

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI**

**BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND**

**SHRI C.N. PRASAD, JUDICIAL MEMBER,**

**आयकर अपील सं /I.TA No.329/Mum/2015**

**(निर्धारण वर्ष / Assessment Year: 2010-11**

LRN Technology and Content Solutions (India) Pvt. Ltd., Nirlon Knowledge Park, Block B6, 3 <sup>rd</sup> Floor, Off Western Express Highway, Goregaon East, Mumbai-400 063	<b>बनाम/</b> Vs.	The DCIT-Circle 9(2), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.		
<b>(अपीलार्थी /Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
अपीलार्थी ओर से/ <b>Appellant by:</b>		Karishma R. Phatarphekar
प्रत्यर्थी की ओर से/ <b>Respondent by:</b>		Shri Keerthika R. Sharma

**सुनवाई की तारीख / Date of Hearing : 18.04.2016**

**घोषणा की तारीख /Date of Pronouncement : 24.06.2016**

**आदेश / ORDER**

**PER C.N. PRASAD, JM:**

This appeal is filed by the assessee against the directions of the DRP-III, Mumbai dated 26.9.2014 pertaining to assessment year 2010-11.

2. The only issue in the appeal of the assessee is regarding Transfer Pricing Adjustment relating to Software development

services by selecting comparables functionally dissimilar to the assessee by the TPO/Assessing Officer under the directions of DRP.

3. Facts in brief are that the assessee is a company registered in India under the Indian Companies Act, 1956 and is a wholly owned subsidiary of LRN Ltd, a UK based company having its parent company as LRB Corporation in Los Angeles, USA. The assessee is a captive service provider engaged in providing on-line software content development and partner support services on a cost plus basis to its Associated Enterprise (AE). The services rendered by LRN Ltd are carried out as per specifications received from the AEs. During the year, the assessee had entered into international transactions with its AEs, in respect of provisions of software content development services for an amount of Rs. 15,12,35,313/-. The assessee adopted Transactional Net Margin Method as the most appropriate method and computed the arm's length price by selecting 15 comparables. Out of 15, TPO accepted 7 comparables and he has taken 5 new comparables and arrived at arithmetic mean of 24.11% as against 14.79% arrived by the assessee. The TPO made adjustment of Rs. 91,56,111/- in the order passed u/s. 92CA (3) of the Act dated 30.1.2014. Draft assessment order was passed on 10.2.2014 u/s. 143(3) r.w. Sec. 144C(1) of the Act adopting arm's length price in relation to international transaction with AE at Rs. 91,56,111/- by the Assessing Officer.

4. The assessee filed objections before the DRP on 11.3.2014 contenting that the TPO erred in disregarding the detailed benchmarking exercise conducted by the assessee. The TPO erred in conducting a fresh benchmarking analysis without providing the

details of search filters/criteria's applied. The assessee filed objections stating that TPO not provided an opportunity to provide reasons and to refute against the action of rejecting comparables forming part of the detailed TP study conducted by the assessee. It was also submitted before the DRP that TPO erred in arbitrarily rejecting comparables by applying inappropriate filters and not giving due consideration to the functional profile of the assessee vis-à-vis the comparable companies adopted in the TP study. It was also contended before the DRP that TPO grossly erred in benchmarking the transactions of the captive software services of the assessee with companies operating as full-fledged entrepreneurs without considering the differences in the functions performed, assets employed and risk undertaken by the assessee vis-à-vis comparable companies. Therefore, it was contended that TPO erred in comparing the assessee with companies considering the turnover, size, goodwill and functions performed by the assessee and the companies. It was also contended that the TPO adopted cherry picking approach by selecting the additional 5 comparables and did not provide details of search process i.e. filters/criteria's undertaken for selection of the additional 5 companies. Therefore, it was contended that not providing the details of search filters/criteria applied etc., would tantamount to denial of principles of natural justice and lead to a conclusion that these companies have been arbitrarily selected/ cherry picked. The DRP however rejected the contentions of the assessee and affirmed the order of the TPO in selecting 5 comparables and rejecting 8 comparables of the assessee.

5. The Ld. Counsel for the assessee before us submits that even if one comparable i.e. Infosys Technologies Ltd., which was taken as

comparable by the TPO is excluded it will not result in any TP adjustment. The Ld. Counsel for the assessee submits that Infosys Technologies Ltd., is functionally different from the assessee company. He submits that Infosys Technologies Ltd., engaged in various activities and hence is not functionally comparable to assessee which is a captive software services. The Ld. Counsel for the assessee submits that Infosys Technologies Ltd., has a different business model and its 48.70% of Revenue's are from Onsite activities. He submits that its turnover is 1396.30 times more as compared to the turnover of assessee and its R &D expenditure is significantly high which is approximately 438 crores in financial year 2009-10 and has in possession of significant intangibles. The Ld. Counsel for the assessee submits that Infosys Technologies Ltd., has significant brand value as it has been ranked among the 50 most respected companies in the world by Reputation Institute's Global Reputation pulse 2009. The Ld. Counsel for the assessee submits that Infosys Technologies Ltd., is engaged in diversified services like Software Engineering Services, designing etc.

5.1. He further submits that the Bombay High Court in the case of M/s. Pentair Water India Pvt. Ltd in Tax Appeal No. 18 of 2015 dated 16<sup>th</sup> September, 2015 considered a situation where the turnover of the comparables is much more than the turnover of the assessee i.e. HCL Comnet Systems & Services Ltd having turnover of more than 23 times of an assessee, Infosys BPO Ltd. having turnover of more than 65 times of an assessee and M/s. Wipro Ltd., having turnover of 939 crores as against 11 crores of an assessee i.e. Pentair Water India Pvt. Ltd., and in such circumstances, the Hon'ble High Court held that

these companies are large and distinct companies and the area of development of subject services are different and as such the profit earned therefrom cannot be bench-marked or equated with the respondent-company. Placing reliance on the said decision, the Ld. Counsel for the assessee submits that the turnover of Infosys Technologies Ltd., which was considered as comparables by the TPO has turnover of 1396.30 times more than the turnover of the assessee and therefore the Infosys Technologies Ltd., cannot be taken as comparable. He further submits that Infosys Technologies Ltd., is functionally different company having diversified activities and hence cannot be taken as comparable company. The Ld. Counsel for the assessee submits that if Infosys Technologies Ltd., is excluded from comparables, it would not result any TP Adjustment. The detailed working of average margin comparables excluding Infosys is given as under:

S. No.	Name of comparable company	As per TPO	Excluding Infosys
1.	Akshay Software Technologies Ltd.	-3.19	-3.19
2.	Helios & Matheson Information Technology Ltd	16.12	16.12
3.	L G S Global Ltd	10.02	10.02
4.	Mindtree Ltd.	22.98	22.98
5.	Persistent Systems Ltd.	30.53	30.53
6.	Sasken Communication Technologies Ltd.	24.71	24.71
7.	Thirdware Solutions Ltd.	29.59	29.59
8.	F C S Software Solutions Ltd	30.38	30.38

9.	Infosys Technologies Ltd	45.47	-
10.	KALS Information Systems Ltd (Seg)	34.41	34.41
11.	Larsen & Toubro Infotech Ltd.	20.11	20.11
12.	Bodhtree Consulting Ltd.	28.15	28.15
A.	Average	24.11	22.16
	<b>Margin of Assessee</b>		
B	Operating Revenue		15,13,98,218
C	Operating cost		12,93,64,539
D	Operating Profit (D=B-C)		2,20,33,679
E	OP/OC(E=D/C)		17.03
F	Arm's length Operating Margin (F=C *22.16%)		2,86,73,062
G	Arm's length Operating Revenue (G= C+F)		15,80,37,601
H	Difference between Actual Revenue and Operating Revenue (H=G-B)		6,39,383
I	5% OF operating Revenue (I=B * 5%)		75,69,911
	<b>TP Adjustment</b> (Adjustment only if difference between Actual Revenue and Operating Revenue exceeds 5% of Operating Revenue)		Nil

6. The Ld. Departmental Representative submits that turnover never had an influence on profitability and there is no difference between the assessee company and the Infosys Technologies Ltd., as assessee is also into other services. The Ld. Departmental Representative vehemently supports the orders of the authorities below in taking Infosys Technologies Ltd., as one of the comparable companies and making Transfer Pricing adjustment.

7. We have heard the rival contentions, perused the orders of the TPO & DRP and the case laws relied on by the Ld. Counsel for the assessee. The assessee is engaged in the business of captive service provider and providing online software content development and partner support services on a cost plus basis to its AEs. The assessee benchmarked international transactions with AEs adopting TNMM and selecting 15 comparables. The TPO rejected 8 comparables and added 5 new comparables and with a set of 12 comparables arrived at arm's length margin at 24.11% as against 14.79% and made an adjustment of Rs. 91,56,111/- rejecting the submission of the assessee that the comparables selected by the TPO are functional, dissimilar and in selecting comparables, no proper opportunity was given and no details were provided regarding such filters/criteria selecting comparables. The DRP also simply accepted the TPO's adjustment without addressing the submission of the assessee. Before us, the Ld. Counsel for the assessee submits that even if one comparable i.e. Infosys Technologies Ltd., is taken out, there will not be any TP adjustment and he also submits that the Infosys Technologies Ltd., is functionally, dissimilar and it has a huge turnover with diversified activities and it has so many divisions like Software Engineering, designing, BPO etc., Therefore placing reliance on the Bombay High Court in the case of Pentair Water India Pvt. Ltd (supra) submits that Infosys Technologies Ltd. should be excluded from comparables. On going through the decision of the Hon'ble Bombay High Court we see considerable force in the contention of the Ld. Counsel for the assessee. In the case of Pentair Water India Pvt. Ltd., the Hon'ble High Court has affirmed the order of the Tribunal in holding that when the comparable companies turnover is

much more than the turnover of the assessee their margins cannot be compared for benchmarking the international transactions. While coming to such conclusion, the Hon'ble High Court held as under :

