

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1457/PUN/2015

निर्धारण वर्ष / Assessment Year : 2011-12

Income Tax Officer,
Ward - 1(1), Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Avalara Technologies Pvt. Ltd.,
Pride Portal, 3rd Floor,
Shivaji Housing Society,
Bahiratwadi, Senapati Bapat Road,
Pune - 411016

PAN : AAFCA5552K

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Dr. Vivek Agrawal

सुनवाई की तारीख / Date of Hearing : 07-03-2018

घोषणा की तारीख / Date of Pronouncement : 16-03-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-13, Pune dated 31-08-2015 for the assessment year 2011-12.

2. The brief facts of the case as emanating from records are : The assessee company is engaged in the business of providing software development and other IT Enabled Support Services (ITES) to its AE. The assessee company was incorporated in February, 2006. The assessee is a fully owned subsidiary of Avalara Inc., a US based company. The assessee company is claiming deduction u/s. 10A of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) and its only customer is Avalara Inc., i.e. its parent company. The assessee company filed its return of income for the impugned assessment year on 29-09-2011 declaring total income as Nil after claiming deduction u/s. 10A of the Act. During the period relevant to assessment year under appeal, the assessee had entered into international transactions with its US based parent company to the tune of Rs.3,16,92,998/- on account of software development and other ITES Services. The assessee followed Transactional Net Margin Method (TNMM) as the most appropriate method for determining Arm’s Length Price (ALP). The assessee selected 11 companies as comparables. The Assessing Officer accepted TNMM as the most appropriate method, however, he rejected 8 out of 11 companies selected by assessee and further introduced 5 new companies as comparables. The final set of comparables selected by Assessing Officer are as under :

Sr. No.	Company’s Name	% OP/OC
1	7Seas Entertainment Ltd.	27.90%
2	Acropetal Technologies Ltd.	23.82%
3	Compucom Software Ltd.	33.62%
4	Infosys Ltd.	43.36%
5	Persistent Systems & Solutions Ltd. (Merged)	24.54%
6	Sasken Communication Technologies Ltd.	18.83%
7	Sonata Software Ltd.	21.01%
8	Spry Resources India Pvt. Ltd.	22.18%
	Arithmetic Mean	26.91%

The Profit Level Indicators (PLI) of assessee i.e. OP/OC was computed at 9.43%. The Assessing Officer after making fresh list of comparables compared the average margins of comparables i.e. 26.91% with that of assessee and made adjustment of Rs.50,62,020/-.

Aggrieved by the assessment order dated 28-02-2014, the assessee filed appeal before the Commissioner of Income Tax (Appeals). Before the First Appellate Authority, the assessee agitated against exclusion of Aftex Ltd., Cat Technologies Ltd., Datamatics Global Services Ltd., Firstobject Technologies Ltd., Mastiff Tech Pvt. Ltd., R S Software (India) Ltd., R Systems International Ltd. and Silverline Technologies Ltd. The assessee further assailed the findings of Assessing Officer in including following companies in the final list of comparables :

- i. Compucom Software Ltd.
- ii. Infosys Technologies Ltd.
- iii. Sonata Software Ltd.
- iv. Sasken Communication Technologies Ltd.
- v. Persistent Systems & Solutions Ltd.

The assessee before the Commissioner of Income Tax (Appeals) prayed for inclusion of Tata Elaxi Ltd. and Thinksoft Global Services Ltd. in the final list of comparables. The Commissioner of Income Tax (Appeals) vide impugned order directed the Assessing Officer to include Firstobject Technologies Ltd., Mastiff Tech Pvt. Ltd., R S Software (India) Ltd. and R Systems International Ltd. The Commissioner of Income Tax (Appeals) further directed to exclude Infosys Technologies Ltd., Sasken Communications Technologies Ltd., Sonata Software Ltd. and Compucom Software Ltd. from the final list of comparables. The Commissioner of Income Tax (Appeals) further directed the Assessing Officer to include Tata

Elaxi Ltd. and Thinksoft Global Services Ltd. subject to the condition that these two companies qualify the filters applied by Assessing Officer while passing the assessment order. Against the findings of Commissioner of Income Tax (Appeals) the Department is in appeal before the Tribunal.

3. The Revenue has raised following grounds assailing the findings of Commissioner of Income Tax (Appeals).

“2. The learned Commissioner of Income-tax (Appeals) erred in holding that the company such as R System should be included in the list of comparable companies even though its financial year starts from 01/01/2010 to 31/12/2010 and this is not as per as per the requirement of Rule 10B(4) of the I T Rules. As per Rule 10B(4) only those companies should be selected as comparable companies which follows financial years start from 1st April and ends on 31st March.

3. The learned Commissioner of Income-tax (Appeals) erred in holding that the company M/s Compucom Software Limited should be excluded from the list of comparable without assigning any acceptable reasons for exclusion of this company from the list of comparables.

4. The learned Commissioner of Income-tax (Appeals) erred in holding that the companies such as Infosys Limited, Sasken Communication Technologies Limited and Sonata Software Limited should be excluded from the list of comparable companies being giant companies as compare to assessee company relying of the decision of Hon'bl Delhi High Court in the case CIT Vs Agnitya India Technologies Ltd.

5. The learned Commissioner of Income-tax (Appeals) erred in holding that the company such as Tata Elix Ltd., and Thinksoft Global Services Limited should be included in the list of comparable companies inspite of the facts that the assessee company while preparing its Transfer Pricing Report has not itself included these companies as comparable companies.”

4. Shri Nikhil Pathak appearing on behalf of the assessee fairly admitted at the outset that the findings of Commissioner of Income Tax (Appeals) with respect to inclusion of R Systems International Ltd. have to be reversed and decided against the assessee in view of Tribunal's order in assessee's own case in ITA No. 1800/PN/2013 in immediately preceding assessment years i.e. assessment year 2010-11. The ld. AR submitted that the Tribunal following the decision in the case of Dover India (P.) Ltd. Vs.

DCIT reported as 59 taxmann.com 53 (Pune-Trib.) excluded Silver Line Technologies from the final list of comparables as the financial year of said company and that of the assessee were not same. Similarly, in the present case, the financial year of assessee and R Systems International Ltd. are different. The financial year of assessee company starts from 1st April and ends on 31st March, whereas, the financial year of R Systems International Ltd. starts from 1st January and ends on 31st December.

4.1 In respect of ground No. 3 relating to exclusion of M/s. Compucom Software Limited, the ld. AR submitted that the said company does not qualify export filter of 75% as applied by Assessing Officer. The Commissioner of Income Tax (Appeals) excluded said company from the final list of comparables only on the ground that it fails to qualify 75% export turnover filter. The ld. AR pointed that for similar reasons the said company was excluded from the final list of comparables in assessee's own case in assessment year 2010-11. The ld. AR further referred to P & L Account of Compucom Software Ltd. at page 30 of the paper book. The ld. AR referring to P & L Account of the said company pointed that the domestic turnover from Software and E-Governance Services is much more than the overseas turnover. The ld. AR further pointed that in assessment year 2010-11 the Tribunal has upheld exclusion of Compucom Software Ltd. as it fails to qualify export turnover filter of 75%.

4.2 In respect of ground No. 4 relating to exclusion of Infosys Technologies Limited, Sasken Communication Technologies Limited and Sonata Software Limited the ld. AR submitted that the turnover of assessee company is merely Rs.3.16 crores. Whereas, the turnover of each of the above mentioned three companies is more than Rs.200 crores. If turnover

filter ranging between Rs.1 crore to Rs.200 crores is applied, the said companies would fail to qualify the filter therefore, these companies have been rightly excluded by Commissioner of Income Tax (Appeals) from the list of comparables. The ld. AR further submitted that the Tribunal in assessee's own case in assessment year 2010-11 upheld the application of turnover filter between Rs.1 crore to Rs.200 cores.

4.3 In respect of ground No. 5 of the appeal the ld. AR fairly admitted that Tata Elaxi Ltd. would fail to qualify turnover filter, as its turnover is more than Rs.200 crores. In respect of Thinksoft Global Services Ltd. the ld. AR submitted that directions may be given to Assessing Officer to comply with the directions of Commissioner of Income Tax (Appeals) in selecting Thinksoft Global Services Ltd. as comparable company. The ld. AR further submitted that merely for the reason that Thinksoft Global Services Ltd. was not considered by assessee in TP study, would not debar the assessee from considering the same at a later stage. The ld. AR in support of his submissions placed reliance on the decision of Tribunal in assessee's own case for assessment year 2010-11 in ITA No. 299/PUN/2015.

5. On the other hand Dr. Vivek Agrawal representing the Department vehemently supported the findings of Assessing Officer and the list of comparable companies finalized by Assessing Officer. The ld. DR submitted that the Commissioner of Income Tax (Appeals) has erred in excluding Compucom Software Ltd., Infosys Technologies Ltd., Sasken Communication Technologies Ltd. and Sonata Software Ltd. from the list of comparables. The ld. AR submitted that the Assessing Officer has given a reasoned finding in including these companies in the list of comparables.

In so far as Thinksoft Global Services Ltd. is concerned the ld. DR pointed that the said company was never considered by the assessee in TP study report. Now, the assessee cannot seek inclusion of fresh comparables.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. In so far as application of TNMM is the most appropriate method for determining ALP is concerned, there is no dispute. The only dispute in the present appeal by Department is with regard to inclusion/exclusion of certain companies in the final list of comparables.

7. The ground Nos. 1, 6 and 7 of the appeal are general in nature, hence require no adjudication.

8. In ground No. 2 of appeal, the Department has assailed inclusion of R Systems International Ltd. in the list of comparables. The ld. AR has fairly admitted that R Systems International Ltd. has to be excluded as the said company has financial year different from that of assessee. The financial year of assessee company starts from 1st April and ends on 31st March. Whereas, the financial year of R Systems International Ltd. starts from 1st January and ends on 31st December. We find that Tribunal in assessee's own case in immediately preceding assessment year excluded Silver Line Technologies for the similar reasons after placing reliance on the decision in the case of Dover India (P.) Ltd. Vs. DCIT (supra). Thus, in view of the decision of Tribunal on similar issue and fair admission by ld. AR the ground No. 2 raised in appeal by Department is allowed.

9. In ground No. 3 of appeal, the Revenue has assailed exclusion of M/s. Compucom Software Limited. A perusal of impugned order shows that the Commissioner of Income Tax (Appeals) has excluded the said company from final list of comparables as it fails to qualify export turnover filter of 75%. A perusal of P & L Account of the said company at page 30 of the paper book reveal that domestic turnover of said company for the financial year ended on 31st March, 2011 is Rs.5,21,90,273/- as against the overseas turnover of Rs.2,82,13,301/-. The above data clearly indicates that the domestic turnover of the company from Software and E-Governance Services is more than the export turnover. The said company was rejected as comparables for the same reason in assessment year 2010-11. Thus, we do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in excluding Compucom Software Ltd. from the list of comparables. Accordingly, ground No. 3 raised in appeal by Department is dismissed.

10. In ground No. 4 the Revenue has assailed the order of Commissioner of Income Tax (Appeals) in excluding Infosys Technologies Limited, Sasken Communication Technologies Limited and Sonata Software Limited from the final list of comparables. The ld. AR submitted that these three companies have turnover of more than Rs.200 crores, whereas the turnover of assessee company is Rs.3.16 crores. The assessee had applied turnover filter with range of Rs.1 crore to Rs.200 cores. The Assessing Officer rejected upper range of the filter applied by assessee. If turnover filter with range of Rs.1 crore to Rs.200 crores is applied the aforesaid three companies would fall outside the range. We observe that the Co-ordinate Bench of Tribunal in assessee's own case in assessment year 2010-11 has approved the turnover filter with the range between Rs.1

crore to Rs.200 crores. The ld. DR has failed to controvert the findings of the Co-ordinate Bench in assessee's own case for assessment year 2010-11 in accepting turnover filter of Rs.1 crore – Rs.200 cores. Nothing has been brought on record by the Department to show that three companies mentioned in ground No. 4 of appeal fall within the range of turnover filter applied in the case of assessee. On the contrary, a perusal of impugned order shows that turnover of Infosys Technologies Ltd. is Rs.21140 crores, turnover of Sasken Communication Technologies Ltd. is Rs.394 crores and turnover of Sonata Software Ltd. is Rs.252 crores in the period corresponding to the year in which the assessee is having turnover of Rs.3.16 crores only. In the backdrop of such facts, we do not find any error in the findings of Commissioner of Income Tax (Appeals) in excluding these companies from the list of comparables. Accordingly, ground No. 4 raise in appeal by Department is dismissed.

11. In ground No. 5 of appeal, the Revenue has assailed the directions of Commissioner of Income Tax (Appeals) to consider Tata Elaxi Ltd. and Thinksoft Global Services Ltd. for inclusion in the final list of comparables, if the said companies qualify the filters adopted at the time of passing of assessment order. The ld. AR of assessee fairly stated at the Bar that turnover of Tata Elaxi Ltd. is beyond the tolerance range of Rs.200 crores, therefore, the said company has to be rejected from the list of comparables. In so far as Thinksoft Global Services Ltd. is concerned we do not find any error in the Commissioner of Income Tax (Appeals) in directing the Assessing Officer to consider the said company and include the same in the list of comparables, if it qualifies all the filters applied in selection of other comparable companies. The ld. DR has raised objection that this company was not consider by assessee at the time of TP study by assessee

and now the assessee cannot agitate to include the said company in the list of comparables. We are of considered opinion that such an objection is not sustainable. There is no bar on assessee in praying for considering fresh company for inclusion in the list of comparables at a later point even if the said company was not part of its TP study. However, the said company has to qualify the filters applied on other comparables before being included in the final list of comparables. Thus, the ground No. 5 raised in appeal by Department is partly allowed.

12. In the result, appeal of the Revenue is partly allowed in the terms aforesaid.

Order pronounced on Friday, the 16th day of March, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 16th March, 2018

RK

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)-13, Pune
4. आयकर आयुक्त /The CIT (IT/TP), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.
//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune