

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
**BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA No.526/PUN/2016**  
**निर्धारण वर्ष / Assessment Year : 2011-12**

Ubisoft Entertainment India Pvt. Ltd.,  
Level 6, Building No.B-3,  
Kumar Cerebrum,  
Kalyani Nagar,  
Pune – 411006 .... अपीलार्थी/Appellant

PAN:AAACU9861E

Vs.

The Dy. Commissioner of Income Tax,  
Circle-12, Pune .... प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA No.664/PUN/2016**  
**निर्धारण वर्ष / Assessment Year : 2011-12**

The Dy. Commissioner of Income Tax,  
Circle-12, Pune .... अपीलार्थी/Appellant

Vs.

Ubisoft Entertainment India Pvt. Ltd.,  
Level 6, Building No.B-3,  
Kumar Cerebrum,  
Kalyani Nagar,  
Pune – 411006 .... प्रत्यर्थी / Respondent

PAN:AAACU9861E

Assessee by : Shri Rajendra Agiwal  
Revenue by : Ms Nandita Kanchan

सुनवाई की तारीख / Date of Hearing : 14.11.2018	घोषणा की तारीख / Date of Pronouncement: 11.02.2019
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### आदेश / ORDER

#### PER SUSHMA CHOWLA, JM:

The cross appeals filed by assessee and Revenue are against order of DCIT, Circle-12, Pune, dated 29.01.2016 relating to assessment year 2011-12 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The cross appeals filed by assessee and Revenue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The Revenue in ITA No.664/PUN/2016 has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, whether the learned DRP was right in law and on facts in excluding functionally comparable companies.*
2. *On the facts and in the circumstances of the case, whether the learned DRP was right in law and on facts in including companies which are not functionally comparable.*
3. *On the facts and in the circumstances of the case, whether the learned DRP was right in law and on facts in excluding functionally comparable companies on the ground of non availability of segmental data, when the entire range of activity of the comparable was in the field of software services.*
4. *On the facts and in the circumstances of the case, whether the learned DRP was right in law and on facts for not considering that onsite and offsite revenue differences are material for deciding the functional comparability of a company and that assets and risk profile, pricing as well as prevailing market conditions are different in predominantly onsite companies from predominantly offshore companies.*

5. *On the facts and in the circumstances of the case, whether the learned DRP was right in law and on facts in excluding companies which are considered as functionally comparable by the assessee himself.*
6. *Did the learned DRP fall into error in not appreciating the safe harbour guidelines issued by CBDT regarding turn over criteria.*

4. The learned Authorized Representative for the assessee pointed out that the assessee was captive service provider to its associated enterprises and was engaged in software development plus software testing for video games, hence it was engaged in entertainment industry. He further pointed out that as far as application of TNMM method is concerned, there was no dispute. The assessee was being remunerated on cost plus markup of 8.87% and the margins of assessee were 8.53%. The assessee has selected certain comparables whose mean margins worked out at 6.80% and hence, international transactions were held to be at arm's length price. However, the TPO selected certain other concerns and data for the contemporaneous period and margins worked out to 24.87%. The Dispute Resolution Panel (DRP) on the objections filed by assessee had given certain relief and mean margins of comparables worked out to 14.92%. Referring to grounds of appeal, he pointed out that grounds of appeal No.1 and 2 are general in nature and further grounds of appeal No.3, 4, 5, 6, 7 (part), 10, 11 and 12 are not pressed. He stressed that grounds of appeal No.8 and 9 were being pressed i.e. in respect of exclusion of comparables and ground of appeal No.7part was also pressed for inclusion of one comparable. In respect of ground of appeal No.13, it was pointed out that the assessee had asked for working capital adjustment, which was allowed in the preceding year and the same should be allowed in the hands of assessee. Further, vide ground of appeal No.14, the assessee is aggrieved by not allowing risk adjustment. He further pointed out that ground of

appeal No.15 is against arm's length price being +/- 5% range and hence, no addition. He also pointed out that grounds of appeal No.16 to 18 were consequential and ground of appeal No.19 is premature. He then took us to the merits of exclusion of two concerns from the final list of comparables i.e. Acropetal Technologies Ltd. and E-Infochips Ltd. and also stressed for inclusion of Maveric Systems Ltd. He then pointed out that in case two concerns are excluded and one is included and working capital adjustment is allowed to the assessee, then margins of assessee and mean margins of comparables would be within +/-5% range and Revenue's appeal would become academic in nature. He also pointed out that the issue of risk adjustment was against the assessee.

5. The learned Departmental Representative for the Revenue relied on the orders of Assessing Officer/DRP and also explained the reason for delay in filing the appeal late by 14 days before the Tribunal.

