

IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND  
SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No. 461/Bang/2013

Assessment Year : 2005-06

The Income Tax Officer, Ward – 3(1)(2), Bangalore.	Vs.	M/s. IGEFI Software India Pvt. Ltd., (erstwhile M/s. Finch Software India Pvt. Ltd.) No. 3, Safina Towers, 2 <sup>nd</sup> , 3 <sup>rd</sup> , 4 <sup>th</sup> and 5 <sup>th</sup> Floor, Ali Askar Road, Vasanth Nagar, Near High Grounds, Bangalore – 560 052.  <b>PAN: AAACF 4678A</b>
APPELLANT		RESPONDENT

C.O. No. 60/Bang/2016  
(in IT(TP)A No. 461/Bang/2013)

Assessment Year : 2005-06

M/s. IGEFI Software India Pvt. Ltd., (erstwhile M/s. Finch Software India Pvt. Ltd.) No. 3, Safina Towers, 2 <sup>nd</sup> , 3 <sup>rd</sup> , 4 <sup>th</sup> and 5 <sup>th</sup> Floor, Ali Askar Road, Vasanth Nagar, Near High Grounds, Bangalore – 560 052.  <b>PAN: AAACF 4678A</b>	Vs.	The Income Tax Officer, Ward – 11(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Narendra Jain, CA
Revenue by	:	Shri B.R. Ramesh, JCIT (DR)

Date of hearing	:	13.11.2017
Date of Pronouncement	:	17.11.2017

**ORDER**

*Per Shri A.K. Garodia, Accountant Member*

This is a revenue's appeal and CO is filed by the assessee and these are directed against the order of Id. CIT (A) – IV, Bangalore dated 29.01.2013 for Assessment Year 2005-06.

2. The grounds raised by the revenue in its appeal 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 CIT(A) erred in directing the AO to exclude from the total turnover expenses excluded from the export turnover and accordingly modify the computation of relief allowable under section 10A.*

*3. The Ld. CIT(A) erred in not appreciating that there is no provision in section 10A which requires the concerned expenses, which are required to be reduced from the export turnover as per clause (iv) of the Explanation to Section 10A to be reduced from the total turnover also.*

*4. The Ld. CIT(A) erred in not appreciating the fact that the jurisdictional High Court decision in the case of M/s Tata Elxsi Ltd. relied upon by him has not been accepted by the department and a SLP has been filed before the Hon'ble Supreme Court which is pending.*

*5. The CIT(A) erred in holding that Exensys Software Solutions Limited, Flextronics Limited, iGate Global Solutions Limited, L&T Infotech Limited, Satyam Computer Services Limited, Infosys Technologies Limited and Thirdware Solutions Limited should not be taken as comparables.*

*6. The CIT (A), in the facts and circumstances of the case, erred in holding that Intertec Communications Limited should be considered as a comparable.*

*7. The CIT (A), in the facts and circumstances of the case, erred in holding that Bodhtree Consulting Limited should be excluded from the list of comparables being functionally different.*

*8. The CIT (A), in the facts and circumstances of the case. erred in holding that the set of 8 comparables listed out by him should be considered for determination of the average margin of comparables and allow consequent working capital adjustment on the ALP thus completed.*

*9. 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 Assessing Officer be restored.*

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

3. The grounds raised by the assessee in its CO are as under.

*“1. The Order of the learned Commissioner of Income Tax (Appeals) - IV, Bangalore [CIT (Appeals)], to the extent prejudicial to the Respondent is bad in law.*

*2. The learned CIT (Appeals) has erred in confirming the action of the Assessing officer ("AO") in making a reference to Transfer Pricing Officer ("TPO") for determining the arm's length price without demonstrating as to how or why it was necessary and expedient to do so.*

*3. The lower authorities have erred in relying upon replies received under section 133(6) disregarding the principles of natural justice.*

*4. The learned CIT (Appeals) has erred in confirming the action of the TPO in:*

*a. Rejecting the transfer pricing analysis undertaken by the Respondent on unjustifiable grounds and conducting a fresh transfer pricing analysis;*

*b. Rejecting the comparables selected by the Respondent on unjustifiable grounds;*

*c. Adopting unjustifiable and inappropriate filters like one-sided turnover filter, 25% RPT filter, etc. in the process of selecting comparables;*

*d. Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, asset utilised, size, turnover etc;*

*e. not appreciating that, apart from failing upper turnover filter, Flextronics Software Systems Ltd is functionally different from the Appellant, Infosys Ltd is a large company having huge brand value and intangible and financial statements of Satyam Computer Services Ltd are not reliable.*

*f. not appreciating that, apart from having abnormal profits, Exensys Software is functionally different from the Appellant & has extraordinary event of merger during the year under consideration and Thirdware Solutions is functionally different from the Appellant.*

