

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH
KOCHI**

BEFORE S/SHRI P K BANSAL, VICE PRESIDENT & GEORGE GEORGE K, JM

ITA No 470/Coch/2016 (Asst Year 2012-13)

M/s. Microobjects Private Limited, 41/1098B, Pullepady Cross Road, Kochi-682018.	Vs	The Asst. Commr of Income Tax Corporate Circle 1(2), Kochi.
(Appellant)		(Respondent)

PAN No.	AABCM 8550H
Assessee By	Shri N. Unnikrishnan, FCA
Revenue By	Sh Shantham Bose, CIT(DR)
Date of Hearing	04/10/2017
Date of pronouncement	05 th ht/10/2017

ORDER

PER GEORGE GEORGE K, JM:

This appeal at the instance of the assessee is directed against the assessment order dated 11/08/2016 passed u/s. 143(3) read with section 144C of the I.T. Act. The relevant assessment year is 2012-13.

2. Briefly stated the facts of the case are as follows:

The assessee is a private limited company. It is a captive service provider (software developer) for its associate enterprise (AE) which is based in USA. For the assessment year 2011-12, the return of income was filed on 26/09/2012, declaring total income of Rs.1,16,55,690/-. The assessment was taken up for scrutiny by issuance of notice u/s.

143(2) of the Act. In the course of assessment proceedings, the Assessing Officer had referred the case to the Transfer Pricing Officer (TPO). The assessee in its transfer pricing study had adopted cost plus method as the most appropriate method (MAM) for determining the arm's length price (ALP) of the international transactions it had undertaken with its associate enterprise (AE). The TPO rejected the cost plus method adopted by the assessee and applied the transactional net margin method (TNMM) as the most appropriate method. The assessee did not object to the TNMM adopted by TPO. The TPO for the TNMM method had selected ten companies as comparable for determining the ALP of the international transactions undertaken by the assessee. Out of the ten companies selected by the TPO, the assessee objected the inclusion of five companies as comparables for the reason that the turnover of these companies are very high compared to that of the turnover of the assessee. The TPO, however, rejected the objections raised by the assessee and passed an order dated 28/01/2016 u/s. 92CA of the Act, determining the ALP of the assessee at Rs.14,73,79,152 as against the total receipt of Rs.13,62,27,688/- received from its AE. Thus the TPO recommended an upward adjustment of Rs.1,11,51,464/- to the total income returned. Based on the recommendation of the TPO, the Assessing Officer issued a draft assessment order u/s. 143(3) r.w.s 144C(1) of the Act, proposing an addition of Rs. 1,11,51,464/- to the total income returned. The assessee filed objections to the proposal before the Disputes Resolution Panel (DRP), Bangalore u/s. 144C(4) of the Act. The DRP passed an order u/s. 144C(5) on 01/08/2016 confirming the order passed by the TPO. Thereafter, the Assessing Officer passed an order u/s. 143(3) r.w.s.

144C(13) of the I.T. Act on 11/08/2016, making an upward adjustment of Rs.1,11,51,464/- to the total income returned as arm's length price adjustment.

3. Aggrieved by the final assessment order passed u/s. 143(3) r.w.s. 144C(13) of the I.T. Act, the assessee has filed the present appeal before the Tribunal raising the following grounds:

1. The order of the learned Assessing Officer (A.O.), Transfer Pricing Officer (TPO), Dispute Resolution Panel (DRP) is opposed to law, facts and circumstances of the case.

2. The learned Assessing Officer has committed a legal error in making the addition of Rs.1,11,51,464/- to the Returned Income, by way of adjustments to international transactions with associated enterprise, based on the recommendation of TPO and confirmation by the DRP, since it is against the relevant provisions of the income Tax Act, 1961 viz. Sec 92CA(1) and the relevant Rules viz: 10B(2) and 10B(3).

3. The Learned TPO has gone wrong in not considering the Appellant's reply to the showcause notice, while passing the order u/s. 92CA of the income Tax Act, 1961, dated 28/01/2016.

4. The learned DRP has committed a legal error in not considering the objections to the draft order u/s. 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961, and the written submissions in connection with the objections filed u/s. 144C(2)(b) of the Income Tax Act, 1961. Especially the decision in Commissioner of Income Tax vs. Pentair Water India (P) Ltd. of Hon'ble High Court of Bombay at Goa and the decision in CIT vs. Agnity India Technologies (P) Ltd. of Hon'ble High Court of Delhi at New Delhi.

5. Such other grounds that may be raised at the time or before the date of hearing.

4. The Ld. Counsel for the assessee in the course of submission, restricted his arguments for the exclusion of five companies from the list of comparable companies for the reason that their turnover is much more than the turnover of the assessee-company and cannot be compared with assessee. The five companies which the assessee has sought for excluding from the comparable list are as follows:

1. Infosys Limited
2. Larsen & Toubro Infotech Limited
3. R S Software (India) Private Limited
4. Mindtree Limited
5. Persistent Systems Limited

4.1 It was submitted that the assessee is a very small company and is only a captive service provider for its AE. It was contended that companies like Infosys Ltd. are giant companies having turnover many times more than assessee and is an independent software developer assuming all the risk, resulting in higher profits. Thus it argued that these companies cannot be compared with assessee company. In support of his contentions, the learned AR relied on the following judicial pronouncements:

1. Commissioner of Income Tax, Goa vs. M/s. Pentair Water India (P) Ltd., Goa (2016) (381 ITR 216) (Bom)
2. CIT vs. Agnity India Technologies (P) Ltd. (2013) 262 CTR (Del) 291.
3. Adaptee (India) Private Limited, Hyderabad vs. ACIT, Circle-1(1), Hyderabad dated 24th March, 2014 (ITAT, Hyderabad)
4. Visual Graphics Computing Services India (P) Ltd. vs. ACIT, Company Circle 111(4), Chennai (2017) 79 taxman.com 178 (Chennai-Trib.)

5. Trilogy E-Business Software India Private Ltd. vs. DCIT dt. 23rd November, 2012 (ITAT, Bangalore Bench)

5. The Ld. DR on the other hand supported the orders of the TPO and the DRP.

6. We have heard the rival contentions and perused the material on record. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax, Goa vs. M/s. Pentair Water India (P) Ltd., Goa reported in (381 ITR 216) held that that companies with large turnover like Infosys and Wipro cannot be compared to companies having much lesser turnover. The relevant finding of the Hon'ble Bombay High Court reads as follows:

"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 submissions of the Id. 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) 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) 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)

Deloitte Consulting India Pvt. Ltd. vs. DCIT : ITA No.1082/Hyd/2010.

Genisys Integrating System (India) (P) Ltd. vs. DCIT : 53 SOT 159 (Bang)”

6.1 Similarly the Hon'ble Delhi High Court in the case of CIT vs. Agnity india Technologies Pvt. Ltd. reported in 262 CTR (Del) 291 had held that large companies like Infosys Technologies Ltd. where the turnover is very high cannot be compared to that of a small company which are essentially captive unit of the parent company. Similar view was adopted in the following orders of the Tribunal:

- 1) DCIT vs. Lumax Industries Limited dated 30/09/2010 (ITAT, Delhi Bench)
- 2) ITO vs. Zyduz Altana Healthcare Private Limited dated 22nd April, 2010 (ITAT, Mumbai Bench).
- 3) DCIT vs. M/s. TCS Limited dt. 4th November, 2015 (ITAT, Mumbai Bench)

6.2 For A.Y. 2012-13, undisputedly, the turnover of the assessee is only Rs.13.62 crores. The turnover of Infosys Limited for the relevant assessment year is to the tune of Rs. 31,254 crores which is 2294 times more than the turnover of the assessee. Similarly, the turnover of L&T Infotech Limited, R S Software (India) Private Limited, Mindtree Limited and Persistent Systems Limited are very high as compared to the turnover of the assessee. The details of the turnover of the disputed comparable companies are listed below:

Sl. No.	Name of the company	Turnover of the company (Rs. in Crores)	Assessee's Turnover	Turnover times as compared to Assessee
1.	Infosys Limited	31,254	13.62	2,294.25
2.	Larsen & Toubro Infotech Limited	2,959.55	13.62	217.25
3.	R S Software (India) Private Limited	2,472.08	13.62	181.47
4.	Mindtree Limited	1,255.80	13.62	92.18
5.	Persistent Systems limited	810.36	13.62	59.49

6.3 As mentioned earlier, the assessee is having turnover of Rs.13.62 crores and is captive service provider to its AE. The assessee cannot be compared to the companies like Infosys for the sheer magnitude of the size of Infosys Ltd. The turnover of Infosys Ltd. is almost 2294 times more than that of the assessee and it is an independent service provider unlike the assessee. Other companies like L&T Infotech Ltd., R S Software (India) Pvt. Ltd., Mindtree Ltd. and Persistent Systems Limited are also independent service providers and are having much higher turnover compared to the turnover of the assessee. For these reasons, we are of the view that Infosys Limited, Larsen & Toubro Infotech Limited, R S Software (India) Private Limited, Mindtree Limited and Persistent Systems Limited cannot be taken as a comparable company to that of the assessee for determining the arm's length price of the international

transactions undertaken by the assessee. Therefore, we direct the TPO to exclude the above mentioned five companies from the list of the comparables.

6.4 It was submitted by the Ld. AR that when the above mentioned five companies are excluded from the list of comparables, the average profit margin for the comparable companies is only 13.36% compared to the profit margin of the assessee as determined by the AO/TPO (page 7 of the TPO's order) at 9.09%. Therefore, it was submitted by the Ld. AR that since the profit margin of assessee is less than 5% to the average profit margin of the comparables, no upward adjustment is required to be made to the international transaction that was undertaken by the assessee with its AE during the relevant assessment year.

6.5 Since we have already directed for the exclusion of the five companies referred above from the list of comparables, the average profit margin of the remaining comparables are to be calculated by TPO afresh. For this purpose, we restore the issue to the file of the TPO for fresh calculation of arm's length price undertaken by the assessee with its AE during the relevant assessment year. It is ordered accordingly.

6.6 No other issues were argued by the Ld. Counsel for the assessee, hence the other grounds raised in the Memorandum of Appeal is not adjudicated.

7. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 05th/10/ 2017.

sd/-	sd/-
(P K BANSAL)	(GEORGE GEORGE K)
Vice President	Judicial Member

Cochin: Dated 5/10/ 2017

GJ

Copy to:

1. M/s. Microobjects Private Limited, 41/1098B, Pullepady Cross Road, Kochi-682 018.
2. Assistant Commissioner of Income-tax, Corporate Circle-1(2), Kochi.
3. DR
4. Guard File

By order

Assistant Registrar
ITAT, COCHIN