

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

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL MEMBER

I.T(TP).A No.782/Bang/2015
(Assessment Year : 2010-11)

Deputy Commissioner of Income tax,
Circle -7(1)(2), Bengaluru .. Appellant

v.

M/s. Webex Communications India P. Ltd,
No.2, North Park Road, Kumara Park East,
Bengaluru 560001 .. Respondent
PAN : AABCC0256A

Assessee by : Shri. Rajan Vora, CA
Revenue by : Smt. Neera Malhotra, CIT-DR

Heard on : 27.03.2019
Pronounced on : 05.04.2019

ORDER

PER LALIET KUMAR, JUDICIAL MEMBER :

The present appeal is filed by the Revenue against the order of the DCIT, Circle -7(1)(2), Bengaluru, dt.29.01.2015, passed u/s.143(3) r.w.s. 144C (13) of the Income tax Act, 1961, in pursuance to the directions of the DRP, for the assessment year 2010-11.

02. The Revenue has raised the following effective grounds of appeal :

1. The DRP erred in excluding Persistent Systems and Solutions Ltd from the list of comparables for software development services eventhough it was satisfying all the quantitative and qualitative filters.

2. The DRP erred in directing the TPO / AO to include the foreign exchange loss / gain for determining the Profit Level Indicator of the assessee in transfer pricing analysis without ascertaining the nexus with the business activity of the assessee even though it is not operating in nature.

3. The DRP erred in directing the TPO to grant risk adjustment without analysing the difference in risk level between the tested party and the uncontrolled comparables and without advising any reasonable accurate method of arriving at it as per Rule 10B(3) of Income tax Rules 1962.

03. Apropos ground no1 Ld. DR for the Revenue had submitted that the order passed by the DRP u/s.154 r.w.s.144C is cryptic as the DRP had excluded the Persistent Systems & Solutions Ltd without giving elaborate and detailed finding.

04. Ld AR had submitted that this ground be sent back to the file of DRP for fresh decision

05. In this regard, we may point out that in the assessee's appeal bearing IT(TP)A.545/Bang/2015, we had already remanded back the entire TP issues to the file of the DRP for denovo examination of the entire case by passing a detailed and reasoned order. Therefore respectfully following the same ratio, we allow the grounds raised by the Revenue.

06. Ground no.2, deals with foreign exchange loss and ground no.3, deals with the risk adjustment.

07. It was submitted by the Ld. DR that the DRP had decided the issue on the basis of the decision of the Hyderabad Tribunal in the matter of DHL Express vs ACIT [(2011)11 Taxman.com 40] without taking into account that there was no specific ground and the details provided by the assessee. Further the Ld. DR relies upon the decision of the coordinate bench in the matter of Mercedes Benz R & D India P. Ltd v. ACIT [(2018) 90 taxmann.com 300], wherein the Tribunal, on identical facts had dealt with foreign exchange gain / loss in para 6.1 and 6.2.1 as under :

6.1 In these grounds, the Revenue contends that the DRP has erroneously considered foreign exchange gain / loss as part of operating income when the TPO has excluded this item while computing the operating margins of the assessee. On the contrary, the assessee contends that the foreign exchange loss / gain are closely linked to its business operations and therefore should be considered as operational in nature as has been held by the DRP.

6.2.1 We have heard the rival contentions, perused and carefully considered the material on record. In the case on hand, the DRP has accepted the assessee's contention that foreign exchange loss / gain is operational in nature, by following the decision of the co-ordinate bench of this Tribunal in the case of SAP Labs Ltd. v. Asstt. CIT[2012] 134 ITD 253/17 [taxmann.com](#) 16 (Bang.) and of another co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2007-08. We find that another co-ordinate bench of this Tribunal in the assessee's own case for Assessment Year 2010-11 in its order in IT(TP)A Nos.291 & 427/Bang/2015 dt.24.6.2016 has held that if foreign exchange gain / loss is operational in nature if it is linked to the exports / imports related to the particular year. To this extent, we find no infirmity in the order of the DRP. However, the facts related to the foreign exchange gain in this year, i.e. as to whether it is related to the business operations and whether they are in the capital or revenue field is not clear from the orders of the authorities below.

The TPO has also not rendered any finding in this regard. In this factual matrix of the case, the finding of the DRP is being set aside and the matter is remanded to the file of the TPO for the limited extent of factual verification in this regard as observed above, before allowing it as operational in nature in keeping with the orders of the co-ordinate bench in the assessee's own case for Assessment Year 2010-11 (supra). Consequently, Revenue's grounds at S.Nos.2 & 3 are partly allowed for statistical purposes.

In respect of risk adjustment, the Tribunal in para 7.3.1 & 7.3.2, held as under :

7.3.1 We have heard both parties, perused and carefully considered the material on record. We find that the DRP, at para 14 of its order, had relied on its decision in the earlier Assessment Year 2010-11 and directed the TPO to allow risk adjustment and decide the percentage of risk adjustment to be allowed. As a matter of guidance, the DRP referred to a decision of the ITAT, Hyderabad in the case of Dy. CIT v. Hellosoft (P.) Ltd. [2013] 32 taxmann.com 101/57 SOT 4 wherein 1% risk adjustment was allowed. From the above, it is seen that the DRP has merely referred to a decision in which 1% risk adjustment was granted and it is not correct to say that DRP directed that 1% risk adjustment is to be granted in this case.

7.3.2 The Bangalore Benches of the Tribunal, while allowing risk adjustment to captive service providers, as a matter of principle has held in many cases, including the one cited (supra), that risk adjustment cannot be granted unless the assessee has submitted computation of the same before the authorities below. In the case on hand, we find that though the assessee in Form 35A submitted before the DRP, at Annexure/Objection 13 thereof, mentioned risk adjustment at 4.92%, no scientific basis or working in respect of the assessee's claim vis-à-vis the comparable companies had been provided. Even on pages 890 & 891 of paper book (Annexure 9-B), no working has been given in respect of risk adjustment claimed at 6.26% vis-à-vis the comparable companies. Since the assessee has not given the computation of risk adjustment of the assessee vis-à-vis the comparable companies, we hold that the assessee shall not be entitled to any risk adjustment and accordingly reverse the DRP's decision granting the assessee

risk adjustment. In coming to this view, we place reliance on the decision of the co-ordinate bench of this Tribunal in the case of Syniverse Teledata Systems (P.) Ltd. (supra) which covers the issue squarely in favour of the revenue in the light of the factual matrix of the case. Consequently, Ground No.4 of Revenue's appeal for Assessment Year 2011-12 is allowed.

08. Per contra, the Ld. AR had submitted that the assessee during the course of appellate proceedings had provided the details of risk adjustment and our attention was drawn to the objection at Annexure-18 for the risk adjustment.

09. We have heard the rival contentions and perused the record. As we had already remanded back TP grounds to the file of the DRP, further we feel that the various companies will be included / excluded based on our remanding back the entire TP issues to the file of DRP. In view of the above, and more particularly when the assessee had provided the details of working risk adjustment before the DRP as well as the AO, in view of the above, we also remand risk adjustment issue to the file of DRP for deciding afresh, after affording opportunity of hearing and provide time to explain the case of the assessee. With respect to the ground no2 , we had taken consistent view that only forex gain / loss which have nexus with the transactions of the year shall alone be taken into account. Hence we also sent back this issue to the file of DRP to decide a fresh in the light of Mercedes Benz R & D India P. Ltd v. ACIT [(2018) 90 taxmann.com 300].

10. In the result, appeal of the Revenue is allowed for statistical purpose.

Order pronounced in the open court on 5th day of April, 2019.

Sd/-

Sd/-

(A. K. GARODIA)
ACCOUNTANT MEMBER

(LALIET KUMAR)
JUDICIAL MEMBER

Bengaluru

Dated : 04.2019

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.