6. We have heard the rival contentions and perused the record. Briefly, in the facts of the case, the assessee was international developer, publisher, distributor of interactive entertainment products. The assessee provided development and quality assurance services to Ubisoft. The assessee had entered into international transactions with its associated enterprises for total value of ₹ 24.70 crores. Reference under section 92CA(1) of the Act was made to the Transfer Pricing Offer (TPO). The TPO adopted revised filters and as against 14 companies selected by assessee as comparables, finally selected 10 concerns as comparable in the software development services segment. The assessee had shown margins of 8.53% as against which mean margins of

comparables finally selected worked out to 24.87%. The TPO thus, proposed an upward adjustment of ₹ 2,30,36,700/-. The assessee filed objections before the DRP after receipt of draft assessment order, who in turn gave certain directions. The final set of comparables after the DRP directions were as under:-

S.No.	Name of the Companies	Margins pursuant to DRP directions
		Unadjusted Margin
1	Acropetal Technologies Limited	21.78%
2	E-Infochips Ltd.	56.44%
3	R S Software (India) Limited	16.37%
4	Thirdware Solutions Limited	13.44%
5	Goldstone Technologies Limited	17.87%
6	Akshay Software Technologies Ltd.	0.86%
7	Cat Technologies Limited	8.57%
8	Evoke Technologies Private Limited	8.11%
9	R Systems International Ltd.	6.87%
10	Thinksoft Global Services Limited	0.05%
11	L S Global Limited	13.75%
	<b>Average</b>	<b>14.92%</b>

7. The mean margins of comparables worked out to 14.92% as against assessee's margins on cost of 8.53% and hence, in the final assessment order, the Assessing Officer made an upward adjustment of ₹ 90,07,200/-.

8. The assessee is in appeal against the said adjustment to arm's length price of international transactions.

9. The grounds of appeal No.1 and 2 raised by assessee are general, hence the same are dismissed. Further, the assessee has not pressed grounds of appeal No.3 to 6, 7 (part) and 10 to 12 and the same are dismissed as not pressed.

10. Now, coming to ground of appeal No.8, which reads as under:-

“8. *erred in considering **Acropetal Technologies Limited** as a comparable without appreciating that the company is functionally different, owns significant intangible assets and has earned supernormal profits and/or has exceptional year of performance.*”

11. With regard to the issue raised by way of ground of appeal No.8 by assessee against exclusion of Acropetal Technologies Ltd., the plea of assessee before us is that the said concern was not accepted as comparable in assessment year 2010-11. The TPO did not accept the contention of assessee that the said concern was engaged in significant research and development activity, since the assessee could not quantify the R&D expenditure of Acropetal Technologies Ltd. The learned Authorized Representative for the assessee pointed out that IT services segment of said concern included variety of services including software development, IT Infrastructure, Management services, IT security consultancy services, enterprise solutions, etc. The plea of assessee before us was that the said services were not comparable to the software development activity undertaken by the assessee. It was further mentioned by the learned Authorized Representative for the assessee that the said concern owned significant intangible assets which comprised of 49% of its total fixed assets and Acropetal Technologies Ltd. also incurred significant R&D expenditure. In the first instance, it may be mentioned that the Pune Bench of Tribunal in assessee's own case in ITA No.351/PUN/2015, relating to assessment year 2010-11, vide order dated 28.06.2017 had rejected Acropetal Technologies Ltd. being functionally not comparable to the assessee. In view of the aforesaid, where the concern Acropetal Technologies Ltd. was engaged in similar line of business as in the preceding year and following the same parity of reasoning as held in assessee's own case for assessment year 2010-

11, we hold that the said concern is functionally not comparable to the assessee and hence, cannot be included in the final set of comparables. Further, the said concern also owns significant intangible assets comprised of 49% of its total fixed assets and also was incurring significant R&D expenditure. Hence, the concern could not be held to be comparable to the assessee. Accordingly, we direct the Assessing Officer / TPO to exclude the concern Acropetal Technologies Ltd. from final set of comparables. The ground of appeal No.8 raised by assessee is thus, allowed.

12. Coming to ground of appeal No.9, which reads as under:-

*“9. erred in considering **E-Infochips Limited** as a comparable without appreciating that the company is functionally different and has earned supernormal profits and / or has exceptional year of performance.”*

13. The issue raised vide ground of appeal No.9 by the assessee is against exclusion of E-Infochips Ltd. The plea of learned Authorized Representative for the assessee before us was that the said concern was engaged in software development services, sale of software products and IT Enabled Services and in the absence of any segmental breakup being available, the margins of said concern could not be applied to benchmark the international transactions of assessee. It was further stressed by the learned Authorized Representative for the assessee that the said concern also earned its revenue both from sale of software services and sale of products and where the assessee was not a product company, then the same cannot be held to be comparable. In this regard, reliance was placed on the decision of Pune Bench of Tribunal in Redknee (India) Technologies Pvt. Ltd. Vs. DCIT in ITA No.486/PUN/2016, relating to assessment year 2011-12, order dated 29.06.2018.

