

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES : "B", BANGALORE**

**BEFORE SHRI B.R.BASKARAN ACCOUNTANT MEMBER
AND**

SMT.BEENA PILLAI, JUDICIAL MEMBER

Sl. No.	ITA/IT(TP)A No.	Assessment. Year	Appellant	Respondent
1	IT(TP)A No.579(B)/2016	2011-12	DCIT, Circle-3(1)(2), Bangalore	M/s Herbalife International India Pvt.Ltd., Bangalore
4	C.O.NO.23(B)/2017 (In IT(TP)A No.579(B)/2016	2011-12	M/s Herbalife International India Pvt.Ltd., Bangalore	DCIT, Circle-3(1)(2), Bangalore

**Revenue by : Miss. Neera Malhotra, CIT
Appellant by Shri Nageshwar Rao, Advocate**

**Date of hearing : 22-07-2019
Date of pronouncement : 07-08-2019**

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER :

Present appeals are filed by revenue along with cross objection filed by assessee against order passed by Ld.DCIT Circle 3 (1) (2), under section 143 (3) read with section 144C of the Act, for assessment year 2011-12 on following grounds of appeal:

IT(TP)A No. 579/Bang/2016(AY: 2011-12)

The directions of the Dispute Resolution Panel are opposed to law and facts of the case. In the facts and circumstances of the case, Whether the Hon'ble DRP is correct in holding that the, M/s RS Software Pvt. Ltd., M/s Acropetal Technologies Ltd and M/s L&T Infotech ltd. cannot be taken as comparable, when it satisfies all the qualitative and quantitative filters adopted by the TPO.

- i) Whether the Hon'ble DRP is right in applying "onsite revenue filter" without appreciating the fact that the function carried out is "Software Development" irrespective of whether onsite or offshore.*
- ii) Whether the Hon'ble DRP in correct in excluding M/s RS Software Pvt. Ltd. and M/s Acropetal Technologies and M/s L&T Infotech ltd on the ground that they have significant onsite revenue without appreciating the fact that onsite development of software entails more cost and thereby results in lower profit margins.*
- iii) Whether the Hon'ble DRP was right in seeking exact comparability while searching for comparable companies of the assessee under TNMM method whereas requirement of law and international jurisprudence require seeking similar comparable companies.*
- iv) Whether the Hon'ble DRP has erred on fact in deleting M/s E-infochips as a comparable on the ground that it fails the filter of service income less than 75% of the sales, when the said company has service income being 100% of the sales.*

- v) *Whether Hon'ble DRP erred in fact in rejecting the company as a comparable on the ground that it is functionally different when the primary source of income of the comparable is from provision of software development services.*
- vii) *Whether while seeking the exact comparability as mentioned above the DRP was right in fact and in law in imposing condition beyond law whereas the requirement of law is to acknowledge only those differences that are likely to materially affect the margin.*
- viii) *Whether the Hon'ble DRP is correct in fact and law in disregarding the position of law that there could be differences between the enterprises compared under the TNMM method that are not likely to materially affect the price or cost charged or the profits accruing to such enterprises?*
- ix) *For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.-*
- x) *The appellant craves leave to add, alter, amend and /or delete any of the grounds mentioned above.*

CO No.23/Bang/2016(In IT(TP)A No.579(B)/2016(AY: 2011-12)

On the facts and circumstances of the case and in law and without prejudice to the directions passed by the Dispute Resolution Panel:

1. *The Dispute Resolution Panel ('DRP') has erred, in law and in facts, by not accepting the Respondent's plea in entirety and confirming the action of the learned Assessing Officer (AO)/Transfer Pricing Officer (TPO) of not accepting the transfer pricing ('TP') documentation maintained by the Respondent and rejecting the economic analysis undertaken by the Respondent in accordance with the provisions of the Income Tax Act, 1961 (The Act') read with the Income Tax Rules, 1962 (The Rules') and conducting a fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction.*

2. *The learned AO / TPO and the learned DRP have erred, in law and in facts, by rejecting the use of multiple year data for determination of arm's length margin/price and using financial year 2010-11 data only which was not available to the Respondent at the time of complying with the transfer pricing documentation requirements.*

3. *The learned AO/ learned TPO have erred, by not accepting the directions given by the DRP and by filing an appeal against the directions of DRP vide Ground No. 1 to 10.*

4. *The Hon'ble DRP/ learned TPO/ learned AO has erred, in law and in facts by:*

a) *Rejecting certain other companies adopted by the assessee based on unreasonable comparability criteria and irrelevant filters.*

b) *Accepting companies that are otherwise not comparable to the assessee based on unreasonable comparability criteria.*

c) Rejecting certain comparable companies appearing in the search process of the learned TPO.

