

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE 'B' BENCH, BANGALORE**

**BEFORE SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER
AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER**

**IT(TP)A No.1289(BNG.)/2014
(Assessment year : 2009-10)**

M/s Citrix R&D India Pvt. Ltd.
Prestige Dynasty No.33,
Ulsoor Road,
Bangalore-560 042
PAN No.AABCN3639C

Appellant

Vs

The Deputy Commissioner of Income Tax,
Circle-11(2),
Bangalore

Respondent

**Assessee by : Shri P.K.Prasad, CA
Revenue by : Smt. S.Praveena, Addl.CIT**

**Date of hearing : 11-02-2016
Date of pronouncement : 19-02-2016**

ORDER

PER SHRI ABRAHAM P GEORGE, AM;

In this appeal filed by the assessee directed against an order dated 19-08-2014 of CIT(A)-IV, Bangalore, it has altogether raised four grounds of which ground 1 & 2 are general in nature needing no adjudication. Ground no.3 is on a credit for TDS being wrongly given for Rs.2,23,699/-. As per the assessee credit has been only for Rs.2,23,699/-, whereas as actual credit available was Rs.2,27,406/-. The learned AO/TPO is directed to look into this claim of the assessee and if found to be correct, allow it.

2. Ground no.4 which assails the transfer pricing adjustment of Rs.4,89,61,089/- done on the assessee which was confirmed by the CIT(A), has in its nine sub-grounds numbered as (a) to (i) Learned counsel for the assessee at the outset submitted if the grounds rejecting exclusion of certain companies from the list of comparables considered by the learned TPO was considered, other grounds could be taken as not pressed. Accordingly, we are confining ourselves to the exclusion sought by the assessee from the list of comparables considered by the TPO, while testing the ALP of the international transactions undertaken by the assessee with its Associated Enterprises.

3. Facts apropos are that the assessee engaged in the business of providing software research and services development to its Associated Enterprise (AE) called M/s Citrix US and Citrix Online LLC had a revenue of Rs.96,36,03,696/- from such activities. In the TP study filed alongwith the return, assessee had selected 21 comparable companies and applied TNM method for justifying the pricing of its international transactions. Assessee used Prowess and capital line plus databases for such research. Learned TPO, when the matter regarding the ALP was referred to him by the AO noted that the assessee had selected comparable companies engaged in the software development services without looking into the verticals/horizontals. Learned TPO, thereafter, for various

reasons cited by him in the show cause notice issued to the assessee, rejected all but 8 of the comparables chosen by the assessee and added three of his own which he selected from the very same database. The new companies added by him were M/s Kals Information Systems Ltd, M/s Bodhtree Consulting Ltd and M/s Tata Elxsi Ltd (Segmental). The final list of comparable considered by the TPO and their margin as a percentage of profit of cost read as under;

Sl.N	Name of the comparable	Sales (in Rs.)	Cost (in Rs)	Margin
1	Kals Information Systems Ltd.	2,14,04,686	1,87,93,813	13.89%
2	Akshay Software Technologies Ltd.	12,23,21,483	11,31,49,350	8.11%
3	Bodhtree Consulting Ltd.	16,05,75,212	9,89,56,821	62.27%
4	R.S.Software (India)Ltd.	1,49,57,12,634	1,36,01,02,589	9.97%
5	Tata Elxsi Ltd (Segmental)	3,78,43,03,000	3,14,63,15,000	20.28%
6	Sasken Communication Technologies Ltd (Seg.)	4,05,31,20,000	3,18,69,97,000	27.91%
7	Persistent Systems Ltd	5,19,69,10,000	3,67,52,70,000	41.40%
8	Zylog Systems Limited	7,34,93,51,475	6,81,69,98,160	8.81%
9	Mindtree Ltd (Seg.)	7,93,22,79,326	5,74,06,73,058	5.52%
10	Larsen and Toubro Infotech	19,50,83,81,374	15,64,12,76,626	24.72%
11	Infosys Ltd	2,02,64,00,00.000	1,39,17,00,00.000	45.61%

Average 24.32%

At this juncture, it is to be noted that the assessee was considered as software development services company by the TPO also for the purposes of TP analysis.

