

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.697/Bang/2016
(Assessment Year : 2011-12)

M/s. Salesforce.com India P. Ltd,
The Executive Centre, 24, Vittal Mallya Road,
Level 11, UB City Canberra Block,
Bengaluru 560 001 .. Appellant
PAN : AAJCS3582R

v.

Deputy Commissioner of Income tax,
Circle -6(1)(1), Bengaluru .. Respondent

Assessee by : Shri. Uma Shankar Goutam, Advocate
Revenue by : Shri. C. H. Sundar Rao, CIT – DR-I

Heard on : 06.12.2018
Pronounced on : 21.12.2018

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

The present appeal is filed by the assessee against the order u/s.143(3) r.w.s.144C(13) of the Act, passed by the DCIT, Circle - 6(1)(1), Bengaluru, dt.29.01.2016, in pursuance to the directions of the DRP dt.23.12.2014, for the assessment year 2011-12.

The assessee has raised the grounds of appeal which are as under :

1. That the order of the learned Deputy Commissioner of Income Tax, Circle 6(1)(1), Bangalore ("Assessing Officer" or "AO") pursuant to the direction of the learned Dispute Resolution Panel ('learned Panel') to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.
2. That the learned AO and the learned Panel erred in upholding the rejection of Transfer Pricing ("TP") documentation by the learned Deputy Commissioner of Income tax, Transfer Pricing – Range 2(1)(1) ('learned TPO') and in upholding the adjustment to the transfer price of the Appellant in respect of software development services.
3. That on the facts and circumstances of the case, the learned AO/learned Panel erred in
 - (a) Upholding the rejection of comparability analysis of the Appellant in the TP documentation and accepting the fresh comparability analysis performed by the learned TPO;
 - (b) Disregarding application of multiple year/prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2010-11) data for companies should be used for comparability;
 - (c) Upholding the learned TPO's approach of 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 the arm's length price;
 - (d) Arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting/not considering companies that are otherwise functionally comparable to the Appellant and on inclusion of companies that otherwise fail the test of comparability;
 - (e) Not accepting the contentions of the Appellant in respect of the computation of the operating margin of comparable companies;
 - (f) Upholding the TPO's approach of restricting the working capital of the company to 1.63% and thus not providing the full adjustment in relation to the working capital position of the company as against the comparable companies selected;
 - (g) Upholding the TPO's approach of not providing Risk Adjustment and thus ignored the limited risk nature of the services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when full-fledged entrepreneurial companies are selected as comparables.

The assessee has also filed the revised grounds of appeal corresponding to the original grounds of appeal as above :

1. That the order of the learned Deputy Commissioner of Income Tax, Circle 6(1)(1), Bangalore ("Assessing Officer" or "AO") pursuant to the direction of the learned Dispute Resolution Panel ('learned Panel') to the extent prejudicial to the Appellant, is bad in law and liable to be quashed. **[corresponding to ground no. 1]**
2. That the learned AO and the learned Panel erred in upholding the rejection of Transfer Pricing ("TP") documentation by the learned Deputy Commissioner of Income tax, Transfer Pricing – Range 2(1)(1) ('learned TPO') and in upholding the adjustment to the transfer price of the Appellant in respect of software development services. **[corresponding to ground no. 2]**
3. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the rejection of comparability analysis of the Appellant in the TP documentation and accepting the fresh comparability analysis performed by the learned TPO **[corresponding to ground no. 3(a)]**
4. That on the facts and circumstances of the case, the learned AO/learned Panel erred in disregarding application of multiple year/prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2010-11) data for companies should be used for comparability **[corresponding to ground no. 3(b)]**
5. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the learned TPO's approach of 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 the arm's length price. **[corresponding to ground no. 3(c)]**
6. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting/not considering Akshay Software Technologies Ltd that is otherwise functionally comparable to the Appellant. **[corresponding to ground no. 3(d)]**
7. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting/not considering Thinksoft Global Services Ltd that is otherwise functionally comparable to the Appellant. **[corresponding to ground no. 3(d)]**

8. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting/not considering Spry Resources India Pvt. Ltd that is otherwise functionally comparable to the Appellant and on inclusion of companies that otherwise fail the test of comparability. **[corresponding to ground no. 3(d)]**
9. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on rejecting/not considering FCS Software Solutions Ltd that is otherwise functionally comparable to the Appellant. **[corresponding to ground no. 3(d)]**
10. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of Acropetal Technologies Limited that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
11. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of E-Infochip Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
12. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of ICRA Techno Analytics Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
13. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of Infosys Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
14. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of Persistent Systems Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
15. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of Sasken Communications Technologies Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
16. That on the facts and circumstances of the case, the learned AO/learned Panel erred in arbitrarily arriving at a set of companies as comparable for the services rendered by the Appellant, on inclusion of Tata Elxsi Infotech Ltd. that otherwise fails the test of comparability. **[corresponding to ground no. 3(d)]**
17. That on the facts and circumstances of the case, the learned AO/learned Panel erred in not accepting the contentions of the Appellant in respect of the computation of the operating margin of comparable companies. **[corresponding to ground no. 3(e)]**
18. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the TPO's approach of restricting the working capital of the company to 1.63% and thus not providing the full adjustment in relation to the working capital position of the company as against the comparable companies selected. **[corresponding to ground no. 3(f)]**
19. That on the facts and circumstances of the case, the learned AO/learned Panel erred in upholding the TPO's approach of not providing Risk Adjustment and thus ignored the limited risk nature of the services provided by the Appellant and in not providing an appropriate adjustment towards the risk differential, even when full-fledged entrepreneurial companies are selected as comparables. **[corresponding to ground no. 3(g)]**

02. At the out set, the Ld. AR has submitted that assessee is not pressing ground nos,1 to 9, 17 and 19 and is only pressing ground nos.10 to 16 and 18. As the assessee has not pressed the ground nos.1 to 9, 17 and 19, the same are dismissed as not pressed.

03. Before we deal with ground nos.10 to 16 and 18, we may give a brief background of the assessee's profile and the history of the assessment proceedings. The assessee filed a return of income declaring total income of Rs.3,39,98,201/-. Notice u/s.143(2) of the Act was issued and thereafter the assessee was called upon to file the response. It was noticed by the AO that the assessee has also undertaken the international transactions during the year under consideration. Accordingly the matter was referred to the TPO for the purpose of determining the ALP of the international transactions vide communication dt.12.11.2013. The TPO in the TP order records the functions of the assessee in para.2 as under :

The functions of the taxpayer:

Salesforce.com India Pvt Ltd(SIPL) provides marketing and after sales support services for Salesforce.com Singapore Pte Ltd(SSPL). The company has entered into a Service Agreement with SSPL to render services in support of SSPL's business operations in India. Per the service Agreement, the company is entitled to received service fees on a cost plus basis. The three main areas of SIPL's marketing functions are (a) acting as sales support, (b) improving brand awareness, and (c) marketing programmes.

During FY 2010-11 , SIPL also started rendering contract software R&D services to its AE. In this regard, SIPL has entered into Research & Development Service Agreement with Salesforce Inc to render contract software R&D services. Per the agreement, SIPL develops, create, tests, analyses, reports and delivers new products within the domain of software R&D services. For the provision of the contract software R& D services, SIPL is compensated on a cost plus basis.

04. The TPO further mentioned that the financial results as per the P & L account for FY 2010-11 as under :

FINANCIAL RESULTS FOR THE F Y 2010-11 AS PER THE P & L A/C

Operating Income (OR)*	27,48,71,273
Expenditure (OC)**	24,02,38,214
Operating Profit (OP)	3,46,33,059
OP/OC	14.41%
OP/OR	12.59%

* Excluding other income

** excluding Exchange variation

05. As per the 92CA report, the international transactions reported by the assessee was as under :

International Transactions (as mentioned in the 92 CE report)

	Amount Paid	Method
Marketing and sales support services	24,59,42,347	TNMM
Research & Development services	2,89,28,926	TNMM
Total	27,48,71,273	

06. During the TP proceedings, the tax payer was issued a show cause notice and in reply the assessee had filed reply and submitted the objections. After considering the reply and submissions made the TPO has rejected the TP study of the assessee and issued a show-cause to bring in various comparables which are functionally similar to that of the assessee. For the purposes of determining the ALP of the international transactions with respect to the software development services, finally the TPO arrived at the following set of comparables :

Sl.No	Name	Sales	Cost	PLI
1	Acropetal Technologies Ltd.(seg)	814,016,893	616,754,876	31.98%
2	e zest solutions (from Capitaline)	112866098	93255341	21.03%
3	E-infochips Ltd	260384251	166447527	56.44%
4	Evoke (from Capitaline)	144869912	133996568	8.11%
5	I C R A Techno Analytics Ltd. (in 000)	158401000	126894000	24.83%
6	Infosys Ltd	253850000000	177,030,000,000	43.39%
7	Larsen & Toubro Infotech Ltd.	23318122096	19,764,861,289	19.83%
8	Mindtree Ltd.(seg)	8,783,000,000	7,937,143,242	10.66%
9	Persistent Systems & Solutions Ltd.	189,490,457	155,172,089	22.12%
10	Persistent Systems Ltd.	6,101,270,000	4,971,860,000	22.84%
11	R S Software (India) Ltd.	1,882,638,471	1,617,804,170	16.37%
12	Sasken Communication Technologies Ltd	3,941,962,000	3,175,616,000	24.13%
13	Tata Elxsi Ltd (seg)	3,581,985,000	2,962,533,352	20.91%

Feeling aggrieved by the order of the AO / TPO, the matter was scaled up and objection was filed before the DRP.

05. The DRP considering the reply of the assessee has rejected the contentions of the assessee.

06. It was submitted by the assessee that assessee is not pressing exclusion of ICRA Techno Analytics Ltd, as the Tribunal in the matter of M/s. AT & T Global Business Services India P. Ltd v. ACIT [IT(TP)A.190/Bang/2016, dt.31.08.2016 for AY 2011-12], had decided the issue of exclusion merely on the basis of the RPT filter. However the consistent view of the Tribunal is that if the RPT is less than 25% and the number of comparables are less than six, then RPT of 25% is correct, whereas if the number of comparables selected or remained after the exclusion by the DRP continues to be more than six, then the RPT of 15% is correct. This view was taken by the coordinate bench in the matter of **ACI Worldwide Solutions (P.) Ltd.* [2017] 84 taxmann.com 216 (Bengaluru – Trib.)**

“Therefore, keeping the abovesaid in mind, for many years, the RPT filter had been adopted by the TPOs to exclude the otherwise comparable company from the list of comparables, if the RPT was found to be more than 25%. Theoretically, 0% RPT filter adopted by the DRP is correct, but with a view to appreciate the practical difficulties in finding out the comparable, the RPT filter was relaxed in some matters by the Tribunal to the extent of 25% and in some matters, it was relaxed up to 15%. In our view, a balanced view is required to be adopted and when sufficient number of comparables are available, then the RPT filter should be adopted at 1.5% otherwise it can be relaxed for 25% . Recently, there is a change in law (CBDT issued in rules on multiyear data and range concept after passing of Finance Act 2014) which requires that there should be a minimum of six comparables available for the purpose of determining the ALP. Though the said

amendment is prospective nature, but taking clue from the wisdom of the legislature, we deem it appropriate if more than six comparables are available, then 15% RPT filter should be applied, but if the comparables after applying the 15% RPT filter is less than six, then the RPT filter should be brought up from 15% to 25%. “

As the assessee has not pressed for exclusion of ICRA Techno Analytics P. Ltd, accordingly ground no.12 in the revised grounds is dismissed as not pressed.

07. Now we are left with the following comparables which are now agitated by the assessee before us, namely,

- 1. Acropetal Technologies Ltd (seg)*
- 2. E-infochips Ltd*
- 3. Infosys ltd*
- 4. Persistent Systems Ltd*
- 5. Sasken Communication Technologies Ltd*
- 6. Tata Elxsi Ltd (seg)*

08. WITH regard to exclusion of these six comparables our attention was drawn by the Ld. AR to the decision of the coordinate bench in the matter of M/s. AT & T Global Business Services India P. Ltd (supra), wherein the Tribunal after considering the annual report and functional profile of this company had directed to exclude these companies . For ready reference, we are reproducing para 5 & 6 of the order :

- 5. We have considered the rival submissions, gone through the orders of the lower authorities and the judgments cited by the learned AR of the assessee. Various grounds not pressed by the learned AR of the assessee are rejected as not pressed. As per the appeal of the revenue, the revenue has challenged the exclusion of 10 comparables as per the directions of DRP. Out of this, the assessee has conceded that 3 comparables may be included i.e. 1) Evoke Technologies Pvt. Ltd., 2) Mindtree Limited (Seg.) and 3) A S*

Software (India) Ltd. To this extent, the order of DRP is reversed and the AO,TPO are directed to include these three comparables in the final list of comparables. Regarding the request of the revenue to include remaining seven comparables excluded by DRP and 3 more comparables which are not excluded by DRP but being requested by the assessee for exclusion i.e. for total 10 exclusions, Para 9 of the tribunal order rendered in the case of Commscope Networks India Pvt. Ltd. (Supra) is relevant and therefore, the same is reproduced here in below from pages 2364 & 2365 of the Case law Compendium for ready reference. This Para reads as under:-

"9. Now we decide about the remaining 6 comparables excluded by DRP and 4 comparables retained by DRP but for which the assessee is seeking exclusion. Out of these 6 comparables excluded by DRP, one comparable ICRA Techno Analytics Ltd. is having RPT in excess of 15% and therefore, for this reason alone, this comparable has to be excluded although DRP has excluded it for a different reason that it is having various activities and segmental data are not available. We uphold its exclusion on account of RPT filter. Exclusion of Acropetal Technologies Ltd. (Seg) is covered in favour of the assessee by the same tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT (Supra). Respectfully following the same, we uphold its exclusion. Exclusion of 1) e Zest Solutions Ltd., 2) Infosys Ltd., 3) Larsen & Toubro infotech Ltd., 4) Persistent Systems & Solutions 5) Persistent Systems Ltd., 6) Sasken Communication Technologies Ltd. and 7) Tata Elxsi Ltd. are also covered in favour of the assessee by the same tribunal Order rendered in the case of .Applied materials India Nt. Ltd vs ACJT (Supra) Respectfully following the same we uphold the exclusion of these Seven comparables also. Exclusion of E Infochips Ltd. is covered in favour of the assessee by the tribunal order rendered in the case of Saxo India Pvt. Ltd. vs. A CIT in ITA No, 6148/Del/2015 dated 05.02.2016 Para 10.1 & 10.2 available at pages 221 to 223. Respectfully following the same, we uphold its exclusion. In this manner, we uphold the exclusion of six comparables excluded by DRP out of 9 comparables excluded by DRP and exclude 4 omparables retained by DRP and we have already held that out of 9 comparahies

excluded by DRP, 3 have to come back being 1) Evoke Technologies Pvt. Ltd., 2) Mindiree Ltd. (Seg) and 3) R S Software (India) Ltd. Now, we decide about LGS Global Ltd. As per the tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT (Supra), this is a good comparable and therefore, we direct the A.O. and TPO to include this comparable. So, there should be 4 comparables in the final list of comparable and on the basis of that, the AO/TPO should work out the ALP."

6. *Respectfully following this tribunal order, we exclude these 10 comparables i.e.1) Accropetal Technologies Ltd. (Seg.), 2) E Zest Solutions Ltd., 3) F - Infochips Ltd., 4) ICRA Techno Analytics Ltd., 5) Infosys Ltd., 6) Larsen & Toubro Infotech Ltd., 7) Persistent System & Solutions Ltd., 8) Persistent Systems Ltd., 9) Sasken Communication Technologies Ltd. and 10) Tata Elxsi Ltd.*

09. On the basis of the above, the ld. AR has submitted that these comparables are required to be excluded.

10. On the other hand the Ld. DR relies upon the order passed by the lower authorities.

11. We have heard the rival contentions and perused the record. The functional profile of the assessee is similar to that of the assessee in the matter of AT & T Gobal Business Services India P. Ltd (supra) and the same list of comparables were selected by the TPO in both the matters. Once the coordinate bench has taken a view in identical circumstances to exclude the above six comparables, therefore we do not find any reason to take a contrary view. More particularly when DR had not brought to our notice a contrary facts or dissimilarity. Following the decision of the coordinate bench in AT & T Gobal Business Services India P. Ltd (supra), we allow ground nos. 10, 11, 13, 14, 15 and 16. The

TPO is directed to exclude these comparables from the list of comparables.

12. The next ground is ground no.18 which is with respect to working capital adjustment. The authorities below had restricted the working capital adjustment to 1.63% instead of granting the actual working capital adjustment. In this regard the Ld. AR relies upon the following decisions :

- a) *AT&T Global Business Services India Ltd. - IT(TP)A No. 190/Bang/2016 – A.Y. 2011-12*
- b) *Yokogawa Technologies India P Ltd,- IT(TP)A No. 606/Bang/2016 - AY 2011-12*
- c) *Cypress Semiconductor Technology India Pvt. Ltd. - IT(TP)A No. 356/Bang/2016 - AY 2011-12*
- d) *Metric Stream infotech India Pvt. Ltd. - IT(TP)A No. 493/Bang/2016 - AY 2011-12*
- e) *Finastra Software Solutions India Pvt. Ltd. - IT(TP)A No. 529/Bang/2016 - AY 2011-12*
- f) *Zynga Game Network India Pvt. Ltd. [IT (TP) A. No. 360,/Bang! 2016] (AY 2011-12)*
- g) *M/s. Microsoft Research Lab India Pvt. Ltd. [IT (TP) A. No. 115/ Bang/ 2016] (AY 2011-12)*
- h) *GT Nexus Software Pvt Ltd [IT (TP) A. No 409/ Bang/2016] (AY 2011-12)*
- i) *Comrnscope Networks India Pvt. Ltd. - IT (TP) (A) 166/Bang/16 - AY 2011-12*
- j) *AMD India Pvt. Ltd - IT (TP) (A) -1487/Bang/2015 - AY 2011-12*
- k) *Electronic Imaging India Pvt. Ltd. - IT (TP) (A) 1506/Bang/2015*

– A.y. 2011-12

l) Marvell India Pvt Ltd [IT(TP)A No. 384/Bang/2016] AY 2011-12

m) Saxo India Pvt Ltd - ITA No. 6148/Delhi/2015 AY 2011-12

13. On the other hand the Ld. DR submitted that the assessee has not given any detailed working to the lower authorities. In the absence of the necessary details / data, it is not possible for the lower authorities to adjudicate the claim of working capital adjustment.

14. We have heard the rival contentions and perused the record. The TPO has adopted the TNMM for the purpose of determining the ALP and as per the mandate of law and Rules framed the assessee is required to work out the working capital adjustment with a view to weed out the dissimilarity between the assessee and the comparables. The Rules provide that the working capital adjustment is required to be made on the basis of the actual so as to remove abrasion or distortion in the profit earned by the assessee.

15. In the present case lower authority had worked out working capital adjustment on hypothetical figure of 1.63% instead of on actual basis. Hence we direct the TPO to grant working capital adjustment on actual basis, subject to availability of the workings made available by the assessee to TPO in earlier round of litigation . Accordingly we direct the AO / TPO to give the working capital adjustment on actual basis if the assessee has given the detailed working to the lower authorities. However, if no such working has been given by the assessee to the lower authorities then in our view

the assessee will not be entitled to any such claim. This ground is allowed for statistical purpose.

16. In the result, appeal is partly allowed.

Order pronounced in the open court on 21st day of December, 2018.

Sd/-

Sd/-

(A. K. GARODIA)
ACCOUNTANT MEMBER

(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated : 21.12.2018

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.