

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: 'I-1', NEW DELHI**

**BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT AND  
SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 1565/Del/2015**

**AY: 2010-11**

Contata Solutions Pvt.Ltd. A-16/9, Vasant Vihar New Delhi 110 057  PAN:AABCC8222C	<b>vs.</b>	ITO, Ward 6(3), Room No.376A Central Revenue Building I.P.Estate New Delhi 110 002
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**(Appellant)**

**(Respondent)**

**Assessee by** : Shri Atul Ninawat, C.A.

**Department by** : Sh. Sandeep Kr. Mishra, Sr.D.R.

**Date of Hearing** : 18/12/2018

**Date of Pronouncement** : 15/01/2019

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by assessee against final assessment order dated 31/03/10 passed by Ld. ITO Ward 6 (3), New Delhi under section 143 (3) read with 140 4C of the act, on following grounds of appeal:

1. *The order of the Learned Assessing Officer is bad in law and on the facts and circumstances of the case.*
2. *The Ld. Transfer Pricing Officer/ Ld. Assessing Officer has erred on facts and circumstances of the case in determining the arm's length adjustment to*

*the appellant's international transaction from associated enterprises and thereby resulting in the enhancement of returned income of the Appellant company by Rs. 52,25,570/-.*

- 3. The Ld. Assessing Officer has completely ignored the facts in the submissions made before him and proceeded to make transfer pricing adjustment on the basis of TPO's order.*
- 4. The Ld. Transfer Pricing Officer has erred in facts and in law to reject, based on his subjective grounds and presumptions, the economic analysis conducted by the appellant for determination of the arm's length price.*
- 5. The Ld. Transfer Pricing Officer has erred on facts and circumstances of the case in rejecting the appropriate filters as applied by the appellant and further modifying the filters arbitrarily without proper appreciation of the facts, law and commercial reality.*
- 6. The Ld. Transfer Pricing Officer has erred in laws and facts of the case by rejecting the comparables submitted in a fresh and comprehensive study conducted by the appellant for ascertaining arm's lengths price.*
- 7. The Ld. Transfer Pricing Officer has erred on facts and circumstances of the case by considering companies having very high turnover as comparables.*
- 8. The Ld. Transfer Pricing Officer has erred on facts and circumstances of the case by erroneously computing related party transactions of companies selected by him*
- 9. The Ld. Transfer Pricing Officer has erred in laws and facts of the case by ignoring Functions, Assets and Risk Profile of companies selected by Ld.TPO comparables and that of Appellant.*
- 10. The Ld. Transfer Pricing Officer has erred in laws and facts of the case by ignoring the differences between risk profile of Appellant and companies selected by him as comparables and denying*

*adjustment on account of such differences in risk profiles.*

- 11. The Ld. Transfer Pricing Officer has erred in laws and facts of the case by ignoring the differences between working capital requirements of Appellant and companies selected by him as comparables and denying adjustment on account of such differences in working capital requirements*
- 12. The above grounds are without prejudice to each other.*
- 13. The appellant may be allowed to add/amend/withdraw any grounds at the time of hearing.”*

**2. Brief facts of the case are as under:**

Assessee filed its return of income on 12/10/10 declaring total income of Rs.4,57,361/-. Case was selected for scrutiny and notice under section 143 (2) was issued to assessee. In response to statutory notices, representative of assessee appeared before Ld.AO is and filed details as called for. Ld.AO during assessment proceedings observed that assessee had undertaken international transaction with its associated enterprises. A reference was accordingly made to transfer pricing officer.

**2.1** Ld.TPO upon receipt of reference, called for various details from assessee. He observed that assessee was incorporated on 27/05/02 and was engaged in business of computer software development, data processing, value addition services, content development and solution provider. It was observed that assessee was engaged in providing services exclusively to its subsidiary company; 'Intertech' for software development, and that it will not

accept any other assignment from any other source without permission of Intertech. Ld.TPO further observed that assessee had competencies in following areas like Microsoft technologies; open source and Java technologies; software quality assurance and testing; business process management tools; Microsoft SharePoint. It was also observed that international transaction entered into by assessee was shown as under:

S.No.	Nature of service	Arms length price as per assessee
1.	Rendering of software development services	Rs.9,38,16,056/-.

**2.2** Ld.TPO observed that assessee has selected TNMM as most appropriate method to benchmark international transaction by using OP/OC as PLI. The PLI of assessee accordingly was computed at 15.82% on cost. Assessee selected following 4 comparables with an average margin at 11.11%, and thus, it was contended that transaction was at arm's length.

S.No.	Comparables	OP/OC	Average OP/OC
1.	KALS Inf. Systems	16.40%	14.19%
	KALS Inf. Systems	11.98%	
2.	Space Computers	5.95%	5.95%
	Space Computers	2.34%	0.02%

<b>3.</b>	Zylog Sys	-2.31%	
<b>4.</b>	Laser Soft Infosystems Ltd.	14.56%	24.29%
	Laser Soft Infosystems Ltd.	34.02%	
	<b>Average</b>		<b>11.11%</b>

**2.3** Ld. TPO rejected 3 comparables, by using various filters and selected a set of following 11 comparables including one from assessee's set with an average margin of 20.33%.

S.No.	Comparables	OP/OC (margin)
1.	Evoke Technologies Pvt. Ltd.	18.56%
2.	L & T Infotech Ltd.	19.06%
3.	Mindtree Ltd. (Segment)	13.92%
4.	Sasken Communication Technologies Ltd.	17.54%
5.	Persistent Systems Limited	29.02%
6.	Sonata Software	35.87%
7.	Thinksoft Global Services Ltd.	17.35%
8.	Zylog Systems Limited	25.07%
9.	Sankhya Infotech	18.11%
10.	C T I L Ltd	18.11%
11.	Cat Technologies Ltd.	11.07%
	<b>Average</b>	<b>20.33%</b>

**2.4** He thus computed adjustment of Rs.86,71,096/- to international transaction.

**2.5** Against draft order passed by Ld.TPO, assessee raised objections before DRP, who upheld proposed adjustment. Based upon order passed by DRP, Ld.AO passed impugned final assessment order, against which assessee is in appeal before us.

Only issue raised by assessee is in respect of comparables and filters arbitrarily used by Ld.TPO to accept/reject final list of comparables selected in transfer pricing order.

**3.** Assessee before us alleged for exclusion of following comparables:

1. Evoke Technologies Pvt. Ltd.,
2. L&T Infotech Ltd.,
3. Sasken Communication Technologies Ltd.,
4. Persistent Systems Ltd.,
5. Think Soft Global Services Ltd.,

**4.** Comparables alleged by assessee for inclusion are as under:

1. Cibermate Infotech Ltd.,
2. Melstar Information Technologies Ltd.,
3. Objectone Information Systems Ltd.,

**5.** Before adverting to compatibility analysis, it is *sine qua non* to ascertain functions performed by assessee, assets employed and risks assumed in respect of international transaction undertaken.

**Functions:**

**6.** Assessee undertakes research and development in manufacture of products. The research and development activities relates to various technologies, market scenario is, competitors activities, recent developments in information technology is, prospective clients etc and for itself and Intertech.

**6.1** Product strategy and design carried out by assessee relates to devising plan for positioning a product in marketplace and developing strategy for selling the products. The decisions related to product strategy and designs are taken by assessee and Intertech together.

**6.2** Marketing and distribution activities carried out by assessee involves, decision-making, regarding promulgation of information about companies products to potential customers and development of effective sales and distribution channels for delivering products to customers. It also involves marketing and advertising of products/services for business and promotion of brand name in market, which is carried out by Intertech alone. Further Intertech also takes up marketing and promotion activities of products developed by assessee whereas, assessee is involved in marketing sales and distribution of the same only.

**6.3** Assessee also carries out accounting, administration, human resource management to manage the office and assignments.

**Assets:**

7. Assessee owns normal routine assets like computers officer except at equipments furniture fittings vehicles software etc it does not own any intangibles and non-routine that assets and does not own any trade secrets or undertake research and development activities on its own account, that would lead to development of non-routine intangibles.

**Risks:**

8. Assessee experiences moderate market risk low product liability risk locus, credit risk high foreign exchange risk and nil on inventory risk.

9. Ld. Counsel submitted that **Ground No. 1-3** are general in nature and therefore do not require any adjudication.

**Accordingly the same are dismissed.**

10. **Ground No. 4-5** relates to filters arbitrarily applied by Ld.TPO for exclusion/inclusion of comparables.

11. **Ground No. 6-8** is in respect of comparables exclusion/inclusion by Ld.TPO.

12. **Ground No. 9-10** is on the basis of functional dissimilarity of companies selected by Ld.TPO; and

13. **Ground No. 11** is in respect of denial of working capital adjustment.

14. Ld. Counsel submitted that **Ground No. 4-5** has been raised for using following filters by Ld.TPO to reject comparables based on;

- turnover filter less than 5 crore
- export revenues less than 75% of total revenues
- companies having RPT of 25% and more
- where service income is less than 75% of sales
- turnover filter/super profit companies being excluded
- companies with diminishing revenue/persistent loss making companies being excluded
- employee cost filter of 25% of cost being applied.

**15.** Further it has been argued that **Ground No. 6-10** deals with comparables and its functional similarities/dissimilarities rejected/accepted by Ld.TPO, which can be taken up together. Ld. Counsel contended that assessee is providing low end services and therefore cannot be compared with companies which are providing specialised software services. It has been submitted that filters are used by Ld.TPO arbitrarily, to accept/reject comparables. It has been contended that assessee has turnover of 9.38 crores, whereas Ld.TPO used turnover filter of less than 5 crores, which is inappropriate. Ld. Counsel submitted that companies having sales 10 times more than that of assessee cannot be compared together. He submitted that Ld.TPO rejected companies having employee cost less than 20% of sales which is contrary to turnover filter and total revenue filter applied by him. Ld. Counsel thus submitted that modifications brought by Ld.TPO to filters has rendered economic analysis conducted by assessee to be inadequate or defective. Further Ld. Counsel argued that Ld.TPO failed to consider gross

dissimilarities between assessee and comparables selected by him, without conducting FAR analysis.

**16.** Now coming to filters adopted by assessee, which has been modified by Ld. TPO.

**17.** From records before us, it is observed that assessee included companies having financial data of at least 2 years prior for which Ld.TPO observes that as per Rule 10 B (4) it is mandatory to use current year data, unless it is shown by assessee that such earlier years data has an influence in determining transfer price and that, use of earlier year data is in addition to current year data. Ld.TPO rejected company, where current year data was not available and assessee had sought to rely upon preceding two years data, which in our considered opinion is appropriate as assessee has not been able to establish what is required under rule 10 B (4) of Income Tax Rules 1963.

**18.** Next filter that has been modified by Ld.TPO is in respect of turnover. Assessee had included companies with an average sales of less than 1 crore during the year and companies with more than 50 crores were rejected. Ld.TPO observed that companies whose income is less than 5 crore would be appropriate as otherwise analysis may not lead to proper compatibility. It is observed that Ld.TPO modified lower limit of turnover filter from less than 1 crore to less than 5 crore.

**19.** We have also observed that Ld.TPO rejected companies which are making losses as comparables. This shows that there is a limit for lower end for identifying comparables. In such a situation, we are unable to understand as to why there should not be an upper limit also. What should be an appropriate upper limit is another factor to be considered.

**19.1** In our view, big company would be in a position to bargain price and also attract more customers. It would also have a broad base of skilled employees who are able to give better output. A small company may not have these benefits and therefore, turnover also would come down reducing profit margin. Thus, as held by various benches of this Tribunal, when companies which are loss making are excluded from comparables, then super profit making companies should also be excluded. Thus in present case, range of 1 crores to 200 crores would be ideal.

**19.2** For purposes of classification of companies on the basis of net sales or turnover, we find that a reasonable classification has to be made. In our opinion companies with revenues less than 75% from software development services would be ideal to be excluded, as economic circumstances of such companies would be different. We draw our support from Rule 10 B (2) in respect of this view.

**19.3** Thus based on these criteria, as discussed in foregoing paragraphs, we reject following companies as comparables which are under challenge by assessee either for exclusion or inclusion, as the case may be.

- L&T Infotech Ltd.,
- Sasken Communications Technologies Ltd.,
- Persistent Systems Ltd.,
- Space Computers and Systems Ltd.,
- Mel Starr Information Technologies Ltd.,
- Objectoen Information System Ltd.,

**20.** Before we proceed to examine comparables on the basis of several decisions relied upon by both sides for inclusion/exclusion of comparables, we are of considered opinion that every decision rendered in respect of comparables for its inclusion/exclusion is based upon facts of that case as well as FAR of assessee, in whose case those have been either included/excluded. We are also aware about precedent value of these decisions, while carrying out comparability analysis. However, we feel that Paramount importance must be given to Rule 10B (2). Unless, difference arising on compatibility analysis affects prize or profitability of a comparable, or cannot be adjusted reasonably, the same should be upheld. Thus in our opinion, while deciding compatibility decisions relied upon by both sides would be produced from this angle by us. From TP study as well as TP order, it is observed that comparables selected by assessee has been rejected as these fail revenue's filters. However no FAR analysis has been conducted by Ld.TPO in respect of comparables that has been rejected.

**21.** Comparables alleged for exclusion:

1. Evoke Technologies Pvt. Ltd.

**21.1** Ld. Counsel submitted that this comparable selected by Ld.TPO is functionally dissimilar with that of assessee, as it provides services relating to ITeS and not into rendering of software development services like that of assessee.

**21.2** On the other hand, Ld. DR submitted that this company has revenue from software development charges and its website reveals company to be providing quality software services to its clients.

**21.3** We have perused submissions of both sides in light of records placed before us. Audited account for relevant year of this comparable is placed at page 402-416 of paper book volume 2. It is observed that revenue earned by this company is from software development charges. We are therefore not inclined to accept argument advanced by Ld. Counsel that this company is performing IT enabled services. Assessee has not been able to point out any difference in functions performed by this company *vis-a-vis* that of assessee.

**21.4 We therefore, uphold inclusion of this company into final list of comparables.**

2. Think Soft Global Services Ltd.

**22.** From annual accounts placed in paper book at page 898-1025 of volume 3, it is observed that this company is generating revenue from software testing on time and material contracts and is based on software tested and build to clients as per terms of specific

contract. In our considered opinion, software testing is not the function performed by assessee, for this company to be considered as suitable comparable. **We are therefore inclined to direct Ld.TPO to remove this comparable from final list.**

Comparables alleged for inclusion:

**23.** Regarding following comparables it is observed from TP order that, functional compatibility, assets owned and risk assumed has not been carried out by Ld.TPO *vis-a-vis* that of assessee:

- Kalas Information Systems
- Laser infosystems Ltd.,

**23.1** Further it is alleged by Ld.Counsel that in case of Zylog Sys. India, Ld.TPO has considered a different company (M/s Zylog systems Ltd) as has been submitted by assessee. It is observed from final assessment order that DRP also considered M/s Zylog systems Ltd.

Ld.TPO is directed to ascertain difference brought out by Ld. Counsel, and to select correct comparable after undertaking exercise of FAR analysis with that of assessee as per law.

**23.2** It is observed that during TP assessment, assessee provided fresh comparables being;

- Cybermate Infotek Ltd.,
- CTIL Ltd.,
- Cat Technology Ltd

**23.3** Out of the above, Ld.TPO has accepted CTIL Ltd., and Cat Technology Ltd., as suitable comparable.

**23.4** It is observed that Ld.TPO rejected Cybermate Infotek Ltd., by holding that export turnover is less than 75%. Ld.Counsel before us has placed annual report of Cybermate Infotek Ltd. It is also observed that functional compatibility, assets owned and risk assumed by this company has not been carried out by Ld.TPO *vis-a-vis* that of assessee.

**23.5** We, therefore direct Ld.TPO to undertake compatibility analysis as per rule 10 D (2) for finalising comparables, to be applied for determining the ALP of international transaction. We also direct Ld.TPO to carry out proper FAR analysis in respect of comparables which has been alleged for inclusion by assessee on the basis filters hereinabove referred to and observations made by us hereinabove.

**24. Accordingly grounds raised by assessee stands allowed as discussed above.**

**25. In the result appeal filed by assessee stands allowed for statistical purposes.**

Order pronounced in the open court on 15/01/2019.

Sd/-

**( G.D. AGRAWAL )**  
**VICE PRESIDENT**

Dt. 15/01/2019

\*GMV

Sd/-

**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches

S.No.	Details	Date
1	Draft dictated on Dragon	11/01/19
2	Draft placed before author	15/01/19
3	Draft proposed & placed before the Second Member	15/01/19
4	Draft discussed/approved by Second Member	15/01/19
5	Approved Draft comes to the Sr. PS/PS	15/01/19
6	Kept for pronouncement	15/01/19
7.	Order uploaded on	
8	File sent to Bench Clerk	
9	Date on which the file goes to Head Clerk	
10	Date on which file goes to A.R.	
11	Date of Dispatch of order	