

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

**BEFORE SHRI AK GARODIA, ACCOUNTANT MEMBER AND  
SHRI VIJAYPAL RAO, JUDICIAL MEMBER**

ITA No.1667/Bang/2013  
(Asst. Year – 2008-09)

The Income-tax Officer,  
Ward-11(2),  
Bangalore. . Appellant

Vs.

M/s INTellinet Technologies India Pvt. Ltd.,  
No.810, 5<sup>th</sup> Cross, 12<sup>th</sup> Main,  
Koramangala. . Respondent

Appellant by : Shri KC Das, JCIT,

Respondent by : Shri Bharath L, CA

Date of Hearing : 28-04-2016

Date of Pronouncement : 29-04-2016

**ORDER**

**PER SHRI A K GARODIA, ACCOUNTANT MEMBER :**

This appeal by the Revenue is directed against the order of learned Commissioner of Income-tax - (Appeal) - IV Bangalore dated 7/10/2013 for the assessment year 2008-09.

2. The grounds raised by the revenue are as under:

*“(1) The order of learned CIT(A) is opposed to law and the facts and circumstance of the case.*

*(2) The CIT(A) erred in directing the AO to follow the ration laid down by the Hon’ble Court in the case of Tata Elxsi Ltd, 349 ITR 98 and exclude Rs.13,96,875/- being the communication expenses and expenses incurred in foreign currency attributable to delivery of software services outside India from the total turnover also while computing the deduction u/s 10A of the IT Act, without appreciating the fact that there is no provision in sec. 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to sec. 10A provides that such expenses are to be reduced only from the export turnover.*

*(3) The CIT(A) erred in not appreciating the fact that the jurisdictional High Court’s decision in the case of Tata Elxsi Ltd, 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon’ble Supreme Court.*

*(4) The learned CIT(A) erred in directing the TPO to exclude companies which are functionally dissimilar subject to the guidelines laid down by the Delhi Bench of the Tribunal in Actis Advisers Pvt. Ltd., Vs. DCIT, Tax 20 ITR (Trib) 138 without appreciating the fact that the directions issued are beyond the mandate of the provisions*

*of sec. 25(1)(a) of the IT Act which does not empower the CIT(A) to set aside the issue.*

*(5) The learned CIT(A) erred in not appreciating the fact that when any filter or criteria applied by the assessee is accepted or if any filter or criteria applied by the TPO is relaxed, the entire accept/reject matrix changes resulting in a new set of comparables including those comparables which are neither taken by the assessee or the TPO and which do not find a place in the order u/s 92CA.*

*(6) 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 and that of the AO be restored.”*

3. The learned DR of the Revenue supported the assessment order and the learned AR of the assessee supported the order of the learned CIT(A).

4. We have considered the rival submissions and perused the material on record. We find that ground No.1 is general and in ground Nos. 2 and 3, only one issue is involved regarding exclusion of Rs.13,96,875 being the commission expenses etc. attributable to delivery of software services outside India from the total turnover while computing the deduction u/s 10A of the Income-tax Act.

5. The case of the Revenue is that the same should be excluded from the export turnover but should not be excluded from total turnover. On this issue, the judgment of Hon'ble Karnataka High Court rendered in the case of Tata Elxsi, 349 ITR 98 supports the case of the assessee because in this case, it was held by Hon'ble Karnataka High Court that the total turnover is sum total of export turnover and domestic turnover and, therefore, if an amount is excluded from export turnover, the total turnover is also reduced by the same amount as a consequences of deduction from export turnover. In this view of the matter, we find no infirmity in the order of the learned CIT(A) on this issue. Regarding the contention of the Revenue that the Revenue has not accepted the judgment of Hon'ble Karnataka High Court and has filed appeal before the Hon'ble Apex Court, we would like to observe that it is not the case of the Revenue that the judgment of Hon'ble Karnataka High Court has been stayed by Hon'ble Apex Court, and therefore, the judgment is valid and we are bound to follow the same. Accordingly ground Nos. 2 and 3 of the Revenue are rejected.

6. In ground Nos. 4 and 5, the issue involved is that the order of the learned CIT(A) on transfer pricing issue is beyond the mandate of the provision of sec. 251 (1) (a) of the Income-tax Act which does not

empower the CIT(A) to set aside the issue. We find that this issue was decided by the learned CI(A) by making following observations on page 9 of his order.

