arm's length margin without providing an opportunity to be heard.

4. The Ld. AO/ Ld. TPO incorrectly imputed interest of Rs.7,75,51,735 for the period of delay in realization of receivables -

4.1 disregarding the fact that the Ld. DRP had allowed working capital adjustment and thereby had already taken cognizance of the differences in working capital (including receivables) of the appellant vis-a-vis the com parables and hence, a separate adjustment on receivables was not warranted.

4.2 without prejudice to the above sub-ground, the Ld. AO/ Ld. TPO calculated the adjustment on the opening balance of receivables for the entire year (minus 30 days payment period allowed as per service agreement) without considering the actual ageing of the receivables;

4.3 arbitrarily applying an interest at the rate of 15.77% on the alleged delay in the receipt of receivables.

5. The Ld. AO erred in initiating penalty proceedings under section 271(1)(C) of the Act.

6. That the Ld. AO erred in proposing to levy interest under section 234B, 234C and 234D of the Act.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : The taxpayer is wholly owned subsidiary of Boeing International Corporation, USA which is also a subsidiary of The Boeing Company (TBC), engaged in providing business development, advisory and other support services to the Boeing Group on a cost plus basis. During the year under transaction, the taxpayer entered into international transactions with its Associate Enterprises (AE) as under :-

S.No.	Description of transaction	Method	Value (in Rs.)
1	Provision of Services	TNMM	754,641,094
2	Purchase of Fixed Assets	TNMM	2,739,688
3	Reimbursement of Expenses (Paid)	TNMM	349,831,404
4	Reimbursement of Expenses (Received)	CUP	11,670,526

3. As per TP analysis made by the assessee, the taxpayer served as a communication channel between TBC and Indian customers and its primary functions are the provision of marketing information and knowledge related support Boeing Group entities, which comprises business development collection of information of business activities of interest of TBC and supporting sourcing activities. During the year under assessment, the taxpayer continued to provide communication and information interface for the commercial airplane market in India. The taxpayer team is also engaged in Integrated Defence System segment, Boeing Military Aircraft Segment, Network & Space Systems, Global Services & Support and Boeing Capital Corporation.

4. The taxpayer stated in its TP documentation that it provides intra-group supporting service involving analysis and verification of product design, performance of adequacy and reliability, planning and research and development programs, on-site representation and technical support to the customer, participation in technical reviews and application of expertise in the definition of

new design and procedures and other assistance to meet customers need.

5. Assessee in order to benchmark its international transactions applied Transactional Net Margin Method (TNMM) with Operating Profit/Total Cost (OP/TC) as Profit Level Indicator (PLI) for its transactions relating to provisions of services, purchase of fixed assets and reimbursement of expenses (paid), selected 14 comparables with OP/TC at 13.21% as against result of the taxpayer at 19.50%. For transaction qua reimbursement of expenses, the taxpayer applied CUP method which has not been benchmarked as the expenses have been reimbursed on cost basis.

6. TPO in its TP analysis changed the characterization of assessee from a business model, advisory and other supporting services provider to technical consultancy service provider and finally selected 10 comparables having average OP/TC at 28.18%. TPO also included reimbursement expenses received by the taxpayer in the income as well as cost for the purpose of determining the mark-up earned by the taxpayer and consequently mark-up earned by the taxpayer has been reduced to 19.13% from 19.50% and made the adjustment of transfer pricing at Rs.11,42,15,144/- (Provisions of technical support services

Rs.5,84,43,117/- + Interest impound on outstanding receivables Rs.5,57,72,027/-).

7. The taxpayer carried the matter before the Id. DRP by filing objections who has disposed of the objections by directing the AO to complete the assessment as per directions. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

8. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

9. Undisputedly, after the directions issued by the Id. DRP, 10 comparables have been taken up to arrive at the figure of mark-up earned by the comparable company in order to benchmark the international transaction which are extracted as under :-

Sl.No.	Name of the Company	Adjusted OP/TC (%)
1.	Alphageo (India) Ltd.	19.11%
2.	Certification Engineers International Ltd. ('CEIL')	95.07%
3.	Cethar Consulting Engineers Ltd.	27.49%
4.	Lurgi India Pvt. Ltd.	8.95%
5.	Kirloskar Consultants Ltd.	18.06%
6.	M N. Dastur & Co. Pvt. Ltd.	0.36%
7.	Mahindra Consulting Engineers Ltd.	24.32%
8.	Semac Ltd.	26.18%
9.	Wapcos Ltd.	28.71%
10.	NTPC Electric Supply Co. Ltd.	50.16%
	Average	29.84%

10. It is also not in dispute that TPO computed the interest on outstanding receivables by considering closing outstanding receivables as on 31.03.2009. It is also not in dispute that the Id. DRP after accepting the objections raised by the assessee arrived at the conclusion that the interest has been computed by the TPO for the period 31.03.2009, which pertains to the income for the AY 2010-11 by returning following findings :-

Date of Invoice	Amount of Invoice	Payment Outstanding	Date of payment was received	Period of credit	Period exceeding 30 days	Interest
31-Mar-09	5,49,62,183	1,11,18,337	26-May-09	56	26	1,24,897
31-Mar-09	43,43,11,566	10,00,00,000	23-Jul-09	114	84	36,29,260
		1,26,53,195	20-Oct-09	203	173	9,45,769
		8,09,16,557	19-Feb-10	325	295	1,03,13,314
		24,07,41,813	25-Mar-10	359	329	3,42,20,492
31-Mar-09	4,14,60,331	4,14,60,331	7-Mar-11	706	365	65,38,294
		Total				5,57,72,026

11. Assessment order passed by the AO goes to prove that he has not carried out the directions issued by the Id. DRP, so we direct AO to compute on interest receivables in accordance with the directions issued by the Id. DRP.

12. Ld. AR for the assessee in order to cut short the controversy has challenged the findings returned by the TPO/DRP/AO to the extent that only three comparables viz. Certification Engineers International Ltd., Wapcos Ltd and NTPC Electric Supply Co. Ltd., which are Government companies being not valid

comparables vis-à-vis assessee to benchmark the international transactions.

13. The Id. DR for the Revenue in order to repel the contentions raised by the assessee contended that Government companies can only be excluded from the final set of comparables for benchmarking the international transactions if these companies are found to have taken any grant/subsidy or beneficial treatment from the Government impacting their profit.

14. Undisputedly, Government companies are ordinarily established by the Government in order to accelerate its public welfare policy and growth of the core sector and to generate employment and it is also not in dispute that invariably, the Government companies get contracts by getting preferential treatment from the Government as in the case of NBCC, a public sector undertaking, which is getting most of its construction contract from the Government of India.

15. So, in view of the matter, we are of the considered view that the TPO to reexamine the comparability of aforesaid Government companies vis-à-vis assessee for benchmarking the international transaction by analyzing the factors if these companies are getting grants/subsidy, preferential treatment in getting contracts from the Government working in controlled environment, impacting their

profit in the light of the decisions relied upon by the assessee viz. *Hon'ble Bombay High Court in Thyssen Krupp Industries (P.) Ltd. in ITA No.2218 of 2013, coordinate Benches of the Tribunal in AT & T Communication Services India (P.) Ltd. (2018) 91 taxmann.com 58 (Delhi-Trib.), Bechtel India Private Ltd. in ITA No.6779/Del/2015, M/s. Worley Parsons India Pvt. Ltd. in ITA No.273/Hyd./2016, M/s. Novartis Healthcare Pvt. Ltd. in ITA No.7643/M/2012 and Bechtel India Private Ltd. in ITA No.1476 & 1477/Del/2015.*

16. Needless to say that the TPO is also directed to examine the functional comparability of assessee vis-à-vis aforesaid Government companies in order to benchmark the international transaction.

17. In view of what has been discussed above, the issues in controversy are set aside to the file of AO/TPO to decide afresh after providing an opportunity of being heard to the assessee in the light of the observations made herein above. Hence, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in open court on this 07th day of June, 2018.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 7th day of June, 2018/TS

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)
- 5.CIT(ITAT), New Delhi.

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