The Leaned AO/learned TPO/Hon'ble DRP has erred, in law and in facts, for not allowing suitable adjustments to be made to account for differences in the risk profile of the Assessee vis-à-vis the comparables

The ld. AO erred in making an erroneous computation of interest u/s 234B and 234C of the Act.

The Respondent submits that each of the above ground is independent and without prejudice to one another.

The Respondent craves leave to add, alter, vary, omit, amend or delete one or more of the above grounds of Cross-objections at any time before, or at the time of, hearing of the appeal, so as to enable the Appellate Tribunal to decide this response according to law”.

2. Brief facts of the case are as under:

It has been submitted that assessee is a private limited company and is a subsidiary of Herbalife International Inc, USA. Assessee is engaged in business of dealing in weight management, food and dietary supplements and personal care products that are distributed through a good direct selling network.

It is also been submitted that assessee provides software development, maintenance and support to its group concerns and undertakes development of software activities relating to application development, product enhancement and maintenance. In TP study Ld.TPO observed that Herbalife group owns all valuable intellectual property rights, and bears all significant business risk whereas assessee in India operates as contract service provider who is

compensated at cost plus markup of 15%. Ld.TPO observed assessee to have undertaken following international transactions.

<i>Description of transaction</i>	<i>Paid</i>	<i>Received</i>
<i>Purchase of products</i>	3,53,74,738	
<i>Sale of products</i>		1,80,555
<i>Services income</i>		13,98,69,828
<i>Payment of Royalty</i>	11,20,85,589	
<i>Payment of Administrative fee</i>	20,92,97,868	
<i>Reimbursement of expenses (paid)</i>	2,28,66,554	
<i>Reimbursement of expenses (received)</i>		29,47,928
Total	37,96,24,744	14,29,98,311

2.1 Assessee used TNMM as most appropriate method with PLI s op/OC and determined its margin at 15.10%. He observed that, assessee used TNMM as most appropriate method and OP/OC as PLI to compute its margin. Assessee's TP documentation contained 16 comparables with average margin of 13%, and therefore assessee held transaction entered into with AE under this segment to be at arms length price.

<i>Name of the company</i>	<i>Mark up on Total cost (without adjustment)</i>
<i>Akshay Software Technologies Ltd.</i>	4%
<i>Bells Softech Ltd</i>	5%
<i>FCS Software Solutions Ltd</i>	30%
<i>Helios & Matheson Information Technology Ltd.</i>	16%
<i>LGS Global Ltd</i>	15%
<i>Mindtree Ltd.</i>	21%
<i>Omni xis Sotware Ltd.</i>	2%
<i>Persistent Systems & Solutions Ltd.</i>	20%
<i>Quinnox Consutlancy Services Ltd</i>	14%
<i>Reliance Infosolutions Pvt.Ltd</i>	9%
<i>Spry Resources India Pvt.Ltd</i>	28%
<i>CCE Software Pvt.Ltd</i>	15%
<i>Allied Digital Services Ltd.</i>	13%
<i>Octant Industries Ltd</i>	1%
<i>Techprocess Solutins Ltd.</i>	10%
<i>Maxima Systems Ltd.</i>	5%
<i>Number of Companies</i>	16
Mean	13%

2.2 Ld.TPO rejected economic analysis undertaken by assessee and conducted fresh economic search by applying various filters and selected 13 fresh comparables with operating margin of 23.19%.

Sl.No	Company name	Net margin as per TP order
1	Acropetal Technologies Ltd.	31.98%
2	E Zest Solutions	21.03%
3	E-Infochips Ltd	56.44%
4	Evoke	8.11%
5	ICRA Techno Analytics Ltd.	24.83%
6	Infosys Ltd	43.39%
7	Larsen & Toubro Infotech Ltd	19.83%
8	Mindtree Ltd.(Seg.)	10.66%
9	Persistent Systems & Solutions Ltd.	22.12%
10	Persistent Systems Ltd.	22.84%
11	R S Software (India)Ltd.	16.37%
12	Sasken Communication Technologies Ltd.	24.13%
13	Tata Elxsi Ltd.(Seg.)	20.91%
Average		24.82%
Less: working capital adjustment		1.63%
Adjusted operating margin		23.19%

Ld.TPO thus proposed adjustment of Rs.98,32,574/- in respect of software service segment.

It is submitted that Ld.TPO provided adjustment of 1.63% towards working capital. Ld.TPO rejected submission of assessee to consider adjustment of ALP if any, to be limited to lower end of 5% range as per proviso to section 92C (2) of the act.

