

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2427/Del/2015
(Assessment Year: 2008-09)

Freescale Semiconductor India Pvt Ltd, 13, Abul Fazar Road, Bengali Market, New Delhi PAN:AAACZ1978P	Vs.	DCIT, Circle-9(2), Room No. 405, CR Building, IP Estate New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri SD Kapila, Adv Shri SS Maurya, Adv
Revenue by:	Shri Amrender Kumar, CIT. DR Shri Kumar Pranav, Sr. DR
Date of Hearing	12/09/2017
Date of pronouncement	07/12/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. The assessee is a company engaged in the business of designing of semi conductor products, software and electronic systems and providing sales and technical support services. It is providing services to its Associated Enterprise and is wholly owned subsidiary of Freescale Semiconductor Inc. USA. It has a Software Technology Park Unit at Noida and Bangalore. The assessee is also receiving remuneration based on the contractual low end chip designing services based on agreement on cost plus model. During the year the assessee has entered into two kind of international transaction as under:-
 - a. Provision of software development services Rs. 2392169693/-
 - b. Provision of market support services Rs. 43511233/-
2. In the transfer pricing documentation of software development services and market support services were aggregated, assessee was selected as the tested party and Transaction Net Margin Method (TNMM) was adopted as the Most Appropriate Method (MAM). The assessee selected 16 comparables whose average profit margin was 11.66% on the cost and therefore, the margin earned by the assessee of 14.14% on Profit Level Indicator (PLI) of operating profit to cost and therefore, international transactions was treated at arm's length.
3. The Id Transfer Pricing Officer rejected the transfer pricing study report. He further segregated both the above services. For software development services he carried out fresh search applying different filters and accordingly selected 11 comparables whose arithmetic

mean of the margin was 26.20% and from that he granted adjustment on account of working capital of 2.23% and then determined the adjusted arithmetic mean of comparable @23.97%. Accordingly, on an operating cost of Rs. 2121584211/- he derived arm's length price of Rs. 2630127946/-. Therefore, on the software development services of Rs. 2392169693/-, he determined adjustment of Rs. 237958253/-.

4. For marketing support services of Rs. 43511233/- he selected 10 comparables and their adjusted PLI of operating profit to operating cost was determined 21.38% and on the operating cost based of Rs. 39274283 /- he determined ALP of Rs. 47671125/- and proposed an adjustment of Rs. 4159892/-. Therefore, he proposed an adjustment on account of software development services of Rs. 237958253/- and on marketing support services of Rs. 4159892/- making the total adjustment of Rs. 242118141/- by order dated 28.10.2011 passed u/s 92CA(3) of the Act by the Adl CIT(Transfer Pricing)-I(2), New Delhi. The Id Assessing Officer incorporated the above adjustment in assessment order passed u/s 143(3) of the Act on 22.02.2012 wherein, against returned income of Rs. 14952021/- as per ROI filed on 29.09.2008, assessee was assessed at Rs. 258484330/-. The assessee preferred appeal before the Id CIT(A) who decided the appeal of the assessee vide order dated 18.02.2014 wherein, the appeal of the assessee was partly allowed. With respect to the transfer pricing adjustment assessee did not get full relief and therefore, assessee is in appeal before us. Therefore, this appeal filed by the assessee against the order of the Id CIT(A) in ITA No. 2427/Del/2014 for the Assessment Year 2008-09:-

I. Transfer Pricing Grounds

1. *That on the facts and in the circumstances of the case and in law, the order passed by the learned Assessing Officer ("Ld. AO") is bad in law and void ab-initio.*
2. *The Ld. CIT(A) erred on facts and circumstances of the case in determining the arm's Length adjustment to the Appellant's international transactions from Associated Enterprises ("AEs") and thereby resulting in the enhancement of returned income of the Appellant by Rs. 150,929,620.*

The Ld. AO/Ld. TPO erred on facts and in law in the assessment of the arm's length price of the Appellant's international transactions with associated enterprises in the following manner:-

3. *Ld. AO/TPO has erred in using the power conferred under section 133(6) of the Act for collecting information that was not available to the Appellant in the public domain and using the information so collected for the purpose of selection of comparable companies.*
4. *The Ld. AO/TPO erred in using the information collected by him u/s 133(6) of the Act from the various companies without giving the assessee an*

opportunity to cross examine the companies on the information supplied by them even though the appellant had pointed out several discrepancies.

