

IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T(TP).A No.340/Bang/2015
(Assessment Year : 2010-11)

Income-tax Officer,
Ward – 6(1)(2), Bengaluru

.. Appellant

v.

M/s. Dell International Services India P. Ltd,
(Merged with Sonic Wall Info Security P. Ltd)
4th floor, Wing –A, Office -1,
Salarpuria Solutzone,
Bellandur, Bengaluru 560 066
PAN : AAECA3617Q

.. Respondent

I.T(TP).A No.555/Bang/2015
(Assessment Year : 2010-11)
(By the Assessee)

Assessee by : Shri. Raghunathan, Advocate
Revenue by : Shri. C. H. Sundar Rao, CIT - DR

Heard on : 04.12.2018
Pronounced on : 13.12.2018

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

These are cross appeals are filed by the Revenue and the assessee respectively, against the order of the ITO, Ward -6(1)(2), Bengaluru, dt.29.01.2015, for the assessment year 2010-11.

The Revenue has raised the following grounds of appeal :

1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in holding that the size, turnover and brand of the company are the deciding factors for treating a company as a comparable and accordingly erred in excluding M/s. Tata Elxsi Limited, Sasken Communication Technologies Ltd., Persistent Systems Ltd., Mindtree Ltd., L & T Infotech and Infosys Technologies Ltd. as comparables.
3. On the facts and in the circumstances of the case, the Disputes Resolution Panel erred in excluding uncontrolled comparables having turnover more than Rs. 200 crores in the absence of Turnover criterion prescribed in Rule 10B of Income Tax Rules and also there being no correlation between turnover and profit margin.
4. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.

The Assessee has raised the following grounds of appeal :

A. Transfer Pricing:

1. The learned Deputy Commissioner of Income Tax (Transfer Pricing-IV), Bangalore ("Transfer Pricing Officer" or "learned TPO") grossly erred in determining an adjustment u/s 92CA of the Income-tax Act, 1961 to the Arm's Length Price ('ALP') of the international transaction entered into by the Appellant with its Associated Enterprises ("AEs") with respect to the Information Technology Enabled services ("ITeS").
2. The Appellant aggrieved by the TPO Order further appealed before the Dispute Resolution Panel ("DRP") against the TPO order and subsequently, the learned Assessing Officer ("learned AO") issued the final assessment order with a transfer pricing ("TP") adjustment of INR 9,323,961/-
3. The learned AO/learned TPO erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act contending that the information or data used in the computation of the ALP is not reliable or correct. The learned AO/learned TPO has grossly erred therefore in:
 - 3a rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.
 - 3b including companies that do not satisfy the test of comparability. Specifically, the following companies selected as functionally comparable by the learned AO/ learned TPO ought to have been rejected:
 - Accentia Technologies Limited
 - Acropetal Technologies Limited

- ICRA Online Limited
 - Fortune Infotech Limited
 - Jeevan Scientific Technology Limited
4. The learned AO/learned TPO has erred in rejecting the companies which were additionally proposed by the Appellant and are functionally comparable to the Appellant. Specifically, the following companies ought to have been included as comparable:
 - Nittany Outsourcing Services Private Limited
 - Datamatics Financial Services Limited
 - R Systems International Limited
 - Caliber Point Business Solutions Limited
 - Ultramarine & Pigments Limited
 - Jindal Intellicom Private Limited
 5. The learned AO / learned TPO erred in non-application of employee cost filter of 25%.
 6. The learned AO / learned TPO erred in not considering the multiple year / prior year financial data of comparable companies while determining the ALP.
 7. The learned AO / learned TPO erred in application of different financial year ending filter.
 8. The learned AO / learned TPO erred in using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining ALP.
 9. The learned AO / learned TPO erred in not considering the provision for bad and doubtful debts as operating in nature.
 10. The learned AO / learned TPO erred in computation of working capital adjustment.
 11. The learned AO / learned TPO erred in ignoring the limited risk nature of the contractual services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when the full-fledged entrepreneurial companies are selected as comparable companies.

IT(TP)A.555/Bang/2015 – By the Assessee :

02. In this regard the Ld. AR for the assessee has drawn our attention to para 6.2.4 of the DRP order, as well as para 6.3.2 of the DRP order to the effect that the DRP without specifically dealing with the inclusion / exclusion of the comparables, has passed a consolidated order in cryptic manner and therefore the decision is required to be remanded back .Para 6.2.4 and 6.3.2 mentioned as under :

6.24 of the DRP order reads as under :

6.24. I find that the TPO's findings are in order to render the balance functionally similar. In view of the aforesaid, I see no reason to exclude any further comparables on the ground of functional dissimilarity. The above mentioned 05 comparables shall now form the final comparables on which the ALP adjustment needs to be carried out by the TPO. It is ordered accordingly.

6.32 of the DRP order reads as under :

6.32. In view of the aforesaid, we see no reason to exclude any further comparables on the ground of functional dissimilarity, as the business of the comparables vis-a-vis the assessee company falls within the same sector. Thus, the balance comparables mentioned above shall form the final comparables, excluding the ones that do not qualify the turnover filter, on which the ALP adjustment needs to be carried out by the TPO.

Our attention was further drawn to objection at Annexure 1.19, raised by the assessee before the DRP in respect of employee cost filter of 25%. This ground reads as under :

Ground No.1 : The learned Transfer Pricing Officer ("TPO") has not given any rationale, neither in show-cause notice nor in TP order, for not applying the employee cost filter in the benchmarking analysis.

Ground No.2 : The learned TPO ought to have applied employee cost filter wherein only companies having an employee cost greater than 25% of revenue should be accepted.

It was also submitted by the Ld. AR that the DRP despite raising the specific ground has failed not even to mention the grounds from the list of grounds reproduced by it in the body of the order and it had further failed to adjudicate this ground.

03. Per contra, the Ld. DR relies upon the order passed by the lower authorities.

04. We have gone through the order passed by the DRP and the grounds raised before us.

05. We have considered the contentions of the parties and perused the record. From the perusal of the paragraph reproduced hereinabove, it is clear that the DRP had passed a cryptic and stereotyped order without giving any reasoning for including / excluding the comparables in respect to ITES and SWDS. We expect the DRP to give a reasoned and cogent finding while dealing with the contention of the assessee for allowing or disallowing the plea of the assessee. Hence we remand the entire matter back pertain to inclusion / exclusion of comparables to the file of the DRP to pass a reasoned speaking order, after dealing with the contention of the assessee. Needless to say while doing so the DRP shall give adequate opportunity of hearing to the assessee and pass a detailed order.

06. With respect to the other aspect, i.e., employee cost filter, as pointed out by the Ld. AR that the assessee has raised the ground no.1.19 before the DRP and the supporting documents in this regard were also filed. However, the DRP had failed to adjudicate this ground. In view of the above, we deem it appropriate to remand the matter to the DRP with a direction to adjudicate the ground of employee cost filter after considering the submission of the assessee

and if required, call for a report from the AO / TPO in this regard, a fresh .

07. In the result, appeal filed by the assessee is allowed for statistical purpose.

IT(TP)A.340/Bang/2015 – By the Revenue :

08. In respect of ground no.2 and 3, we may mention that just like the assessee, the Revenue is also aggrieved by the cryptic and stereotyped order passed by the DRP, especially paras 6.2.4 and 6.3.2 which are reproduced elsewhere in this order. As we are remanding the matter back to the file of the DRP for deciding the issue afresh after giving the assessee a hearing, therefore we deem it appropriate to remand even the grounds raised by the Revenue also to the file of the DRP for passing a detailed and speaking order with regard to inclusion / exclusion of the comparables. We may like to add that while adjudicating these grounds, the DRP may also consider the decisions passed by the Tribunal as also the judgment of Hon'ble Delhi High Court in the matter of Chryscapital Investment Advisors (India) (P.)Ltd. V. DCIT [(2015) 376 ITR 183. In view of the above, ground nos.2 & 3 by the Revenue are allowed for statistical purpose.

09. Ground no.4, raised by the Revenue, pertains to export turnover / total turnover. In this regard the parties before us have submitted that this issue has been concluded by the Hon'ble Supreme Court in the matter of H C L Technologies Ltd [(2018) 93 taxmann.com 33],

10. On the other hand the Ld. AR for the assessee supported the order of the lower authorities.

11. We have heard the rival contentions and perused the material on record. We find that this issue is put to rest by the judgment of the Hon'ble Supreme Court in the matter of CIT v. HCL Technologies Ltd [(2018) 93 taxmann.com 33], wherein the Hon'ble Supreme Court has decided the issue in favour of the assessee holding that the expenses be reduced both from the export turnover as well as from the total turnover. The Hon'ble Supreme Court in paras 20 and 21, held as under :

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21. On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.

Respectfully following the above order of the Hon'ble Supreme Court, we direct that the expenses incurred shall be deducted both from the export turnover as well as the total turnover for arriving at the deduction u/s.10A of the Act.

12. In the result, Revenue's appeal is partly allowed.

13. To summarise, appeal of the Assessee is allowed for statistical purpose and the appeal of the Revenue is partly allowed.

Order pronounced in the open court on 13th day of December, 2018.

Sd/-

Sd/-

(A. K. GARODIA)
ACCOUNTANT MEMBER

(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated : 13.12.2018

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By order

Assistant Registrar
Income Tax Appellate Tribunal,
Bangalore.