3. Aggrieved by adjustment proposed by Ld.TPO, assessee raised objections before DRP. DRP rejected 14 comparables selected by Ld. TPO and restricted to 4 comparables with average margin of 19.94% as under:

<i>Sl.No</i>	<i>Company name</i>	<i>Net margin as per TP order</i>
1	<i>Persistent Systems & Solutions Ltd.</i>	<i>22.12%</i>
2	<i>Persistent Systems Ltd</i>	<i>22.84%</i>
3	<i>Sasken Communication Technologies Ltd.</i>	<i>24.13%</i>
4	<i>Mindtree Ltd.(Seg.)</i>	<i>10.66%</i>
	<i>Average</i>	<i>19.94%</i>

3.1 DRP further allowed working capital adjustment to assessee but rejected risk adjustment. As margin earned by assessee was within +/-5% range, no adjustment was called for.

Based upon DRP directions, Ld.AO passed final assessment order making addition.

4. Aggrieved by order of Ld.AO, revenue is in appeal and assessee filed cross objection before us.

4.1 In revenue's appeal, grounds raised pertains to application of "on-site revenue filter" selectively to reject few comparables and against excluding E-Infochips Ltd., on the ground of having service income less than 75% of sales, which is alleged to be contrary to observations of Ld.TPO.

4.2. In cross objection filed by assessee it is observed that assessee is challenging inclusion of 3 comparables on the basis of functional dissimilarities, being ;

- Persistent Systems and Solutions Ltd;
- Persistent Systems Ltd;
- Sasken Communication Technologies Ltd;

5. We first take up appeal filed by revenue in ITA No. 579/Bang/2016

5.1 Ld. CIT DR submitted that **Ground No. (i) to (iii)** is in respect of applying “on-site revenue filter” selectively on following comparables by DRP:

- RS software Pvt. Ltd.,
- Acropetal Technologies Ltd
- L&T Infotech Ltd.,

She submitted that DRP applied on-site revenue filter selectively instead of applying on all comparables. It has been argued by her that application of a filter determines is what set of comparables would be displayed on the database where search is carried. Application of filter to shortlist companies under a particular segment is the second step in transfer pricing analysis. She payment clay argued that, once comparables are shortlisted by TPO, DRP *suo moto* applied “on-site revenue filter” and excluded 3 comparables, which is not as per procedures laid down under law. She submitted that “on-site revenue filter” applied by DRP, neither applied by assessee in the transfer pricing study nor considered by Ld.TPO, while conducting analysis under section 92CA of the Act.

6.2 Placing reliance upon decision of this Tribunal in case of *ACIT vs Broadcom Communication Technologies Pvt. Ltd.*, reported in (2017) 88 *Taxmann.com* 309, she submitted that new filter *suo moto*

cannot be applied by DRP selectively, but should be applied to all comparables.

In support, she also placed reliance upon decisions of *Delhi Tribunal* in case of *DCIT vs Vertex customer services in ITA No.5228/Del/2018 vide order dated 06/11/17 and Aircom International India Pvt. Ltd., in ITA No. 04/04/03/del/2012 wide order dated 19/05/17*. She further submitted that RS Software India Ltd rejected by DRP was acceptable to assessee as well as Ld.TPO.

It is contended by her that entire analysis needs to be revisited based upon new filter that has been applied by DRP and therefore needs to be set aside to Ld.TPO.

7. On the contrary, Ld.AR submitted that issue of *suo moto* application of “on-site revenue” filter by DRP has been addressed by coordinate bench of this *Tribunal* in case of *Autodesk India private limited vs ACIT* in *ITA(TP)A No.156/Bang/2016 for assessment year 2011-12 vide order dated 21/12/18*. She further submitted that assessee do not have any objection of RS software India Private Limited to be included as they are functionally similar.

8. We have perused submissions advanced by both sides in the light of records placed before us.

8.1 Main grievance of revenue is in respect of on-site revenue filter applied by DRP *suo moto* selectively, on certain comparables, and excluding them. On this, we agree with contention raised by Ld. CIT DR that a filter cannot be applied once TP analysis has been

concluded by Ld.TPO However on perusal of observations recorded by DRP, Acropetal Technologies Ltd., L &T Infotech Ltd., has primarily excluded on basis of functional dissimilarities and that segmental information not being available. DRP further observed that these comparables cannot be considered comparable with contract service provider like assessee. Therefore, in our considered opinion, these grounds raised by revenue becomes academic Decisions relied upon by Ld. CIT DR of Delhi Tribunal in case of *DCIT vs Vertex customer services in ITA No.5228/Del/2018 (supra)* and *Aircom International India Pvt. Ltd., (supra)* does not deal with on-site revenue filter as has been admitted by Ld. CIT DR.

9. On merits, Ld.CIT DR regarding functional similarities/dissimilarities of these companies with assessee, relied upon decision of coordinate bench of this Tribunal in case of *Mercedes-Benz Research and Development India Private Limited vs ACIT* reported in *(2018) 90 Taxmann.com 300*, and submitted that, these comparables were sent back to Ld.TPO for re-examination. She thus submitted that, view taken by *coordinate bench of this Tribunal in Mercedes-Benz Research and Development India Pvt Ltd. vs ACIT (supra)* may be followed.

10. We have perused view of *coordinate bench of this tribunal* in case of *Mercedes-Benz Research and Development India Pvt. Ltd (supra)* in respect of M/sAccropatel Technologies Ltd and M/s L&T Infotech

Ltd. It is observed that these comparables were sent back to Ld.TPO by observing as under:

13. Acropetal Technologies Ltd. ('Acropetal')

.....

13.3.1 *We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncements cited. We find that the DRP has observed that this company, 'Acropetal', operates in three segments and the segmental results are available; while on the contrary the assessee contends that 'Acropetal' operates in four segments. Further, it is seen that even though the assessee has raised the other issues before the DRP, as laid out in para 13.1 of this order, the DRP has not rendered any finding thereon. We find that the co-ordinate bench of this Tribunal in the case of AMD India (P.) Ltd. (supra) relied on by the assessee has excluded 'Acropetal' on the ground that it fails the service income filter of 75%; a ground apparently not put forth by the assessee before the authorities below.*

13.3.2 *Considering the facts and circumstances of the case, as discussed above; that the DRP has not rendered findings on some of the issues raised by the assessee before it and there is a contradiction in the number of segments that this company 'Acropetal' operates in, we are of the opinion that it is necessary to remand the issue of comparability of this company back to the file of the DRP for examining and adjudication of the issues raised by the assessee, after affording the assessee adequate opportunity of being heard in the matter and to file details / submissions in this regard, which shall be duly considered. We hold and direct accordingly.*

.....

16.2 *During proceedings before us, the learned Authorised Representative for the assessee stated that the assessee does not wish to press the ground related to exclusion of Sasken Communication Technologies Limited; therefore this ground is dismissed as not pressed and consequently Sasken Communication Technologies Ltd. is retained in the final list of comparables.*

16.3 According to the learned Authorised Representative, the other two companies were chosen as comparables by the assessee in its TP Study itself. The learned Authorised Representative however submits that the assessee seeks exclusion of L & T Infotech Limited and Persistent Systems Limited, due to more details being now available in the public domain which render these two companies as not comparable to the assessee and therefore prays that they be excluded from the list of comparable companies.

16.4 Per contra, the learned Departmental Representative for revenue objected to the admission of this additional ground stating that when the assessee itself has selected these two companies, the authorities below had no occasion to consider the objections now raised by the assessee before the Tribunal.

16.5 After having heard both parties and perused and considered the material on record, we find that the functional comparability of these two companies i.e. (i) L & T Infotech Limited and (ii) Sasken Communication Technologies Limited have been considered by benches of this Tribunal in various cases, including those cited by the ld.AR. By way of this additional ground, the assessee is raising objections to the inclusion of these companies on the issue of functional dissimilarity and other grounds. In our considered view, the assessee cannot be precluded from raising an objection against inclusion of a company even if the said company was selected by the assessee in its TP Study. This view was taken by the Special Bench of ITAT, Chandigarh in the case of Dy. CIT v. Quark Systems (P.) Ltd. [\[2010\] 38 SOT 307](#). As per the principles laid down in the aforesaid decision of the Special Bench (supra), we admit this additional ground raised by the assessee seeking exclusion of these two companies (i) L & T Infotech Limited (ii) Sasken Communication Technologies Limited without commenting on the merits of the case and remit the matter of their comparability analysis to the file of the TPO/A.O. for examination of the assessee's claim and to adjudicate thereon after providing the assessee adequate opportunity of being heard, which shall be duly considered. We hold and direct accordingly.”

11. On perusal of aforesaid observations by coordinate bench of this Tribunal, it is very clear that comparables were remanded for the reason that, in case of Acropetal, DRP rendered finding that segmental details were available which was contrary to materials placed on record. In case of L & T, coordinate bench sent back comparable for reason that financial details which were initially not available on public domain was subsequently available for consideration.

11.1 In the facts of present case there is no such dispute between parties and observations regarding financials of these companies by DRP are concurrent with annual reports placed in paper book filed before us. Thus, in our considered opinion, these comparables cannot be held to be functionally similar with of assessee, who is a contract service provider, working on a cost plus business model.

It is observed that RS software (India) Ltd, has been excluded by DRP on application of 'on-site revenue filter'.

Both parties do not have objection for inclusion of this company. We are therefore of the view that this company should be included in the list of comparables.

Accordingly, Ld.TPO is directed to consider this comparable in the list.

Accordingly grounds raised by revenue stands partly allowed.

12. **Ground No. (iv)** is for excluding M/s.E-Infochips, by DRP as comparable on the ground that it fails service income filter.

Ld. CIT DR submitted that Ld.TPO while analysing comparables observed that, this company has revenue from software development up to 88%, whereas DRP observes that revenue earned by this company is less than 75%, and therefore cannot be included. She submitted that basis of DRP to hold that revenue is less than 75% has not been demonstrated and therefore needs to be reconsidered.

13. Ld.AR placed reliance upon decision of coordinate bench of this *Tribunal* in case of *Autodesk India Pvt Ltd. vs ACIT (supra)* wherein, E- Infochips Ltd is excluded for failing in service income filter.

14. We have perused submissions advanced by both sides in light of records placed before us.

It is observed that this *Tribunal* in case of *Autodesk India Pvt Ltd. vs ACIT (supra)* excluded E- Infochips Ltd., by following view taken by this *Tribunal* in case of **Comscop Network (India) Pvt.Ltd. Limited vs ITO in IT (TP) A/Bang/2016 dated 22/02/17** wherein, this company was excluded for reason that, there is no segmental information regarding diverse functions performed by this company and that there was major fluctuation in its profits, which influenced turnover of this company. Further it is observed that in case of *DCIT vs M/s CGI Information Systems and management consultations private limited* in ITA No. 502/bang/2016 for assessment year 2011-12 vide order dated 06/04/18 dealt with identical objection raised by Ld. CIT DR before as under:

24. As far as ground No. 4 raised by revenue is concerned, the said ground of appeal is weak and any event comparability of companies that were excluded by the DRP were on valid grounds contemplated by the relevant statutory provisions of the act and rules. As far as ground No. 5 in revenue's appeal is concerned, the revenue seeks to challenge the exclusion of AE Infotech Ltd. On the ground that it failed direct software service income filter at 75%. At the outset, the assessee submits that E Infotech Ltd was excluded by the DRP on the ground that: (i) no segmental information is regarding its diverse functions is available; (ii) it failed the software service income filter and 75%; (iii) there were major fluctuations in profit and turnover every years which seems to be influenced by extraordinary/peculiar circumstances; and (iv) there is a presence of inventory (page 10 and 11 of the DRP's directions). The revenue, in its appeal has challenged its exclusion only on the 2nd ground. In other words, the revenue has not challenged its exclusion on the other grounds stated hereinabove and thus its exclusion on these grounds have attained finality and cannot be disturbed by this Hon'ble Tribunal. Even otherwise, we are of the view that the DRP rightly arrived at the finding that companies software development service revenue for FY 2010-11 was less than 75% of its total operating revenue for the year. Thus the above action of the DRP in rejecting the above companies correct."

From the above, it is observed by this Tribunal consistently in various decisions for AY:2011-12 held that this company does not satisfy service income filter being 7.5%. We therefore, do not see any reason to set aside this company to Ld.TPO.

In the facts before us, revenue is challenging exclusion of this comparable as DRP recorded finding in respect of service income being less than 75%. Other factual dissimilarities considered by DRP regarding extraordinary event and no segmental information available, has not been challenged before us (page 11 of DRP order). Therefore, respectfully following view taken by coordinate bench of this Tribunal in *DCIT vs M/s CGI Information Systems and management consultations private limited (supra)*, we direct Ld. TPO to exclude this company.

Accordingly this ground raised by revenue stands dismissed.

Ground No. (v) - (x) has been stated to be general in nature and therefore do not require any adjudication.

15. In the result appeal filed by revenue stands dismissed.

As appeal filed by revenue stands dismissed the cross objection filed by assessee does not survive. However, liberty is granted to assessee to challenge inclusion of certain comparables therein in an appropriate year.

Accordingly cross objections filed by assessee stands dismissed.

In the result appeal filed by revenue and cross objection filed by assessee stands dismissed.

Order pronounced in the open court on 07-08-2019

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Dated: the 7th August, 2019.

***am**

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
5. DR
6. ITO (TDS)
- 7.Guard File

By Order

Asst.Registrar