Against the average operating margin of 14.13% worked out by the assessee from the comparables considered by it. The list above mentioned considered by the TPO resulted in a margin of 24.32%. Assessee's own PLI as a percentage of the cost came to 16.68%, since the average mean of PLI of the comparables worked out by the TPO came to 24.32% which was much higher than the PLI of the assessee, learned TPO chose to make a recommendation for adjustment of Rs.4,89,61,089/- on the pricing of the international transaction undertaken by the assessee with its AE. The workout of the above sum was given as under;

Arm's length mean margin on cost	24.32%
Less: Working Capital adjustment (Annex C)	1,71%
Adjusted margin	22.61%
Operating cost	825,841,926
Arm's length Price (ALP) 122.61% of operating cost	1,012,564,785
Price received	963,603,696
Shortfall being adjustment u/s 92CA	48,961,089

The assessment was completed thereafter by making an addition of the above amount.

4. Aggrieved, assessee moved in appeal before the learned CIT(A). Apart from assailing the comparables considered by the TPO, assessee also argued

before the CIT(A) that the working capital adjustment though it was computed by the TPO at 3.26% was unjustly restricted to 1.71%. Learned CIT(A) did not accept any of these contentions, but confirmed the addition made by the AO.

5. Now before us learned AR submitted that apart from working capital adjustment which was required to be given he was assailing inclusion of three comparable companies namely M/s Bodhtree Consulting Ltd., M/s Tata Elxsi Ltd (Segmental) and M/s Infosys Ltd. According to the learned AR, even though, Infosys Ltd. was one among the comparables in the list considered by the assessee in its TP study, it had specifically sought exclusion of the said company before the TPO itself, relying on the judgment of the Hon'ble Delhi High Court in the case of M/s Agnity India Technologies Pvt. Ltd Vs ITO(2013) 93 DTR 0375). Reliance was placed on the copy of the submissions dated 15-11-2012 filed with the TPO, placed at paper book page no.527 – 633 specifically page no.591. Further, as per the learned AR, assessee had before the CIT(A), also assailed the comparability of M/s Infosys Technologies Ltd. vide submissions dated 07-08-2014 placed at paper book page nos.253 to 323 specifically page nos.294 & 295. Learned AR also pointed out that the assessee had objected to inclusion of M/s Bodhtre Consulting Ltd. and M/s Tata Elxsi Ltd(Seg.) from the list of comparables before the TPO as well as before the CIT(A), since these companies

were functionally different from the assessee. According to him learned CIT(A) brushed aside these objections.

6. As per the learned AR, M/s Bodhtree Consulting ltd, M/s Tata Elxsi Ltd and M/s Infosys Tech. Ltd were having activities which were not comparable to that of the assessee who was solely doing software development services. According to him, the co-ordinate Bench of this Tribunal in the case of M/s Cisco Systems (Ind.) Pvt. Ltd Vs DCIT (In IT(TP)A No.271(B)/2014 dated 14-08-2014 had held that these companies could not be considered as comparable in the software development services segment. As per the learned AR M/s Bodhtree Consulting Ltd was a software product company whereas M/s Tata Elxsi Ltd was engaged in specialized projects like embedded product design, industrial services and engineering services. In sofaras M/s Infosys Tech.Ltd is concerned, learned AR submitted that it was a very huge company with significant intangibles and product dominance. Reliance was also placed once again on the judgment of the Hon'ble Delhi High Court in the case of M/s Agnity India Technologies Pvt. Ltd.(Supra).

7. Insofar as the working capital adjustment was concerned, learned AR submitted that learned TPO having worked out the working capital adjustment of the comparables at a particular percentage ought not have restricted it to 1.71%.

8. Per contra, learned DR submitted that assessee itself had not considered the vertical and horizontal, while selecting the comparables against software development services which was being rendered by it. However, now it was relying on the verticals for seeking exclusion of M/s Bodhtree Consulting Ltd and M/s Tata Elxsi Ltd. As per the learned DR the objections now being raised were already considered by the TPO and rejected. Insofar as the working capital was concerned learned DR submitted that excessive working capital adjustment if given would negate the purpose of a TP study.

9. We have perused the orders and heard the rival contentions. Profile of the assessee as mentioned by the TPO himself at page no.2 states as under;

“Citrix R & D India is engaged in the business of providing software research and development services to Citrix US and Citrix Online LL.C.”.