*“ On perusal of the impugned Order passed by the Tribunal dated 23.05.2014, we find that the Tribunal has recorded the reasons for not accepting the said three companies are comparable by stating as follows :*

- (I) *HCL Comnet Systems & Services Ltd :- We find force in the submission of the ld. AR that this company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the Assessee, the turnover is around Rs.11 crores only. While making the selection of comparables, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of Rs.11 crores cannot be compared with a company which is having turnover of Rs.260 crores which is more than 23 times the turnover of the Assessee. This company cannot be regarded to be in equal size to the Assessee. We, accordingly, direct the AO to exclude this company out of the comparables.*
- (II) (ii) *Infosys BPO Ltd. :- In this case also we noted the turnover in respect of this Company is Rs.649.56 crores while the turnover of the Assessee company is around Rs. 11 crores which is much more than 65 times of the Assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT(A) in excluding this Company out of the comparables. Accordingly, we confirm the order of the CIT(A).*
- (III) (iii) *Wipro Ltd. :- After hearing the rival submissions, we noted that the CIT(A) applying the turnover filter has excluded this company out of the comparables. The turnover reported in the case of Wipro Ltd. Is Rs.939.78 crores while in the case of the Assessee the turnover is around Rs. 11 crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the Assessee company and accordingly, we do not find any infirmity in the finding of CIT(A) while he excluded this company on the turnover criteria following the decision of this tribunal in :*

*Sony India (P) Ltd. vs. DCIT, 114 ITD 448 Delhi,  
E-Gain Communication, 2008 TIOL 282 ITAT (Pune)  
Deloittee Consulting India Pvt. Ltd. vs. DCIT, ITA No.  
1082/Hyd/2010*

*Genisys Integrating System (India)(P.) Ltd. vs DCIT., 53 Sot 159 (Bang)”*

6. *The said findings of the Tribunal in respect of the said three Companies are on the basis of appreciation of evidence on record. We find no infirmity in the said findings of the Tribunal on that count. In fact, the Tribunal has endorsed the views of the CIT Appeals whilst coming to such conclusions. The concurrent findings of facts arrived at by the Authorities below, cannot be reappreciated by this Court in the present Appeal.*

7. *In this connection, the Apex Court in the Judgment reported in 2011(1) SCC 673 in the case of Vijay Kumar Talwar vs. CIT, has observed at Para 23 thus :*

*“23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See Madan Lal v. Gopi, Narendra Gopal Vidyarthi v. Rajat Vidyarthi, Commr. of Customs v. Vijay Dasharath Patel, Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v. CESC Ltd)”*

8. *In the present Appeal, the Appellant-Revenue has not been able to controvert or deny the data relied upon by the Authorities below to come to such conclusion. The said Companies are no doubt large and distinct companies where the area of development of subject services are different and as such the profit earned therefrom cannot be a bench-marked or equated with the Respondent Company.*

9. *Shri Jain, learned Counsel has rightly relied upon the Judgment of the Delhi High Court reported in (2013) 36 taxmann.com 289(Delhi) in the case of Commissioner of Income-tax vs. Agnity India Technologies (P.) Ltd. Learned Counsel has also brought to our notice the Order of the Income Tax Appellate Tribunal whilst examining similar circumstances for the assessment year 2005-06. He has taken us through the findings therein to point out that the conclusions arrived at are based on a comparison that the condition in any uncontrolled transaction between an independent enterprises for the purpose of such comparison, economically relevant characteristics must be sufficiently comparable if two parties are to be placed in a similar situation. Learned Counsel as such submitted that it is not open for the appellant to now contend a different criteria to ascertain the comparability. In fact the Tribunal whilst passing the impugned Order has considered the said principles whilst coming to the conclusion that*

*the said three Companies cannot be treated to be comparable to the Respondent-Assessee Company. The turnover is obviously a relevant factor to consider the comparability”.*

Respectfully following the said decision of the Jurisdictional High Court, we direct the Assessing Officer to exclude Infosys Technologies Ltd., from the comparable companies for arriving at TP adjustment.

8. Rest of the grounds taken by the assessee are with regard to levy of penalty u/s. 271(1)(c) and interest u/s. 234B & C of the Act. As these grounds are consequential they need not be adjudicated. Hence these grounds are dismissed.

9. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 24<sup>th</sup> June, 2016.

Sd/-

**(RAJENDRA)**

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 24<sup>th</sup> June, 2016

व.नि.स./ Rj , Sr. PS

Sd/-

**(C.N. PRASAD )**

न्यायिक सदस्य/JUDICIAL MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,  
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai