

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND  
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

IT(TP)A No.523/Bang/2017
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Assessment year : 2012-13
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<b>M/s. EMC Software and Services India Private Limited,</b> (successor in the interest of EMC Data Storage Systems (India) Private Limited), Bagmane World Technology Centre, SEZ, Mahadevapura, Doddanekundi Village, K. R. Puram Hobli, Bangalore – 560 048. <b>PAN : AABCE 0989 Q</b>	Vs.	The Assistant Commissioner of Income Tax, Circle – 2(1)(2), 2 <sup>nd</sup> Floor, BMTC Depot, 80 Feet Road, 6 <sup>th</sup> Block, Koramangala, Bangalore – 560 095.
APPELLANT		RESPONDENT

Assessee by	:	Ms. Tanmayee Rajkumar, Advocate
Revenue by	:	Shri. Pradeep Kumar, CIT

Date of hearing	:	02.05.2019
Date of Pronouncement	:	03.07.2019

**ORDER**

***Per Jason P Boaz, Accountant Member:***

This appeal filed by the assessee is directed against the final order of assessment dated 29.12.2016 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short ‘the Act’) for Assessment Year 2012-13, pursuant to the directions of the Dispute Resolution Panel – 1, Bangalore (DRP) under section 144C(5) of the Act on 31.10.2016.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, a subsidiary of EMC Corporation, USA, engaged in marketing and distribution of EMC Products, consultancy and provision of software development services and IT enabled services (ITES) to its Associated Enterprises (AEs), filed its original return of income for Assessment Year 2012-13 on 29.11.2012 declaring income of Rs.61,23,25,140/-. A revised return was filed on 10.06.2013, wherein the assessee declared income of Rs.41,11,22,730/-. The case was selected for scrutiny and thereafter the Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) under section 92CA of the Act for determination of the arm's length price (ALP) of the international transactions entered into by the assessee with its AEs in the year under consideration. The TPO passed an order under section 92CA of the Act dated 06.01.2016, wherein he proposed (i) an adjustment of Rs.20,99,44,284/- to the international transactions relating to the assessee's software development services segment (SWD segment) and (ii) an adjustment of Rs.1,66,99,160/- to the assessee's ITES segment. Vide order under section 92CA(5) r.w.s. 154 of the Act, dated 04.04.2016, the TP adjustment to the SWD segment was reduced to Rs.15,35,74,316/-.

2.2 The assessee filed its objections thereto before the DRP, who vide its directions dated 31.10.2016 allowed the assessee partial relief. Pursuant thereto, the AO passed the impugned final order of assessment dated 29.12.2016 under section 143(3) r.w.s. 144C(13) of the Act wherein the assessee's income was determined at Rs.61,57,40,610/-; which included a TP adjustment of Rs.16,46,17,878/- in respect of the assessee's international transactions in the software development services segment.

3.1 Aggrieved by the final order of assessment for Assessment Year 2012-13 dated 29.12.2016 for Assessment Year 2012-13, the assessee has preferred this appeal before the Tribunal, wherein it has raised the following grounds:-

1. *That the order of the Assistant Commissioner of Income-tax, Circle - 2 (1)(2), Bangalore (the "learned Assessing Officer" or the "learned AO") dated December 29, 2016, passed under Section 143(3) read with section 144C(13) of the Act, pursuant to the directions of the learned Dispute Resolution Panel-1, Bangalore (the "learned Panel") to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.*
2. *That on the facts and in the circumstances of the case, the learned AO and the Deputy Commissioner of Income-tax (Transfer Pricing) — 1(2)(1), Bangalore (the "learned Transfer Pricing Officer" or the "learned TPO") erred in not conforming with the directions of the learned Panel in entirety and making an adjustment to the transfer price of the Appellant, in doing so the learned AO/ learned TPO erred in not providing the basis on which the aforementioned adjustment was made.*
3. *That on the facts and in the circumstances of the case, the learned Panel and the learned AO erred in upholding the learned TPO's approach of determining the arm's length price for the contract software development services segment of the Appellant by:*
  - 3.1. *Invoking provisions of section 92C(3) read with section 92CA of the Act contending that the information or data used in the computation of the arm's length price is not reliable or correct;*
  - 3.2. *Disregarding application of multiple year/ prior year data as used by the Appellant in the transfer pricing documentation and holding that current year (i.e. Financial Year 2011-12) data for companies should be used for comparability;*
  - 3.3. *Using data which was not available in the public domain at the time, the transfer pricing documentation was prepared by the Appellant;*
  - 3.4. *Conducting a fresh comparability analysis by rejecting certain filters applied by the Appellant in the transfer pricing documentation (i.e., R&D spend / Sales filter, net-worth filter and advertising, marketing and distribution expenses / sales filter) and applying additional /modified filters (i.e., service revenue > 75% filter, export sales / total sales filter, consistent losing making filter, different year ending filter and RPT /Sales >25% filter).*

- 3.5 *Rejecting companies (i.e., Celstream Technologies Private Limited, Akshay Software Technologies Limited and Evoke Technologies Private Limited) which pass the test of comparability and are functionally comparable to the Appellant;*
  - 3.6 *Introducing additional purported companies (i.e., Larsen & Toubro Infotech Ltd and Persistent Systems Ltd.) which fail the test of comparability;*
  - 3.7 *Ignoring 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 were selected as comparable companies; and*
  - 3.8 *Not considering certain items of expenses/income while computing the operating mark-up on cost of the comparable companies.*
4. *That on the facts and in the circumstances of the case, the learned Panel erred in rejecting certain companies (i.e., Sasken Communication Technologies Limited and Spry Resources India Private Limited) via otherwise pass the test of comparability and are functionally comparable to the Appellant in respect of its software development segment and were not particularly disputed by the learned AO / learned TP 01 aid tie Appellant.*
  5. *That on the facts and in the circumstances of the case, the learned AO and the learned TPO erred in the computation of :*
    - 5.1 *the operating mark-up on cost for certain comparable companies and*
    - 5.2 *the working capital adjustment.*
  6. *The learned AO erred in charging interest under section 234A of the Act.*

*That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.*

4. In the course of hearings, the assessee has filed paper book, synopsis of arguments, a chart of comparables and Case Law Index. The learned DR for Revenue has also filed written submissions; all of which are duly considered while disposing off this appeal.

5. At the outset of the hearings, the learned AR submitted that the assessee is not urging any of the aforesaid grounds of appeal (supra) except ground No.3.6; wherein it has sought for the exclusion of the following two companies from the TPO's list of comparables; (i) Larsen & Toubro Infotech Ltd., and (2) Persistent Systems Ltd., in the Software Development Services Segment. In view of the above, ground Nos. 1,2, 3.1 to 3.5, 3.7, 3.8 and 4 to 6 (supra) are rendered infructuous and accordingly dismissed as not pressed. We, therefore, now proceed to consider and adjudicate ground No.3.6 (supra); which is the only surviving ground of appeal.

### **Transfer Pricing Issues**

#### **Ground No.3.6 – Exclusion of companies from list of comparables (software Development Services segment)**

6.1 In this ground, the assessee seeks exclusion of the following two comparables chosen by the TPO:-

- (1) Larsen & Toubro Infotech Ltd.,
- (2) Persistent Systems Ltd.,

The assessee had objected to the inclusion of both these companies as comparables on the ground that they were software product companies and were functionally different.

6.2 Before taking up the comparables of these two companies for consideration, it would be appropriate to give a factual background of the transfer pricing issues in this case. The assessee, *inter alia*, in the year under consideration, is engaged in providing software development services and IT enabled services to its AEs. In its

TP study / documentation, the assessee selected the following 14 comparable companies, as listed at para 8 of TPO's order, with an average margin of 13.08%.

Sl. No	Name of the Company	Weighted Average (%)	Remarks
1	Helios & Matheson Information Technology Ltd.	16.04	No Data and different year ending.
2	L G S Global Ltd.	13.58	Data not available in public domain.
3	Melstar Information Technologies Ltd	-5.13	Failed the Forex filter of 75% to sales.
4	Persistent Systems & Solutions Ltd.	16.30	<b>Qualifies all filters. Hence accepted</b>
5	Synetairos Technologies Ltd.	15.13	No Data and different year ending.
6	Asap Automation India Pvt. Ltd.	10.64	Data not available in public domain.
7	Cadence Design Systems (India) Pvt. Ltd.	16.49	Data not available in public domain.
8	E-zest Solutions Ltd.	29.15	<b>Qualifies all filters. Hence accepted</b>
9	IDBI Intech Ltd.	4.58	Different functions hence rejected.
10	Ideavat Solutions Pvt. Ltd	31.47	Data not available in public domain.
11	Jeevan Scientific Technology Ltd.	12.33	Failed the Forex filter of 75% to sales.
12	Proteans Software Solutions Pvt. Ltd.	1.90	Data not available in public domain.
13	Allied Digital Services Ltd. – Solutions	4.24	Failed the Employee cost filter of 25% to sales.
14	Mindtree Ltd. – IT Services	16.41	<b>Qualifies all filters. Hence accepted</b>
<b>Average</b>		<b>13.08</b>	

As the PLI of the assessee (OP/TC) was 12.02% in comparison to those of the comparable companies selected (supra) at 13.08%, the assessee considered its international transactions in the software development services segment to be at arms length.

6.3.1 The TPO rejected the assessee's TP study for the reasons stated in his order under section 92CA of the Act. He then proceeded to conduct his own TP study / comparability analysis, applying various filter and selected the following 10 companies with average margin of 22.63% as comparable to the assessee:-

Sl. No.	Name of the taxpayer	OP/OC
1.	Datamatics Global Services Ltd.	14.57%
2.	Genesys International Corpn. Ltd.	30.09%
3.	I C R A Techno Analytics Ltd.	17.24%
4.	Infosys Ltd.	43.10%
5.	Larsen & Toubro Infotech Ltd.	25.47%
6.	Mindtree Ltd.	15.01%
7.	Persistent Systems Ltd.	27.20%
8.	R S Software (India) Ltd.	15.34%
9.	Sasken Communication Technologies Ltd.	12.15%
10.	Spry Resources India Pvt. Ltd.	26.18%
	<b>Average</b>	<b>22.63%</b>

6.3.2 In view of the above, the TPO, in his order under section 92CA of the Act, *inter alia*, proposed a TP adjustment of Rs.20,99,44,284/- to the International transactions in the software development services segment of the assessee business. This TP adjustment was subsequently reduced to Rs.15,35,74,316/- pursuant to order under section 92CA(5) r.w.s. 154 of the Act dated 04.04.2016. Pursuant to the DRP's directions dated 31.10.2016, the aforesaid TP adjustment was determined at Rs.16,46,17,878/- in the impugned final order of assessment. Having laid out the background facts of the matter, we now proceed to consider ground No.3.6 raised by the assessee in this appeal (*supra*) seeking the exclusion of the following two companies from the final set of comparables i.e., (1) Larsen & Toubro Infotech Ltd., and (2) Persistent Systems Ltd.

6.4.1 We have considered the rival contentions / submissions and perused the material on record; including the judicial pronouncements cited. The issue before us is basically in respect of the comparability or otherwise of the two companies, M/s. Larsen & Toubro Infotech Ltd., and M/s. Persistent Systems Ltd.,

to an assessee who only provides software development services to its AEs; like the assessee in the case on hand. Admittedly, these companies were chosen as comparables by the TPO and assessee had objected to their inclusion in the set of comparables on grounds of being functionally different, as they were into software products; had brand value, etc. In this regard, we find that a Co-ordinate Bench of this Tribunal in the case of CGI Information Systems & Management Consultants Pvt. Ltd.,; where the assessee was also providing software development services to its AEs; in its order in IT(TP)A No.183/Bang/2017 dated 11.04.2018, also for Assessment Year 2012-13, at paras 28 to 30 of its order, *inter alia*, considered the comparability of Larsen & Toubro Infotech Ltd., and Persistent Systems Ltd., and directed the exclusion of these two companies, holding as under:-

“28. *The learned counsel for the Assessee submitted before us that the comparability of the 3 companies out of the aforesaid 4 companies which the Assessee seeks to exclude from the list of comparable companies chosen by the TPO viz., Infosys Ltd., Larsen & Toubro Infotech Ltd. and Persistent Systems Ltd., were considered by the ITAT Delhi Bench in the case of Agilis Information Technologies India (P) Ltd. Vs. ACTT (2018) 89 taxmann.com 440 (Delhi-Trib.) for the same AY 2012-13. In this regard it was submitted that the functional profile of the Assessee is same as that of the Assessee in the case of Agilis Information Technologies India (P) Ltd., is identical in as much as the said company was also involved in providing SWD services to its AE and the TPO had chosen 16 comparable companies out of which 6 companies chosen by the TPO in the case of the Assessee for the purpose of comparability were the same. His submission was that the decision rendered by the Tribunal in the case of Agilis Information Technologies India (P) Ltd., (supra) would be equally applicable to the Assessee in the present case also. The learned DR submitted that the DRP in its directions has merely accepted with the reasoning of the TPO and therefore the issue of exclusion of these companies should be directed to be examined afresh by the DR.*

29. *We have considered the rival submissions. In the case of Agilis Information Technologies India (P) Ltd., (supra), this Tribunal considered the comparability of the 3 companies which the Assessee seeks to exclude from the final list of comparable companies chosen by the TPO. The functional profile of the Assessee and that of the Assessee in the case of Agilis Technologies India (P) Ltd., is identical in as much as the said company was also involved in*

*providing SWD services to its AE and the TPO had chosen some comparable companies which were also chosen by the TPO in the case of the Assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the Assessee seeks to exclude as follows:*

*(a) Infosys Ltd., was excluded from the list of comparable companies by following the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Agnity India Technologies (2013) 36 taxmann.com 289 (Delhi). The discussion is contained in paragraphs 4.5 to 4.7 of the Tribunal's order. The Tribunal accepted that Infosys Ltd. is a giant risk taking company and engaged in development and sale of software products and also owns intangible assets and therefore not comparable with a software development service provider such as the Assessee in that case.*

*(b) Larsen & Tourbro Infotech Ltd., was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of ITAT in the case of Saxo India (P) Ltd. Vs. ACIT (2016) 67 taxmann.com 155 (Del-Tri). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L & T Infotech Ltd., was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the revenue against the tribunal's order was dismissed by the Hon'ble Delhi High Court in ITA No.682/2016.*

*(c) Persistent Systems Ltd., was excluded from the list of comparable companies on the ground that this company was a software product company and segmental information on SWD services was not available. The Tribunal in coming to the above conclusion referred to the decision rendered by ITAT Delhi Bench in the case of Cash Edge India Pvt.Ltd. Vs. ITO ITA No.64/De1/2015 order dated 23.9.2015 and the decision of Hon'ble Delhi High Court in the case of Saxo India Pvt.Ltd. (supra). The findings in this regard are contained in Paragraphs 4.14 to 4.16 of its order.*

*30. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins.”*

6.4.2            Respectfully following the aforesaid decision of the Co-ordinate Bench of this Tribunal in the case of CGI Information Systems & Management

Consultants Pvt. Ltd., Vs. ACIT in ITA No.183/Bang/2017 dated 11.04.2018, which is also rendered for Assessment Year 2012-13, we direct the AO/TPO to exclude:-

- (1) M/s. Larsen & Toubro Infotech Ltd., and
- (2) M/s. Persistent Systems Ltd., from the TPO's list of comparable companies. We hold and direct accordingly. Consequently, ground No.3.6 of the assessee's appeal is allowed.

7. In the result, the assessee's appeal for Assessment Year 2012-13 is partly allowed.

*Order pronounced in the open court on this 3<sup>rd</sup> day of July, 2019.*

Sd/-  
**(N. V. VASUDEVAN)**  
**Vice President**

Sd/-  
**(JASON P BOAZ)**  
**Accountant Member**

Bangalore.

Dated: 3<sup>rd</sup> July, 2019.

/NS/\*

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT        | 4. CIT(A)     |
| 5. DR         | 6. Guard file |

By order

Assistant Registrar,  
ITAT, Bangalore.