Assessee had considered itself to be software development services provider and the TPO had also accepted this. The most appropriate method selected both by

assessee and TPO were TNM method. This method obviates necessity for complete product identity or services identity between the tested party and the comparables. Broad functional similarities would suffice. However, where the functional profile show that the dissimilarity, even within the very same segment was so significant so as to erode the comparability, then there is a good case for exclusion. Assessee has mainly relied on the decision of the Co-ordinate Bench in the case of M/s Cisco Systems (Ind.) Pvt.Ltd (Supra). The said company was also engaged in the business of rendering software development services. Nothing has been brought before us by the revenue to show that the functional profile of M/s Cisco Systems (Ind) Pvt.Ltd(Supra) was so different from that of the assessee so as to erode the comparability of the comparable companies considered in the said case with that of the assessee. In our opinion, assessee is justified in relying on the said decision which was also for the very same assessment year.

10. Vis-à-vis M/s Bodhtre Consulting Ltd, the observation of this Tribunal as it appeared at page no.26.1 of the order in the case of M/s Cisco Systems (Ind.) Pvt.Ltd. read as under;

**“26. COMPANIES INCLUDED IN THE FINAL LIST OF
COMPARABLES WHICH THE ASSESSEE WANTS TO BE
EXCLUDED:-**

26.1 Bodhtree Consulting Ltd.:- As far as this company is concerned, it is not in dispute that in the list of comparables chosen by the assessee, this company was also included by the assessee. The assessee, however, submits before us that later on it came to the assessee's notice that this company is not being considered as a comparable company in the case of companies rendering software development services. In this regard, the ld. counsel for the assessee has brought to our notice the decision of the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. v. ITO, ITA No.7633/Mum/2012, order dated 6.11.2013. In this case, the Tribunal followed the decision rendered by the Mumbai Bench of the Tribunal in the case of Wills Processing Services (I) P. Ltd., ITA No.4547/Mum/2012. In the aforesaid decisions, the Tribunal has taken the view that Bodhtree Consulting Ltd. is in the business of software products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology. The decision rendered by the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. (supra) is in relation to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Following the aforesaid decision of the Mumbai Bench of the Tribunal, we hold that Bodhtree Consulting Ltd. cannot be regarded as a comparable. In this regards, the fact that the assessee had itself proposed this company as comparable, in our opinion, should not be the basis on which the said

company should be retained as a comparable, when factually it is shown that the said company is a software product company and not a software development services company”.

11. Observations of the Co-ordinate Bench with regard to M/s Tata Elxsi Ltd. as it appears at para-26.4 of the very same order is re-produced hereunder;

“26.4 Tata Elxsi Ltd.:- As far as this company is concerned, it is not in dispute before us that in assessee’s own case for the A.Y. 2007-08, this company was not regarded as a comparable in its software development services segment in ITA No.1076/Bang/2011, order dated 29.3.2013. Following were the relevant observations of the Tribunal:-

II. UNREASONABLE COMPARABILITY CRITERIA :

19. The learned Chartered Accountant pleaded that out of the six comparables shortlisted above as comparables based on the turnover filter, the following two companies, namely (i) Tata Elxsi Ltd; and (ii) M/s. Flextronics Software Systems Ltd., deserve to be eliminated for the following reasons :

(i) Tata Elxsi Ltd., : The company operates in the segments of software development services which comprises of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There is no

sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. The company has also in its response to the notice u/s.133(6) stated that it cannot be considered as comparable to any other software services company because of its complex nature. Hence, Tata Elxsi Ltd., is to be excluded from the list of comparables.

20. On the other hand, the learned DR supported the order of the lower authorities regarding the inclusion of Tata Elxsi and Flextronics Software Systems Ltd., in the list of comparables. He reiterated the contents of para 14.2.25 of the TPO's order. He also read out the following portion from the TPO's order :

"Thus as stated above by the company, the following facts emerge :

- 1. The company's software development and services segment constitutes three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs.*
- 2. The product design services sub-segment is into embedded software development. Thus this segment is into software development services.*
- 3. The contribution of the embedded services segment is to the tune of Rs.230 crores in the total segment revenue of Rs.263 crores. Even if we consider the other two sub-segments pertain to IT enabled services, the 87.45% (>75%) of the segment's revenues is from software development services.*

