

IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER

**IT(TP)A No. 606/Bang/2011**  
**Assessment Year: 2004-05**

M/s. ABB Industrial IT Development Centre Ltd., (Now known as ABB Global Industries and Services Limited) Khanija Bhavan, Race Course Road, 2 <sup>nd</sup> Floor, East Wing, Bangalore – 01.  <b>PAN: AADCA 3271B</b>	Vs.	The Assistant Commissioner of Income-tax, Bangalore.
APPELLANT		RESPONDENT

**IT(TP)A No. 609/Bang/2011**  
**Assessment Year: 2004-05**

The Deputy Commissioner of Income-tax, Circle-11(1), Bangalore.	Vs.	M/s. ABB Industrial IT Development Centre Ltd., (Now known as ABB Global Industries and Services Limited) Khanija Bhavan, Race Course Road, 2 <sup>nd</sup> Floor, East Wing, Bangalore – 01.  <b>PAN: AADCA 3271B</b>
APPELLANT		RESPONDENT

Date of hearing	:	16.02.2017
Date of Pronouncement	:	28.04.2017

## **ORDER**

*Per Laliet Kumar, Judicial Member*

These are the two appeals filed by the revenue as well as the assessee against the order of the CIT(A) dated 01.03.2011 passed on section 143(3) of the I.T. Act, 1961 for the assessment year 2004-05. The grounds raised by the revenue and the assessee are as under.

- “1. The order of the Learned CIT(Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.*
- 2. The learned CIT(Appeals) was not justified in directing the AO to recompute the deduction allowable u/s. 10A of I.T.Act, 1961 after reducing the telecommunication expenses amounting to Rs. 8,59,000-00 both from the export turnover and the total turnover, without appreciating the facts and circumstances of the case.*
- 3. The learned CIT(Appeals) has erred in not appreciating that there is no provision in section 10A, which requires the telecommunication expenses reduced from the export turnover as per clause (iv) of Explanation 2 to section 10A, to be reduced from the total turnover also.*
- 4. The learned CIT(Appeals) was not justified in allowing relief of Rs. 66,74,232/- out of the adjustment made by the Assessing Officer u/s 92CA of the I.T. Act, 1961 by directing the Assessing Officer to adopt the mean PLI of 21.72% as reduced by 5%, i.e. at 16.72%, without appreciating the facts and circumstances under which the adjustment was made by the Assessing Officer based on the TPO's order.*

5. *The Learned CIT(Appeals) was not justified in holding that the assessee was entitled to a standard deduction of 5% from the arithmetical mean of the profit margin of the comparables under the proviso to section 92C(2) of the I.T. Act, 1961 while computing the arm's length price (ALP).*
6. *The Learned CIT(Appeals) has erred in interpreting the second limb of the proviso to section 92C(2) of the I.T. Act, 1961 as it stood prior to the amendment brought about by the Finance (No. 2) Act 2009 with effect from 01.10.2009 without taking into consideration the ITAT decision in the case of DCIT vs Global Vantage Pvt Ltd. (2010-TIOL-24-ITAT-DEL).*
7. *The Learned CIT(Appeals) has erred in relying on the CBDT Circular No. 5/2010 dated 03.06.2010 where it has been clarified that the second proviso to section 92C(2) was applicable for the assessment year 2009-10 onwards, which was subsequently modified by CBDT by way of a corrigendum dt. 30.9.2010.*
8. *The Learned CIT(Appeals) has erred in directing the Assessing Officer to exclude 7 (seven) comparable companies as being super profit making cases and companies making profits at wide variance with the arithmetic mean of the PLI of the comparables, without appreciating the detailed reasons recorded in the TPO's order for the selection of such companies as functionally comparable companies following an elaborate search process and application of appropriate filters.*
9. *The Learned CIT(Appeals) has erred in following the order of the ITAT, Bangalore Bench in the case of SAP Labs Ltd. for the assessment year 2003-04 in ITA No. 398 and 418/Bang/2008 dated 30.08.2010 without examining the facts and circumstances of the assessee's case in detail and without appreciating that the assessee company is not a risk mitigated company and that*