14. On perusal of financial statement of E-Infochips Ltd., it is apparent that the said concern was engaged in various activities and was also having income from sale of products. The segmental details of said business activity undertaken by the said concern were not available. In view thereof, where the concern is engaged in diversified activities and was also a product company, then the margins of said concern cannot be applied to the margins of assessee, who was only providing software development services to its associated enterprises and was not a product company. In the absence of segmental details, E-Infochips Ltd. cannot be adopted as comparable to benchmark the international transactions undertaken by the assessee. In this regard, we find support from the ratio laid down by the Pune Bench of Tribunal in Redknee (India) Technologies Pvt. Ltd. Vs. DCIT (supra) with special reference to para 8 of the said decision and accordingly, we direct the Assessing Officer to exclude E-Infochips Ltd. from the final set of comparables.

15. Now, coming to the last concern i.e. the issue raised vide part of ground of appeal No.7, under which the assessee is aggrieved by non inclusion of Maveric Systems Ltd. The said ground of appeal No.7 part reads as under:-

*“7. erred in rejecting .... **Maveric Systems Limited** on the basis that they failed the export earnings filter of 75% of revenues i.e. their export turnover were less than 75% of respective revenues.”*

16. The learned Authorized Representative for the assessee in this regard pointed out that the TPO had rejected Maveric Systems Ltd. as comparable on the ground that it failed the export turnover filter and RPT filter. The DRP accepted the contention of assessee that Maveric Systems Ltd.'s RPT was merely 9.52% of total sales and hence, the contention of TPO in this regard was incorrect. However, the DRP upheld the order of Assessing Officer in

rejecting the said concern on the basis of said concern failing export turnover filter. The learned Authorized Representative for the assessee before us pointed out that in the TP study report the export turnover filter of 25% was applied, which was modified by the TPO to 75%. The first plea which was raised was that the application of filter of 75% was arbitrary and in assessment year 2010-11, the same filter of 25% of export turnover was applied and accepted by the TPO. On without prejudice basis, the learned Authorized Representative for the assessee further contended that the TPO had erred in computing the export filter which was 75.87% for the year. In this regard, he pointed out that Schedule forming part of Profit and Loss Account needs to be referred and the TPO had erred in computing export filter by referring to Note No.11 in the financial statement i.e. earning in foreign currency rather than export sales in the Schedule 10 of the financial statement. The learned Authorized Representative for the assessee pointed out that as against total sales of ₹ 56.90 crores, export sales were ₹ 43.17 crores and export sales to total sales ratio worked out to 75.87%. On the other hand, the TPO had taken total sales correctly at ₹ 56.90 crores but had adopted the earning in foreign currency as equivalent to export sales. The earnings were to the tune of 39.37% and hence, the export sales to total sales ratio worked out to 69.20%. Our attention was also drawn to the Notes to Accounts i.e. Schedule No.10 and Note No.11 in this regard.

17. On perusal of record and after verifying the financial statements of the said concern Maveric Systems Ltd., we find that as against total turnover of ₹ 56.90 crores, the export turnover was ₹ 43.17 crores and in such regard, the export sales to total sales ratio worked out to 75.87%. Without going into

merits of applying export filter of 75%, we hold that since the said concern fulfills the export turnover filter, then the said concern is to be included in the final set of comparables for benchmarking the international transactions. Accordingly, we hold so. The ground of appeal No.7 part is thus, allowed.

18. Now, coming to ground of appeal No.13 i.e. allowance of working capital adjustment. The learned Authorized Representative for the assessee pointed out that similar issue was decided by the Tribunal in assessee's own case for assessment year 2010-11 and vide para 10 at pages 19 and 20 of the said order, the Tribunal has allowed the claim of assessee. Following the same parity of reasoning, we direct the Assessing Officer to allow working capital adjustment and re-compute the margins of comparables.

19. As far as ground of appeal No.14 is concerned, the said issue of allowance of risk adjustment is decided against the assessee. Hence, we dismiss the ground of appeal No.14 but allow the ground of appeal No.13.

20. The learned Authorized Representative for the assessee pointed out that in case two concerns are excluded and one concern is included and working capital adjustment is allowed, then the margins shown by the assessee were within +/- 5% of mean margins of comparables and there is no need to adjudicate any other issue. Even the issues raised in the Revenue appeal would become academic.

21. We further find that appeal filed by the Revenue is time barred by 14 days, against which the Revenue has filed an affidavit. In the totality of the

above said facts and circumstances, we condone the delay of 14 days in filing the appeal late before the Tribunal but we hold that grounds of appeal raised by Revenue are academic in nature, in view of the concession given by the learned Authorized Representative for the assessee.

22. In the result, appeal of assessee is partly allowed and the appeal of Revenue is dismissed.

Order pronounced on this 11<sup>th</sup> day of February, 2019.

**Sd/-**  
**(ANIL CHATURVEDI)**  
 लेखा सदस्य / **ACCOUNTANT MEMBER**

**Sd/-**  
**(SUSHMA CHOWLA)**  
 न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 11<sup>th</sup> February, 2019.

GCVSR

**आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :**

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'B', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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