4. *This segment qualifies all the filters applied by the TPO."*

Regarding Flextronics Software Systems, the following extract from page 143 of TPO's order was read out by him as his submissions :

"It is very pertinent to mention here that the company was considered by the taxpayer as a comparable for the preceding assessment year i.e., AY 2006-07. When the same was accepted by the TPO as a comparable, the same was not objected to it by the taxpayer. As the facts mentioned by the taxpayer are the same and these were there in the earlier FY 2005-06, there is no reason why the taxpayer is objecting to it. How the company is functionally similar in the earlier FY 2005-06 but the same is not functionally similar for the subsequent FY 2006-07 even when no facts have been changed from the preceding year. Thus the taxpayer is arguing against this comparable as the company was not considered as a comparable by the taxpayer for the present FY 2006-07."

21. *We have heard the rival submissions and considered the facts and materials on record. After considering the submissions, we find that Tata Elxsi and Flextronics are functionally different from that of the assessee and hence they deserve to be deleted from the list of six comparables and hence there remains only four companies as comparables, as listed below:"*

26.5. *Following the aforesaid decision of the Tribunal, we hold that M/S.Tata Elxsi Ltd. should not be regarded as a comparable".*

12. Observation of the Co-ordinate Bench in the very same order with regard to the comparability of M/s Infosys Ltd appears at para-26.2 of the order which is re-produced here under;

“26.2 Infosys Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. TDPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-

“11.0 Infosys Technologies Ltd.

11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.

11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee is merely a software service provider operating its business in India and does not

possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-

(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee ;

(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;

(iii) the company has generated several inventions and filed for many patents in India and USA ;

(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;

(v) the company has incurred huge expenditure for research and development;

(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems.

In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.

11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.

11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dissimilar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the break up of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.

The decision rendered as aforesaid pertains to A.Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies”.

13. No doubt, in so far in the case of M/s Infosys Tech.Ltd. is concerned, it was one among the many companies chosen by the assessee itself. However, in view of the special Bench decision in the case of CIT Vs M/s Quark Systems Pvt.Ltd.,(2010) 38 SOT 0307, which was affirmed by the Hon'ble Punjab & Haryana High Court in (2011) 62 DTR 0182, assessee cannot be stopped from raising a plea for exclusion, especially when it had objected to the inclusion before the TPO and DRP. As mentioned at para- five above, assessee had objected to the inclusion of M/s Infosys Tech.Ltd. both before the TPO and DRP. In the normal course, in view of the judgment of the Hon'ble Punjab & Haryana High Court mentioned supra, the issue has to be remitted back to the TPO for considering its comparability. However, Hon'ble Delhi High Court in the case of CIT Vs M/s Agnity India Technologies Pvt. Ltd. (Supra) had affirmed an order of this Tribunal where M/s Infosys Technologies Ltd was directed to be excluded from the list of comparables considering the peculiar features of the said company. Hence, no purpose will be served in remitting the question of comparability of M/s Infosys Tech.Ltd back to the TPO/AO. In view of the above discussion, we direct exclusion of M/s Bodhtree Consulting Ltd., M/s Tata Elxsi Ltd.(Seg.) and M/s Infosys Tech.Ltd from the list of comparables. Ordered accordingly.

14. Insofar adjustment of working capital is concerned, we are of the opinion, that the AO cannot force an artificial limitation to the actual working capital adjustment ratio derived from the comparable companies considered for the arm's length study. The restriction of working capital adjustment based on PLR of SBI will be appropriate since it is based on a presumption with all lending or credit are having uniform interest rates as decided by the SBI. We therefore, direct the AO to give working capital adjustment considering the comparable companies after exclusion of the three companies mentioned by us at para thirteen (supra).

15. In the result, the appeal of the assessee is treated as partly allowed.

Order pronounced in the open Court on the 19th February, 2016.

Sd/-
(VIJAYPAL RAO)
JUDICIAL MEMBER
Bangalore:
D a t e d : 19-02-2016
am

Copy to :

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- 2 *Respondent*
3. *CIT(A), Bangalore*
4. *CIT, Bangalore*
5. *DR, ITAT, Bangalore*
6. *Guard File*

Sd/-
(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

By order
AR, ITAT, Bangalore