*in the above mentioned ITAT decision, no bench marks have been laid down for categorizing a company as a super profit or low profit case.*

*10. The Learned CIT(Appeals) has erred in relying on the above mentioned ITAT, Bangalore Bench decision in the case of SAP Labs Ltd. without pointing out any peculiar economic conditions attributable to the so called super profit or low profits of the concerned companies.*

*11. The Learned CIT(Appeals) has erred in arriving at the adjusted mean PLI of 21.72% on page 11 of the appellate order after deducting working capital adjustment of 2.0% as worked out by the TPO which was based on the 11(eleven) comparables selected by the TPO, whereas, the working capital adjustment was required to be recomputed in consequence of the CIT(Appeals) direction to exclude 7(seven) of the comparables selected by the TPO.*

*12. 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 in so far as the above mentioned issues are concerned and that of the assessing officer be restored.*

*13. The appellant craves leave to add, to alter, to amend or to delete any of the grounds that may be urged at the time of hearing of the appeal.”*

2. Ground No. 1 to 3 of the revenue appeal pertains to the deduction u/s. 10A of the Act. It was submitted on behalf of the ld. AR for the assessee that the issue is covered in favour of the assessee by the judgment of Hon'ble High Court of Karnataka in the case of Tata Elecsi Ltd. (349 ITR 98).

3. We have considered the rival submissions. We find that in the present appeal of the revenue, the issues involved (1 to 3) pertains to the quantum of deduction allowable u/s. 10A which has been reduced by the AO by reducing the telecommunication expenses incurred in foreign currency by the Assessee on telecommunication charges. The CIT(A) has held that the action of the AO in re-computing the deduction u/s. 10A by reducing the telecommunication expenses has been in foreign currency only from export turnover and not from the total turnover is not sustainable.

4. We find this issue is no more res integra and is settled by the jurisdictional High Court in Tata Elxsi Ltd. (supra) thereby it is held **“Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover.”**

Therefore if the amount is reduced from the Export turnover it is bound to be reduced from the total turnover of the undertaking. As the order of the CIT(A) is in conformity with the order of

jurisdictional High Court therefore this ground of the revenue is dismissed.

5. The Ground No. 4, 5,6 & 7 of the revenue appeals pertains to the standard deduction of 5% given by the CIT(A). After following the SAP Labs Ltd. judgment, in our view these issues are required to be allowed as the amendment was brought into force in the Act with retrospective effect in section 92C(A)(2) of the Act. Further this issue is also covered by the judgment of coordinate bench in the matter of **Acusis Software India (P.) Ltd. [2016] 76 taxmann.com 121 (Bangalore - Trib.)**

“23. Ground Nos 5 to 7 challenges the direction of CIT (A) to grant the benefit of the proviso to sub-section (2) of section 92C of IT Act as a standard deduction. This issue is covered against the assessee by the decision of Bombay Bench in the case of *Bayer Crop Science Ltd. v. Addl. CIT [2012] 25 taxmann.com 575/[2014] 62 SOT 109 (Mum. - Trib.)* wherein it has been held as follows:

"Last ground of the assessee's appeal is against the rejection of benefit of 5% % margin as prescribed in proviso to section 92C(2) in determining the Arm's Length Price (ALP) of its export transactions. Filtering out unnecessary details it is observed that the assessee's international transactions were referred to the TPO for determination of ALP. The TPO proposed adjustment of Rs. 19,23,948, for which addition was made by the A.O. It was argued before the Id. first appellate authority that the TPO ought to have allowed standard adjustment of 5% before making addition as per proviso to section 92C(2). The learned CIT (A) rejected this contention by holding that since the ALP exceeded the price declared by the assessee by more than 5%, the entire excess was liable to be added. It is this direction of the learned CIT (A) against which the assessee has come up in appeal before us.

After considering the rival submissions and perusing the relevant material on record, we find that the dispute about the question as to whether plus

minus 5% standard adjustment should be allowed while determining the ALP or the entire amount representing difference between ALP and the declared price should be added where the difference exceeds 5%, has been set to rest by the Finance Act, 2012 with the insertion of sub-section (2A) to section 92C with retrospective effect. With this amendment it has been made clear that where the variation between arithmetical mean and price at which the transaction has actually been undertaken exceeds 5% of arithmetical mean, the assessee shall not be entitled to exercise the option. The learned AR was fair enough to concede that the retrospective amendment by the Finance Act, 2012 has the effect of upholding the opinion taken by the learned CIT (A). In view of this amendment to section 92C, we hold that the learned CIT (A) was justified in not granting standard adjustment of 5%. This ground is not allowed."

24. Even the special bench in the case of *IHG IT Services (India) (P.) Ltd. v. ITO* [2013] 33 taxmann.com 1/144 ITD 16 (Delhi - Trib.) (SB) held that after the amendment by the Finance (No. 2) Act, 2009 with effect from 1.10.2009, such benefit of 5% tolerance margin was restricted to the cases where variation between the arm's length price and the price at which the international transaction has actually taken place does not exceed 5%. In other words the benefit under the proviso cannot be given as a standard deduction. In the results, the grounds of appeal raised by the revenue on this issue are allowed.

In view thereof these grounds 4, 5, 6 & 7 of the revenue are allowed.

### **TP Issue**

6. Ground No. 8 to 11 pertains to the TP issue. In this regard, the Id. DR has brought to our notice the findings recorded by the CIT(A) for excluding 7 comparables out of the 11 comparables finally selected by the TPO. We would like to reproduce paragraph no 4.4(i) of CIT(A) order which is as under

**“4.4(i) Is comparison of the appellant company with companies involved in software development and service providing companies – correct.”**

Before zeroing on only 11 companies the TPO has done exhaustive search. She picked up 24 companies from “Capital Line”, “Prowess” and NASSCOM website. Out of the 24 companies selected, applied filters and rejected 13 companies to short list only 11 companies. More or less, they are almost in the same line of business but the most similar companies to the appellant’s business were selected. Accordingly, it is held that the AO is correct in zeroing in on only 11 companies out of 24 selected. However, **based on the judgment of SAP Labs, the super profit companies or the companies having abnormal results are excluded for the purpose of re-determining the average.** Since the average margin is determined at 27.92% by the TPO, the **super profits companies like I-power Solutions India Ltd., which had made 80.87% OP to total cost and VMF Softech which had made 72.38% OP to total cost are to be excluded. Also for the reason that Gold Stone Tech Ltd. which had an OP to total cost of only 12.18%, Lanco Global Systems Ltd which had an OP to total cost of only 10.93% L & T Infotech Ltd., which had an OP to total cost of only 9.2%, VJIL Consulting Ltd which had an OP to total cost of only 10.65% and Xcel Vision Tech Ltd which had an OP to total cost of only 8.72% and these margins are far wider from the average determined by the TPO, these companies are also to be excluded while working out the PLI. Also for the reason that Satyam results are not reliable AO is directed to delete it from the list of comparables.”**

7. If we look into the order passed by the CIT(A) and the reasons given for excluding the 7 comparables out of 11 comparables selected by the TPO, the reasons given by CIT were that these

companies were superprofit companies and therefore relies upon the judgment of SAP Labs Ltd. Excluded these 7 companies. The name of the 7 companies excluded by the CIT(A) was as under.

- a) Goldstone Technologies Limited
- b) iPower Solutions India Limited
- c) Lanco Global Systems Limited
- d) Larsen & Toubro Infotech
- e) VJIL Consulting Limited
- f) VMF Softech Limited
- g) XcelVision Technologies Limited

8. The Id. Senior Advocate for the AR, has submitted that the case of the assessee is covered by the judgment of SAP Labs Ltd.
  
9. We have gone through the record and the order passed by the CIT(A). In our view the assessee as well as the TPO had applied the TNMM being the most appropriate method for the purposes of determining the ALP. The TPO for the purposes of determining the ALP had applied various filter namely functional comparability, related party transaction (RPT) etc . Further TPO had also compared the financials of the selected companies based

on their profile. TPO had also examined the PLI of those companies on the basis of the operating profit / operating cost.

Assessee Company is into software development and therefore the TPO has used the functional similarity / comparable filter to find out the comparables. We found that the Id. CIT(A) has rejected the 7 companies selected by the TPO on the basis of margins being wider from the range determined by the TPO. In our view, the inclusion / exclusion of the comparables is required to be based on the basis of parameters laid down under rule 10B(2) of the Income-tax rules for the purposes of determining the functional comparability. If we examine the order passed by the CIT(A) , we will reach to the inescapable conclusion that the order of Id CIT is a cryptic / non-speaking order and the Id. CIT(A) has not examined profile of each company on the touch stone of functional similarity, relating party filters, turn over filter etc. In our view these aspects of the comparable companies are required to be considered in view of rule 10B(2) of the IT rules.

10. In the light of the above we are left with no other option but to remand the matter to the file of the Id. CIT(A) for the purposes of exercising his jurisdiction and to determine fresh about the

inclusion and exclusion of the comparables based on the rules and regulations framed for that purposes and also on the basis of judgment of the Tribunal.

11.The Id. AR for the assessee has submitted that M/s. Bodhtree Consulting Ltd., M/s. iPower Solutions India Limited, M/s. Infosys Technologies Limited, M/s. Larsen & Toubro Infotech and M/s. Satyam Computers Services Limited are required to be excluded being functionally different than that of the assessee . Furher Ld AR had also pointed out that these companies are liable to be excluded if turnover filter is applied, as these companies turnover are either below of 10% or more than 10 times of the turnover of the assessee company.

12.In our view, whole purposes of undertaking the exercises of TP study is to determine the ALP of the assessee on the basis of the profit margin of unrelated party in an uncontrolled transaction, therefore Id. CIT(A) while re-examining the TP issue in terms of our directions under Para 9 above ,shall also consider the turnover filter of the comparables in respect of the comparable transactions only.

## **Assessee Appeal**

13. The Ground No. 1 of the assessee appeal is with respect to the exclusion of 3 comparables by the AO / CIT(A), M/s. Bangalore Soft Sell Limited, M/s. Essar Information Technology Limited and M/s. Future Software Limited. In this regard, the Id. AR has drawn our attention to para 4.4(2) which we deem it appropriate to reproduce below which provides as under.

### **4.4(ii) Whether rejection of appellant's comparables is in order.**

*It is worthwhile to mention that the appellant normally prefers for comparison only cases which have declared operating profit less than that of the appellant's OP and the department chooses cases on either side both which have declared lesser OP than that of the appellant's as also which have declared more OP than that of the appellant's. Accordingly, it is held that the rejection of the appellant's comparables is in order."*

14. The Id. AR has submitted that the order of the Id. CIT(A) and TPO is without any substantial reasoning. In fact it was pointed out that the reasoning given by the Id. CIT(A) do not fit in the scheme of the Act and the comparables were only rejected by the CIT on pretext that operating profit is less than appellant's OP.

15. We have heard the parties and peruse the record. In our view the order of the Id. CIT(A) is lacking the reasoning and application of mind while deciding the exclusion of three comparables suggested by the assessee, therefore following the reasoning given hereinabove while remanding back the matter to the CIT(A) for rejecting the inclusion of 7 comparables by the CIT on the appeal of the revenue, we deem it appropriate to remand this issue also to the file of CIT(A) to decide afresh after passing the reasoned order. Needless to say the assessee as well as the revenue shall be free to provide all assistance and all documents which they deem it appropriate, just and fair for the adjudication grounds raised by the assessee/ revenue.

16. The second ground is not pressed by the assessee, therefore the same is rejected being not pressed.

17. The third ground raised by the assessee is with respect to interest income amounting to Rs. 4, 34,000 as income from other sources. The Id. AR, has submitted that the issue of interest income being part of the business income and the claim of the assessee for deduction falls under section 10A of the Act has been adjudicated

by the tribunal in the case of the assessee in ITA No. 1353/Bang/2011 vide order dated 31.10.2013. The Para 14 at Page 565 of the Paper Book provides as under.

“14. The Id. Counsel for the assessee drew our attention to page 16 of the paperbook (PB) which contains the details of the interest income. He pointed out that surplus business funds not immediately required had been temporarily parked in FDs. In this regard, he drew our attention to the fact that the FDs were made for periods ranging from 6 days to 53 days, which itself would go to show that business funds temporarily not required were parked temporarily in FDs. It was his submission that the conclusions of the CIT(A) that surplus profits of the assessee were parked in FDs resulting in interest income cannot be considered as business income are not correct.”

18. On the other hand, DR for the revenue has submitted that this issue is required to be sent back for the purposes of verification of facts by the CIT(A).

19. We have perused the record and gone through the Paper Book filed by the assessee. At page 158 of the Paper Book, assessee has submitted as under.

“ Ground No. 5- Interest on deposit amounting to Rs. 434,000/- to be excluded while computing 10A deduction:-

The Interest earned on deposit is part of the business activities as it is relating to remittance received from abroad **and kept temporarily** as deposit in the Bank. As the remittances received from abroad forms part of the Business Income and gets accumulated as part of working capital, this working capital cannot be kept idle and needs to be put to revenue earning use. Since bank deposits facility are available for a flexible period of time, the same has been utilized and the remittance received from abroad, which forms part of working capital has been parked as

deposits with bank till the need for working capital for business purpose arises. In short as the money parked in deposits are out of remittances received from abroad, the interest earned from the bank deposits forms part of the Business Income. Hence the same needs not be excluded while computing the deduction u/s 10A of the Act. The Copy of the TDS Certificate wherein the interest of Rs. 434,000 is paid to the assessee is enclosed as **Annexure-1.**“

20. We have also seen the computation of account filled by the assessee, in the computation assessee has mentioned the opening deposit as on 31.03.2003 was Rs. 70 Lakhs and the opening deposit as on 31.03.2004 as Rs. 75 Lakhs. If we see the reasoning given by the tribunal in its earlier order in ITA No. 1353/Bang/2011 we found the order was passed merely because funds were temporarily not required and therefore the interest accrued in temporary parking amount in temporary FDRs therefore it was held to Business Income u/s. 10A of the Act. We found that in the present case neither the temporarily availability of fund was proved nor temporarily non requirement of funds was proved nor it was set up by the assessee when the funds were temporarily available and when the FDRs were made on temporary basis.

21. In the light of the above, we deem it appropriate to remand the matter to the file of the CIT(A) to decide this issue fresh after giving opportunity to the assessee. The assessee shall be at liberty to file all relevant documents in support of its claim to prove that the funds were temporarily available and the FDRs were temporarily made with the view to optimize the profit of the business.

22. In the light of the above, this issue is also remanded back to CIT(A).

23. In the light of the above, both the appeals are allowed for statistical purposes.

Pronounced in the open court on this 28<sup>th</sup> day of April, 2017.

Sd/-  
( A.K. GARODIA )  
Accountant Member

Sd/-  
(LALIET KUMAR)  
Judicial Member

Bangalore,  
Dated, the 28<sup>th</sup> April, 2017.

/ MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.