*g. Adopting Foursoft Ltd. and Geometric Software Solutions Company Ltd as comparables even though they are functionally different from the Appellant and fail 15%RPT filter.*

*h. Adopting Sankhya Infotech Ltd as a comparable even though it is functionally different from the Appellant.*

*i. not appreciating that Tata Elxsi Ltd is functionally different from the Appellant.*

*5. The lower authorities have erred in:*

*a. Not making proper adjustment for enterprise level and transactional level differences between the Respondent and the comparable companies;*

*b. Not considering that the Respondent is insulated from certain risks, as against comparables, which assume these risks and therefore have to be credited with a risk premium on this account; and*

*c. Not allowing the benefit of the +/-5% range mentioned in the proviso to section 92C (2).”*

4. It was submitted by Id. AR of assessee that ground nos. 1 and 3 of the CO are general and ground no. 2 is not pressed and hence, ground no. 2 of the CO is rejected as not pressed and we hold that for ground nos. 1 and 3, no separate adjudication is required.
  
5. Regarding ground no. 4, it was submitted that as per this ground, the main grievance of the assessee is regarding this aspect that in respect of exclusion of various comparables such as Flextronics Software Systems Ltd, Infosys Ltd., Exensys Software Solutions Ltd., Foursoft Ltd., Geometric Software Solutions Company Ltd., Sankhya Infotech Ltd. etc., the Id. CIT(A) had decided only one aspect i.e. high turnover and high profit ratio but the assessee's objection was regarding functional dissimilarity also in respect of some of the comparables and RPT filter in respect of some of the comparables apart from this contention that financial statements of Satyam Computer Services Ltd. is not reliable. He submitted that these contentions of the assessee were not examined and decided by Id. CIT(A). He also submitted that in appeal of the revenue, apart from the issue in respect of corporate taxation being computation of deduction allowable u/s. 10A of IT Act, the revenue is aggrieved for exclusion of several comparables such as Exensys Software Solutions Ltd., Flextronics Ltd., iGATE Global Solutions Ltd., L & T Infotech Ltd., Satyam Computer Services Ltd., Infosys Technologies Ltd. and Thirdware Solutions Ltd. on the basis of high turnover / high profit ratio of these comparables. At this juncture, it was pointed out by the bench that now this tribunal is following the judgment of Hon'ble

Delhi High Court rendered in the case of Chryscapital Investment Advisors (India) (P.)Ltd. Vs. DCIT as reported in 376 ITR 183 and restoring the matter back to the file of AO/TPO for fresh decision in the light of this judgment because it was held by Hon'ble Delhi High Court in this case that huge profit or huge turnover does not lead ipso facto to the exclusion of a comparable and the TPO first had to satisfy that such differences do not material affect the price or cost and secondly, an attempt should be made to make reasonable adjustment to eliminate the material effect of such differences. In reply, it was submitted by Id. AR of assessee that as per the judgment of Hon'ble Bombay High Court rendered in the case of CIT Vs. M/s. Pentair Water India Pvt. Ltd. in Tax Appeal No. 18 of 2015 dated 16.09.2015 which is after the judgment of Hon'ble Delhi High Court delivered on 27.04.2015, it was held that the turnover is relevant factor to consider the comparability. He submitted that this later judgment of Hon'ble Bombay High Court should be followed instead of judgment of Hon'ble Delhi High Court rendered in the case of Chryscapital Investment Advisors (India) (P.)Ltd. Vs. DCIT (supra). The Id. DR of revenue submitted the copy of tribunal order rendered in the case of M/s. NTT DATA Global Delivery Services Ltd. Vs. ACIT in IT (TP) A No. 1487/Bang/2013 dated 06.04.2016 and pointed out that as per para no. 10 of this tribunal order, it was held by the tribunal in this case for the same assessment year that Exensys Software Solutions Ltd. is a good comparable and the same cannot be excluded from the list of comparables. He further submitted that as per Para no. 11 of this Tribunal order, it was held that Flextronics Software Systems Ltd. is also a good comparable and it cannot be excluded from the list of comparables. Then he pointed out that as per para no. 15 of this Tribunal order, the Tribunal held that Thirdware Solutions Ltd. is not a good comparable.

6. We have considered the rival submissions. First of all we deal with this aspect as to whether high turnover and high profit ratio of a comparable company can be a basis for excluding that company from the list of comparables. As per the judgment of Hon'ble Delhi High Court rendered in the case of Chryscapital Investment Advisors (India) (P.)Ltd. Vs. DCIT (supra), merely on the basis of high profit and high turnover, the comparable cannot be excluded and in doing

so, various aspects has to be looked into as to whether such high profit or high turnover is affecting the price or cost materially and this is also required to be seen as to whether reasonable adjustment can be made to eliminate the material effect of such differences. This is worth noting that in TP study, the purpose of study is to see that the prices charged by the assessee are at arm's length and therefore, the size of the turnover of the tested party and comparable company, this is a vital factor to see that such difference in turnover or profit is affecting the price or cost or not and whether such material effect of differences can be removed by making suitable adjustments. If it is found that such high turnover or high profit is affecting the price or cost and suitable adjustment is not possible to be made to remove such differences then only such comparable should be excluded on account of high turnover or high profit. Hence, it is seen that as per this judgment, this is not a ratio that high turnover and/or high profit is not relevant. As per this judgment, even in case of high turnover and/or high profit, some more aspects should be looked into before deciding about the need and justification of exclusion of that comparable. Now we examine the judgment of Hon'ble Bombay High Court cited by Id. AR of assessee having been rendered in the case of CIT Vs. M/s. Pentair Water India Pvt. Ltd. (supra). We find that as per para no. 5 of this judgment of Hon'ble Bombay High Court, it was noted that the turnover of one comparable i.e. HCL Comet Systems & Services Ltd. was about 23 times of the turnover of the assessee company and the turnover of the second comparable Infosys BPO Ltd. was more than 65 times of the assessee's turnover and similarly, the turnover of the third comparable Wipro Ltd. was 939.78 crores against the turnover of assessee company in that case of Rs. 11 crores only. We also find that in that case, the turnover was above 23 times, 65 times and 85 times of the turnover of the assessee company and simply on the basis of these facts, it was held that these three companies are not good comparable without going into this aspect as to whether such high turnover is affecting the prices of those comparable companies because this was not an argument raised before Hon'ble Bombay High Court. Any judgment is an authority in respect of that aspect only which is actively examined and decided by that judgment. Since this aspect that high turnover is affecting the price or not was

not examined or decided by Hon'ble Bombay High Court but was decided by Hon'ble Delhi High Court and which is very important and relevant aspect, in our considered opinion, we feel it proper to follow the judgment of Hon'ble Delhi High Court in preference to the judgment of Hon'ble Bombay High Court on this issue because the judgment of Hon'ble Delhi High Court is not in conflict of the judgment of Hon'ble Bombay High Court and it only says that some more aspects should be looked into before deciding about the need and justification of exclusion of that comparable.

7. Regarding the reliance placed by Id. DR of revenue on the Tribunal order rendered in the case of M/s. NTT DATA Global Delivery Services Ltd. Vs. ACIT (supra), we want to observe that since we are sending back the matter to the file of AO/TPO for fresh decision in the light of this judgment of Hon'ble Delhi High Court rendered in the case of Chryscapital Investment Advisors (India) (P.) Ltd. Vs. DCIT (supra), all the aspects can be examined and decided by the AO/TPO afresh. Moreover as per this Tribunal order also, all the aspects were not decided because they were never argued before the Tribunal. In para no. 10 of this Tribunal order, regarding Exensys Software Solutions Ltd., the only aspect in dispute was whether there was abnormal profits on account of amalgamation. It was held by the Tribunal in this case that since the amalgamated company was also having similar functions, event of merger cannot be a factor for exclusion of this company from the list of comparables. Hence it is seen that no other aspect was examined by Tribunal in that order because the same was never argued by Tribunal in that case. In the present case, several aspects have to be examined and decided i.e. high turnover, functional similarity, high profit etc. Hence we feel it proper that the matter should go back to the file of AO/TPO for a fresh decision on all aspects after considering the judgment of Hon'ble Delhi High Court rendered in the case of Chryscapital Investment Advisors (India) (P.)Ltd. Vs. DCIT (supra). We order accordingly.

8. The TP issue regarding exclusion of various comparables is restored back to the file of AO/TPO for fresh decision in the light of above discussion after providing adequate opportunity of being heard to assessee.
9. The only other issue to be decided is regarding corporate tax issue being computation of deduction allowable u/s. 10A of IT Act. This issue is covered by the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Tata Elxsi Ltd. as reported in 349 ITR 98. It was held in this case that total turnover is sum total of export turnover and domestic turnover and therefore, if any amount is reduced from export turnover than total turnover also gets reduced automatically by the same amount. The direction of DRP on this issue is in line with this judgment and therefore, we find no infirmity in the same. This issue is decided in favour of the assessee.
10. In the result, the appeal of the revenue and the C. O. of the assessee are partly allowed for statistical purposes.

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

Sd/-  
(LALIET KUMAR)  
Judicial Member

Sd/-  
(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 17<sup>th</sup> November, 2017.  
/MS/

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

By order

Senior Private Secretary,  
Income Tax Appellate Tribunal,  
Bangalore.