*“Recently, the Bangalore Bench of the Hon’ble Tribunal in Witness Systems Software Ind. Pvt. Ltd., Vs. DCIT, Circle-11(1), [2013] 34 taxmann.com 183 (Bangalore Trib) has held that functionally dissimilar companies cannot be upheld as comparables. The Bangalore Bench of the Hon’ble Tribunal has ruled that functionally dissimilar companies cannot be upheld as comparables, whereas the Delhi Bench has categorically stated that companies who are engaged in the business of information Technology services cannot be rejected just because it is operating in that very sector in a different line. It is not open to the assessee to demand that Information Technology enabled services be further dissected because in such a case, there will be not e any end to the matter. Hence, it is ordered that functionally dissimilar companies have to be excluded, but however, business of the same sector but operating in a different line need not be considered as a functionally dissimilar. The TPO is directed to exclude functionally dissimilar companies subject to the observations of the Delhi Bench of the Hon’ble Tribunal.*

7. From the above para reproduced from the order of the CIT(A), we find that the CIT(A) has simply followed the Tribunal order of Bangalore Bench of the Tribunal rendered in the case of Witness Systems Software India Pvt. Ltd., Vs. DCIT (Supra) and directed the A.O. to exclude functionally dissimilar companies.

8. Regarding this direction of learned CIT(A) that the TPO should also consider the Tribunal order of Delhi Bench of the Tribunal rendered in the case of case of Actis Advisers Pvt. Ltd., Vs. DCIT, 20 ITR (Trib) 138, we find that as per the relevant portion of this Tribunal order, reproduced by learned CIT (A) on page 5 to 8 of his order, this Tribunal order is in fact against the assessee because in this Tribunal order, it was held that a comparable cannot be rejected just because it is operating in that very sector in different line. Hence, it is seen that reference to this tribunal order of Delhi Bench of the Tribunal is in fact supporting the case of the Revenue and therefore, there cannot be any grievance in respect of this Tribunal order of Delhi Bench of the Tribunal. The order of the CIT(A) is dated 7/10/2013 and now we are in the year 2016 and therefore, more than 2 and half years have already passed and therefore, we do not find any justification of restoring back the matter at this stage to the file of learned CIT(A) to decide the matter afresh after obtaining remand

report from the AO/TPO instead of directing the AO/TPO to decide the matter as per his directions because it will be a time taking and futile exercise and therefore, we hold that even if restoring back of the matter to the file of the TPO with some direction mainly by following the tribunal order in some other case, was not within the power of the learned CIT(A), considering the facts of the present case as discussed above, we restore back the matter to the file of the TPO with the direction to exclude functionally dissimilar companies as per the tribunal order of the Bangalore Bench rendered in the case of Witness Systems Software India Pvt. Ltd. Vs. DCIT (Supra) and subject to the observation of the Delhi Bench of the Tribunal in the case of Actis Advisers Pvt. Ltd. Vs. DCIT (Supra). Accordingly, ground Nos. 4 and 5 of the Revenue's appeal are also dismissed. In ground No.5, it is stated by the Revenue that this direction of the learned CIT(A) will require new set of comparables including those comparable which are neither taken by the AO or the TPO and which do not find a place in the order u/s 92CA but we find that in the order of the TPO u/s 92CA on pages 6 and 7, objections were raised by the assessee against various comparables on this plea that these companies are functionally dissimilar such as Avani Cincom Technologies, Celestial Biolabs, e-zest Solutions Ltd. etc. and these objections of the assessee regarding

functionally dissimilarity was rejected by the TPO in a summary manner and now on restoring back the matter to the file of TPO, TPO has to examine these claims of the assessee regarding functionally dissimilarity of various companies in the light of the tribunal order of Bangalore Bench rendered in the case of Witness Systems Software India Pvt. Ltd. (Supra) and of Delhi Bench of the Tribunal in the case of Actis Advisers Pvt. Ltd., (Supra). There is no infirmity in the order of CIT (A) on this aspect also. Accordingly ground Nos. 4 and 5 are rejected.

9. In the result, the appeal filed by the Revenue stands dismissed.

10. Order pronounced in the open court on the date mentioned in the caption page.

**Sd/-**  
**(VIJAYPAL RAO)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(AK GARODIA)**  
**ACCOUNTANT MEMBER**

Vms.  
Bangalore  
Dated : 29/04/2016

Copy to :

1. The Assessee
2. The Revenue
3. The CIT concerned.
4. The CIT(A) concerned.
5. DR
6. GF

By order