5. *The Ld. AO/Ld. TPO erred in facts and in law the rejecting the FAR analysis conducted by the appellant in its transfer pricing documentation.*
6. *The Ld. AO/ Ld. TPO erred in suo motu conducting a fresh benchmarking analysis based on additional qualitative/ quantitative filters for which he has arbitrarily fixed lower or upper limits.*
7. *The Ld. AO/Ld. has erred in computing the margins of comparable companies proposed by him and the margin of the Appellant by considering foreign exchange gain/loss as operating in nature.*
8. *Ld.TPO/AO/ CIT(A) erred in law in not following the directions/ order of the superior Appellate Tribunal.*
9. *The Ld.AO/TPO has erred by selecting certain companies as comparable which were not functionally comparable to the Appellant and/or had witnessed abnormal margin/growth during the year under consideration, in order to determine the arm's length margin for the software development services segment.*
10. *The Ld. AO/TPO erred in denying the economic adjustment for the difference in risk profile of the Appellant vis a vis comparable companies.*
11. *The Ld. AO/ Ld. TPO considered the current year (i.e. financial year 2007-08) data for comparability despite the fact that at the time of comparison done by the Appellant, data for financial year 2007-08 was not available within the public domain.*
12. *That the Ld. AO/ Ld. TPO has erred in making a transfer pricing adjustment especially as the Honourable Commissioner of Income Tax (Appeals) has accepted the arm's length nature of the international transactions in FY 2004-05.*
13. *The Ld. AO/ Ld. TPO did not appreciate the fact that the Appellant is a company incorporated under the provisions of the Companies Act, 1956 and enjoying the tax holiday benefits conferred under the tax holiday benefits as per the Software Technology Park of India (herein after referred to as "STPI") Scheme Thus, there is no motive on the part of the Appellant to shift the profits to any other jurisdiction. Hence the case of the Appellant falls squarely within the ambit of aforementioned principle."*

5. Before us the Id AR submitted that he presses the issue with respect to transfer pricing adjustment and more precisely the comparables selected by the Id Transfer Pricing Officer in software development segment. He stated that the marketing support services are not now in dispute. Therefore, he is pressing for exclusion of three comparables selected by the Id Transfer Pricing Officer and confirmed by the Id CIT(A) as (a) Kals Information System (b) Infosys Ltd, (c) Wipro Ltd. He also contested by way of additional ground with respect to inclusion of Bodhtree Consulting Pvt. Ltd as a comparable. Therefore, in software

development services four comparables are in dispute. The functional profile of the assessee is not in dispute. Therefore, we consider the four comparables contested as under:-

a. Kals Information System Ltd

The Id AR referred to the various pages of the annual accounts of this comparable and stated that there is a difference in the asset base of both the companies. It was further stated that comparable company is engaged in several software products and has products like 'la-visor', CMSS, eDMS, Shine etc. for which its sales licenses. It was further stated that there is an arithmetical error in the annual accounts of the company while calculating profit before tax in segments. He further relied on the decision of coordinate benches where this comparable is excluded. The Id DR stated that there is no difference in the functional profile of the company with the assessee and therefore, it cannot be excluded. He further stated that if the asset base does not impact the profitability which has not been demonstrated by the Id AR, same cannot be excluded.

In the case of the assessee for Assessment Year 2007-08 the issue about the exclusion of the above comparable arose wherein, in para No. 8.1(iv) the coordinate bench excluded the above comparable relying on the para No. 94.1 of the decision of Motorola Solution India Pvt. Ltd dated 14.08.2014 in ITA No. 5637/Del/2011 for Assessment Year 2007-08. The Id DR could not point out that why we should not follow the same decision in the assessee's own case without there being any change pointed out, hence, as judicial discipline demands we respectfully follow the decision of the coordinate bench and direct the Id Transfer Pricing Officer to exclude the above comparable.

b. Infosys Ltd

For the Infosys the Id AR stated that above comparable needs to be excluded because of the decision of the Hon'ble Delhi High Court in case of Agnity India Technologies Ltd 262 CTR 291. The Id DR submitted that as directed in that decision about the impact of net profitability of the comparable which has not been demonstrated by Id AR, same cannot be excluded. The Id AR further stated that particular comparable has huge IPR and the profits are attributed to its brand which is valued at Rs. 31100 croes. He further stated that the company also owns 'Finacle' Software which is used worldwide in banking industry.

In the case of the assessee for Assessment Year 2007-08 the issue about the exclusion of the above comparable arose wherein, in para No. 8.1(vii) the coordinate bench excluded the above comparable relying on the decision of Hon'ble Delhi High Court in case of CIT Vs. Agnity India Technologies Pvt. Ltd 262 CTR (Del) 291. The Id

DR could not point out that why we should not follow the that decision in the assessee's own case without there being any change pointed out, hence, we respectfully follow the decision of the coordinate bench and directs the Id Transfer Pricing Officer to exclude the above comparable.

c. Wipro Ltd

The Id AR submitted that there are extraordinary events of merger in the above company. It has huge goodwill and intangibles. It has several patents across the globe and further the segmental results with respect to the stand alone financials of Wipro are not available. Therefore, it should be excluded.

The Id DR stated that the functions of the assessee and comparable are same therefore, it cannot be excluded.

In the case of the assessee for Assessment Year 2007-08 the issue about the exclusion of the above comparable arose wherein, in para No. 8.1(xiii) the coordinate bench excluded the above comparable relying on the decision of Hon'ble Delhi High Court in case of CIT Vs. Agnity India Technologies Pvt. Ltd 262 CTR (Del) 291. The Id DR could not point out that why we should not follow the that decision in the assessee's own case without there being any change pointed out, hence, we respectfully follow the decision of the coordinate bench and directs the Id Transfer Pricing Officer to exclude the above comparable.

d. Bodhtree Consulting Pvt. Ltd

With respect to this comparable the assessee relied on the decision of the special bench of tribunal in case of Quark System and then stated that as same is the mistake of the assessee in accepting this comparable in its original accept/ reject matrix and therefore, he relied on several decisions of Hon'ble Courts, prominent among them are 81 ITR 202 and 29 ITR 661.

The Id DR relied upon the decision of coordinate bench in ITA No. 4001/Del/2013 for Assessment Year 2006-07 dated 11.05.2017, where para No. 31 the issue of resiling of a comparable originally selected by the assessee was discussed. Therefore, it was stated that this comparable cannot be excluded.

For the exclusion of the above comparable the Id AR stated that the comparable has revenue recognition policy that states that revenue is recognized based on software developed and billed to client. It was further stated that appellant has not raised the objection before the TPO or the first appellate authority as it was not aware about the

accounting policy of the comparable. For this the Id AR has submitted annual report of this company for AY 2009-10. The Special Bench of ITAT in case of Quark System has held that assessee can resile from the comparable because the substantial justice deserves to be preferred. Despite this as we have not been shown any functional dissimilarity or the impact on the profitability of the accounting policy of the company, we set aside this comparable to the file of the Id TPO/AO with a direction to the assessee to show how the accounting policies of the comparable company has impacted the profitability of the comparable. The Id Assessing Officer may consider the objection of the assessee with respect to this aspect and if satisfied may exclude the above comparable or may adjust the margin of the above comparable in accordance with the law.

6. In the result ITA No. 2427/Del/2014 preferred by the appeal for Assessment Year 2008-09 is allowed to the extent of direction of exclusion to the Id TPO of (1) Kals Information Systems Ltd., (2) Infosys Technologies Ltd, (3) Wipro Ltd and to examine the margin as well as exclusion of Bodhtree Consulting Ltd in comparability analysis of software development services division of the international transactions entered into by the assessee.
7. As no other grounds were pressed before us we dismiss all other issues raised before us.
8. In the result appeal of the assessee is partly allowed
Order pronounced in the open court on 07/12/2017.

-Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:07/12/2017
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi