

आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.117/PUN/2017

निर्धारण वर्ष / Assessment Year : 2011-12

The Assistant Commissioner of Income Tax,
Circle-2, Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. NetHawk Networks India Pvt. Ltd.
1249/50, 1st Floor, Life Style Building,
F.C. Road, Shivajinagar,
Pune-411 004.
PAN: AACCN0994P

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.2927/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

M/s. NetHawk Network India Pvt. Ltd.
1249/1250, 1st Floor, Goodluck Chowk,
F.C. Road, Pune-412 207.
PAN : AACCN0994P

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-2, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Mahavir Jain
Revenue by : Shri Ashok Malvya

सुनवाई की तारीख / Date of Hearing : 16.07.2019
घोषणा की तारीख / Date of Pronouncement : 17.07.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These cross appeals preferred by the assessee as well as the Revenue emanates from the order of the Ld. CIT(Appeals)-13, Pune dated 07.10.2016 for the assessment year 2011-12 as per the grounds of appeal on record.

2. At the outset, the Ld. AR of the assessee submitted that if the issues in the Revenue's appeal are decided in favour of the assessee then in such a scenario, the assessee's appeal would become academic/infructuous in nature since the Assessing Officer/ Transfer Pricing Officer has provided necessary relief to the assessee through rectification u/s.154 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') dated 05.04.2019 giving appeal effect to the order of the Ld. CIT(Appeals). In view of the aforesaid submissions made by the Ld. AR, we proceed to first adjudicate the issues in the Revenue's appeal.

ITA No.117/PUN/2017 (By Revenue)
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3. The first ground of Revenue's appeal is with regard to that the Ld. CIT(Appeals) had directed to include the company "Maveric Systems Ltd" in the final list of comparables with that of the assessee. The Transfer Pricing Officer had rejected the company "Maveric Systems Ltd.", as stated in this ground of appeal by the Revenue, on account of extraordinary events and also failed the filter export to sales filter of 75%.

4. The facts on record demonstrates that the Transfer Pricing Officer had rejected the comparable company selected by the assessee, “Maveric Systems Ltd.”, on the ground that it is a loss making company for financial year 2010-11 and that it has incurred extra-ordinary cost during the year under consideration. That before the Ld. CIT(Appeals), the assessee had filed detailed written submissions stating that the said comparable company i.e. “Maveric Systems Ltd.” was consistently making profits in the past years. Thus, it is not a case of persistently loss making company. The profitability of “Maveric Systems Ltd.” during the last three years i.e. financial year 2008-09, 2009-10 and 2010-11 has been given in the form of chart before the Ld. CIT(Appeals) which reads as under:

<i>Financial Year</i>	<i>Operating margin (OP/OC) (Forex as Operating Item)</i>	<i>Operating margin (OP/OC) (Forex as non-Operating Item)</i>
2008-09	15.14%	7.98%
2009-10	16.37%	15.28%
2010-11	-9.68%	-10.62%

The assessee further submitted that a company should not be rejected as ‘loss maker’ merely on the basis of incurring loss in any given year and that at least three years results should be considered for analysis, if not more than that. That further, persistent loss making companies have been suo-moto rejected by the assessee on the most conservative approach. The Transfer Pricing Officer had also rejected “Maveric Systems Ltd.” on the ground that the company had incurred substantial indirect cost which constitutes an extra ordinary expenses which needs to be adjusted first. The Transfer Pricing Officer has relied on the Director’s Report of the company. In

that Director's Report, it was stated that the loss during the year has been incurred due to the substantially higher indirect cost aimed at increasing revenue. However, nowhere it has been stated that an extra ordinary cost has been incurred. The Ld. CIT(Appeals) after considering the submissions of the assessee and facts of the case held that merely because the company has incurred loss, it is considered as a non comparable with that of the assessee, is not the correct indication. This is also because the assessee does not charge on "Cost + Plus" basis but charges on hourly basis. Therefore, the assessee also can incur losses. The Ld. CIT(Appeals) had perused the Annual Report of the "Maveric Systems Ltd." and also observed that Transfer Pricing Officer's reasons of the company's inconsistent performance in earlier 2 years and non availability of segmental accounts of indirect expenses should not be a reason to exclude the company from the final list of comparables. In view of this observation, the Ld. CIT(Appeals) directed the Assessing Officer/Transfer Pricing Officer to include this company i.e. "Maveric Systems Ltd." in the final list of comparables company with that of the assessee.

5. We have perused the case records and analyzed the facts and circumstances while providing considerable thought to the relevant documents on record. The rejection by the Transfer Pricing Officer of "Maveric Systems Ltd." as comparable to that with the assessee on the ground that it was consistently loss making company, is not correct, since as per tabulation on record, the company had been earning profit and at the same time, the Transfer Pricing Officer relying on the Director's Report had stated that "Maveric Systems Ltd" has incurred extra ordinary cost. However, on perusal of the Director's Report of the said company, no categorical/specific finding is there that extra ordinary cost has been incurred by this company. The Ld.

CIT(Appeals) also has given findings perusing all the relevant factors/criterias and we do not find any infirmity in his order. Therefore, relief provided to the assessee regarding the inclusion of “Maveric Systems Ltd.” in the final list of comparables is hereby sustained.

5.1 With regard to the second part of the first ground raised by the Revenue regarding “**filter export to sales filter of 75%**”, we observe that no where it is coming from the order of the Transfer Pricing Officer or from Ld. CIT(Appeals). Therefore, we are of the considered view that this is not an issue for adjudication since no where it was considered by the Revenue Authorities in their respective orders and therefore, **inclusion of this part in the ground of appeal is infructuous.**

In view of the matter as herein above discussed, **ground No.1 of Revenue’s appeal is dismissed.**

6. **Ground No. 2** of the Revenue’s appeal is “*whether the Ld. CIT(Appeals) was justified in directing the Assessing Officer to exclude certain comparables only on the ground of higher turnover and without analyzing the FAR of the comparables.*”

7. The assessee has excluded five comparables which the Transfer Pricing Officer/ Assessing Officer had included which are as follows:

A. Infosys Technologies Limited : Against the selection of Infosys Technologies Limited in the final set of the comparable companies, the assessee has submitted before the Ld. CIT(Appeals) as under:

- *Infosys has significantly huge (i.e.1000 times higher) turnover of Rs. 25,385 Crores as compared to the turnover of the Assessee of Rs. 21 Crores.*
- *Infosys is giant company and have developed huge brand value, assets, Net-worth over the years of its operations.*
- *Infosys owns significant intangible assets as compared to the Assessee who does not own any intangible asset;*
- *Infosys has incurred huge expenditure on R & D, Marketing and advertising as compared to Assessee who does not undertake any R & D and also does not undertake any advertising and marketing; and*
- *Infosys has revenue from Software development services as well as software products, however, break-up of revenue from respective income stream or segmental data is not available;*
- *Employee Cost to sale ratio is much lower than the assessee company;*
- *More than 50% of the income is from onsite services;*
- *Infosys has earned abnormal profit for tile year (i.e. 43.53%) which cannot be considered as comparable;*
- *In view of the above, Infosys cannot be considered as comparable in case of the assessee company”*

8. The Ld. CIT(Appeals) on the issue has held and observed as follows:

“2.3.4.2 I find that the learned TPO has not applied the upper turnover filter presumably following the decisions of the honourable Tribunal which have held that the turnover filter is of no relevance in the software industry and there is no relationship of the turnover with the profit of the company as the company with lower turnover has also earned higher profit than the company with higher turnover. I agree with the view that turnover may not be a factor in a service industry, however, according to me size of company makes difference in undertaking risks. Bigger sized company is in a position to undertake more risks in the business as compared to the smaller sized companies. The size of the company can be categorized either on the basis of the capital or asset or on the basis of turnover. Para 3.43 of the OECD Guidelines mention size in terms of ‘sales’ as one of the comparability criteria. In this connection, it may not be out of place to mention that the Rule 10TD of the Income Tax Rules provide higher profitability for the companies having turnover of more than Rs.500 cr. Further, turnover is an important criterion in the industrial policies and other commercial policies. The honorable Delhi High Court in the case of CIT Vs. Agnity India Technologies Private Limited has discussed several aspects of the ‘giant’ companies such as Infosys Limited and Wipro Limited and held that such companies cannot be compared with the smaller sized companies.

2.3.4.3 In this connection, it is seen that turnover of Infosys Technologies is 1209 times more than the value of the Appellant’s international transaction. I do not consider this company as comparable with the

appellant. In view of the above discussion, I direct the learned AO to exclude Infosys Technologies Limited from the list of the comparable companies.”

B. IGate Global Solutions Limited : The assessee against the selection of IGate Global Solutions Limited in the final set of comparable companies has submitted before the Ld. CIT(Appeals) as under:

“- iGate has significantly huge (i.e. 56 times higher) turnover of Rs.1184.45 Crores as compared to the turnover of the Assessee of Rs.21 Crores

- iGate is giant company and have developed huge brand value over the years of its operations;

- From the website as well as Annual Report of the company for F.Y.2010-11, it appears that it is also involved into services like Engineering Design, Enterprise Application Solutions & Mobility, Business Intelligence (BI), Application Developments & Maintenance etc. apart from Software Development/testing activities. On the contrary, appellant is purely into Software development only, Thus, in the absence of segmental data, said company cannot be considered to be comparable.

- In view of the above, iGate cannot be considered as comparable in case of the assessee company.”

9. The Ld. CIT(Appeals) on this issue has held as follows:

“2.3.5.2 Findings on the comparability of the above company are covered by the findings of the comparability of Infosys Technologies Limited. Accordingly, I direct the learned AO to exclude IGate Global Solutions Ltd. from the list of the comparable companies.”

C. Larsen and Toubro Infotech Limited : Against the selection of Larsen and Toubro Infotech Limited, the assessee has submitted before the Ld. CIT(Appeals) as under :

“- L & T has significantly huge (i.e.100 times higher) turnover of Rs.2,331 Crores as compared to the turnover of the assessee as Rs.21 Crores

- *L & T is giant company and have developed huge brand value, assets and net-worth over the years of its operations.*
- *L & T owns significant intangible assets (trademarks etc.) as compared to the assessee who does not own any tangible assets;*
- *L& T has incurred huge expenditure on R & D, Marketing and adverting as compared to Assessee who does not undertake any R & D and also does not undertake any advertising and marketing;*
- *L & T has revenue from software development services as well as software products, however, break up of revenue from respective income stream or segmental data is not available.*
- *In view of the above, L & T cannot be considered as comparable in case of the assessee company.”*

10. The Ld. CIT(Appeals) on this issue has held as follows :

“2.3.6.2 Findings on the comparability of the above company are covered by the findings of the comparability of Infosys Technologies Limited. Accordingly, I direct the learned AO to exclude L & T Infotech Ltd. from the list of the comparable companies.

D. Persistent Systems Limited : Against the selection of Persistent Systems Limited in the final set of the comparable companies, the assessee has submitted vide its written submission before the Ld. CIT(Appeals) as under:

“- Persistent has significantly huge (i.e. 30 times higher) turnover of Rs.610 Crores as compared to the turnover of the Assessee of Rs.21 Crores

- In view of the above, persistent cannot be compared as comparable in case of the assessee company.”

11. The Ld. CIT(Appeals) after considering the submissions of the assessee and the facts of the case has held as follows:

“2.3.8.2 Findings on the comparability of the above company are covered by the findings on comparability of Infosys Limited. Accordingly, I direct the learned AO to exclude Persistent Systems Ltd. from the list of the comparable companies.”

E. Zylog Systems Limited : Against the selection of Zylog Systems Limited in the final set of the comparable companies, the assessee has submitted before the Ld. CIT(Appeals) as under :

“- Zylog has significantly huge (i.e.30 times higher) turnover of Rs.916 Crores as compared to the turnover of the Assessee of Rs.21 Crores.

- In view of the above, Zylog cannot be considered as comparable in case of the assessee company.”

12. The Ld. CIT(Appeals) after considering the submissions of the assessee and facts of the case has held as follows:

“2.3.13.2 Findings on the comparability of the above company are covered by the findings on comparability of Infosys Technologies Limited. Accordingly, I direct the learned AO to exclude Zylog Systems Ltd. from the list of the comparables companies.”

13. We have perused the case records and the relevant documents. We have also given considerable thought to the findings of the Ld. CIT(Appeals) for each of the five comparables that had been directed by the First Appellate Authority to be excluded from the final set of comparable companies with regard to the assessee. It is contented by the Revenue that such decision by the Ld. CIT(Appeals) has been made on the ground of higher turnover. However, in our considered view on perusal of the relevant findings of the Ld. CIT(Appeals), apart from considering the turnover, has also looked into various other factors. He had considered that the size of the company makes difference in undertaking risks. Bigger sized company is in a position to undertake more risks in the business as compared to the smaller sized companies. The size of the company can be categorized either on the basis of the capital or asset or on the basis of turnover. The Ld. CIT(Appeals) has also referred to Para 3.43 of the OECD Guidelines mentioning size in terms of ‘sales’ as one of the comparability criteria. In this regard, reference was also

made to Rule 10TD of the Income Tax Rules which provide higher profitability for the companies having turnover of more than Rs.500 Cr. So while considering size of the company, its capacity of risk taking, capital, assets and turnover have been considered by the Ld. CIT(Appeals). We, therefore, do not find any infirmity with the findings of the Ld. CIT(Appeals) and uphold the relief provided to the assessee. Thus, **ground No.2 raised in appeal by the Revenue is dismissed.**

14. **Ground No.3** of Revenue's appeal is general in nature and hence, requires no adjudication.

15. The Revenue has also preferred additional grounds in appeal wherein, it had challenged the decision of the Ld. CIT(Appeals) in excluding "E-infochips Ltd." from the list of comparable companies. Though the Revenue has taken five additional grounds, but crux of these grounds is with regard to the issue as hereinabove referred.

16. The facts on this issue are that the Transfer Pricing Officer had included "**E-infochips Limited**" in the final set of the comparable companies by observing as follows:

" From the accounts of this company the assessee has failed to demonstrate as to how and where the profitability as shown in its books has been impacted due to the various parameters stated by it. These arguments have also been considered in M/s. Willis Processing Services (India) Pvt. Ltd. in ITA No.4547/Mum/2012 in Para 45.2 as well as Delhi Benches of the Tribunal in the case of Actis Advisors Pvt. Ltd. in ITA No. 5277/Del/2011. It is a general claim, hence rejected.

The functions performed by the assessee is broadly similar to that of the assessee as it is very clear from the functional profile of assessee and the comparables."

17. The assessee had made the following submissions before the Ld. CIT(Appeals) against the inclusion of E-infochips Limited in the final set of the comparable companies by the Transfer pricing Officer:

- *From the Annual Report as well as Notes to accounts of the company for FY 20 10-11, it appears that it is also involved into IT'S apart from Software Development activities. On the contrary appellant is purely into son ware Development only. Thus, in the absence or segmental data, said company cannot be considered to be comparable.*
- *Further, E-Infochips is also having inventory of Finished Goods as apparent from financials indicating that the comp.uity is into software products, unlike the Assessee.*
- *Employee Cost to sale ratio is much lower than the assessee company*
- *E-infochips has earned abnormal profit for the year under consideration (i.e. 56.44%) which cannot be considered as comparable. In fact, there was extra-ordinary fluctuation in profit margins over years from loss of (-) 14.33% in 2008-09 to super profit of 56.44% in 2010-11.*
- *In view of the above E-infochips cannot be considered as comparable in the case of the assessee company."*

18. The Ld. CIT(Appeals) after considering the submissions of the assessee has observed that the said company has provided the following information in Para 12 of the 'Notes to Accounts' in the Annual Report regarding information about Primary Segments:

"The company is primarily engaged in Software Development and IT enabled Servies which is considered the only reportable business segment as per Accounting Standard-AS-17 'Segment Reporting' mandatory Accounting Standards prescribed in Companies (Accounting Standard) Rules, 2006 and the relevant provisions of Companies Act, 1956."

The Ld. CIT(Appeals) after considering the facts of the case and Annual report of the company observed that "E-infochips Limited" provides software development services, ITes and sells products and hardware. However,

segmental information is not available for these different activities. The Ld. CIT(Appeals) thereafter held that in absence of segmental information of the IT services and ITes, including “ E-infochips Limited” in the final set of comparable is unjustified and accordingly, he directed the Assessing Officer/ Transfer Pricing Officer that this company should be excluded from the list of comparables companies with that of the assessee.

19. We have perused the case records and the findings of the Ld. CIT(Appeals). We find that it is an undisputed fact that the said company i.e. “E-infochips Limited” is engaged in diversified activities. “**E-infochips Limited**” has earned abnormal profit for the year under consideration (i.e. 56.44%) which cannot be considered as comparable. In fact there was extraordinary fluctuation in profit margins over years from loss of (-) 14.33% in 2008-09 to super profit of 56.44% in 2010-11. Furthermore, segmental information of the activities undertaken is not available. The Ld. CIT(Appeals) therefore, held that in absence of such segmental information specially IT services, ITes, inclusion of “**E-infochips Limited**” in the final set of comparable companies is not justified with that of the assessee. We do not find any infirmity in the findings of the Ld. CIT(Appeals) which is therefore upheld. Thus, **additional ground Nos. 1 to 5 raised in appeal by the Revenue are dismissed.**

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20. Since the issues raised in Revenue’s appeal has been decided in favour of the assessee and also for the fact that as per rectification order passed u/s.154 of the Act dated 05.04.2019 by the Assessing Officer, necessary relief

has been provided to the assessee after providing appeal effect to the order of the Ld. CIT(Appeals), **the present appeal by the assessee, therefore, becomes infructuous and hence, dismissed.**

21. In the combined result, **appeal of the Revenue in ITA No.117/PUN/2017 and appeal of the assessee in ITA No.2927/PUN/2016 are dismissed.**

Order pronounced on 17th day of July, 2019.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 17th July, 2019.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-13, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	16.07.2019	Sr.PS/PS
2	Draft placed before author	16.07.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		