

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

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER  
AND**

**SMT.BEENA PILLAI, JUDICIAL MEMBER**

**ITA No.465(Bang)/2016  
(Assessment Year : 2011-12)**

M/s Mportal (India) Wireless Solutions Pvt.Ltd.,  
No.785, Axis Sai Jyothi,  
JP Nagar, 1<sup>st</sup> Phase, 15<sup>th</sup> Cross,  
Bangalore-560 078  
PANNo.AADCM7527N

Appellant

**Vs**

The Asst. Commissioner of Income tax,  
Circle-4(1)(2),  
Bangalore

Respondent

**Appellant by : Shri M. Kaushik, Advocate  
Revenue by : Ms. Neera Malhotra, CIT**

**Date of hearing : 17-07-2019**

**Date of pronouncement :**

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER :**

Present appeal has been filed by assessee against assessment order passed under section 143 (3) read with 144C (13) of the Act, by Ld.ACIT Circle 4 (1) (2), Bangalore for assessment year 2011-12 on following grounds of appeal:

*1 The orders of the TPO / DRP / Assessing Officer in so far as they are against the appellant, are opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the appellant's case.*

2. The appellant denies itself to be assessed on a total income of Rs.1,61,80,531/- as against income of Rs. 11,14,350/- declared by the appellant.

3.a) The order of the assessment is bad in law as the mandatory conditions to invoke the jurisdiction under section 92CA of the Act did not exist, or having not been complied with and consequently the order of the assessing officer is bad in law for want of requisite jurisdiction.

b) The assessing officer erred in not providing the copy of the approval granted by the Commissioner which is in violation of the settled principles of natural justice and thus the order of assessment needs to be set aside.

4. The addition of Rs.1,50,66,181/- being adjustment under section 92CA of the Act made by the assessing officer is bad in law and thus the addition made needs to be deleted on the facts and circumstances of the case.

5 The TPO, DRP and the Assessing Officer erred in —

a) Rejecting the TP study of the appellant.

b) Rejecting the use of multiple year data while arriving at appropriate comparables.

c) Rejecting companies having different financial year ending

d) Rejecting companies that have export sales less than 75% of the sales.

e) Rejecting companies whose service income is less than 75% of the total operating income.

f) Selecting companies with super profit margins

g) Applying related party filter at 25% of sales

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h) Not applying reasonable employee cost filters.

6. The authorities below erred in not providing proper data of the comparables used against the appellant in arriving at the ALP Margin Which is violative of principles of natural justice and thus the orders passed needs to be set aside on this count alone.

a)The authorities below erred in not providing segmental data of the comparable Acropetal Technologies Ltd. which is against the principles of natural justice and thus the company needs to be rejected as comparable on this ground alone.

b)The authorities below further failed to appreciate that Acropetal Technologies Ltd. is functionally dissimilar to that of the appellant company and thus erred in treating the same as comparable on the facts of the case.

c)The authorities below failed to appreciate that E-zest Solutions Ltd. is functionally dissimilar to that of the appellant company and thus erred in treating the same as comparable on the facts of the case.

d)The authorities below failed to appreciate that E-infochips Ltd. is functionally dissimilar to that of the appellant company and thus erred in treating the same as comparable on the facts of the case.

e)The authorities below failed to appreciate that ICRA Techno Analytics Ltd. is functionally dissimilar to that of the appellant company and thus erred in treating the same as comparable, without considering the submissions made by the appellant in this regard.

f)The learned DRP erred in not considering the submissions made by the appellant with regard to functionality of the comparables which is sine qua non for passing the order and thus the order passed needs to be set aside on the facts and circumstances of the case.

8.The working capital adjustment made to the ALP margin is very low and needs to be substantially enhanced on the facts of the case.

9.a) The TPO, DRP and the AO failed to appreciate that the appellant being a captive service provider runs a 'single customer risk

b) The TPO, DRP and the AO further erred in not appreciating that the appellant renders services only to their parent company and thus suitable risk adjustment needs to be made in case of the appellant under the facts and circumstances of the case.

10. The TPO, DRP and the AO failed to understand, the spirit and intent of Rule 10B(1)(e)(ii) as per which even if one of the comparables selected by the appellant satisfies the computation mechanism for determination of the ALP, the determination of ALP by using arithmetic mean of different comparables is not warranted under the facts and circumstances of the case.

11. The TPO, DRP and the Assessing Officer erred in not granting the benefit of the proviso to section 92C(2) of the Act which is mandatory under the scheme of the Act.

12. The appellant denies itself liable to be levied to interest under sections 234B, 234C and 234D of the Act and further the computation of interest under sections 234B, 234C and 234D was not provided to the appellant as regard to the rate, period and method of calculation of interest under the facts and circumstances of the case.

13. The appellant craves leave to add, alter, delete, and modify any of the grounds which are urged above.

For the above and such other grounds as may be urged at the time of hearing, the appellant prays your Honour to consider the facts and circumstances of the case and justice be rendered.

## 2. Brief facts of the case are as under:

Assessee filed its return of income for year under consideration on 11/08/11 declaring total income of Rs.11,14,350/-. The same was

processed under section 143(1) of the Act, according to which a reference was issued to assessee amounting to Rs.10,980/-.

Subsequently, case was selected for scrutiny and notice under section 143 (2) of the Act was issued and served on assessee. Ld.AO observed that assessee entered into international transactions with its AE and accordingly, case was referred to transfer pricing officer.

Transfer Pricing officer upon receipt of reference issued notice to assessee u/s92CA, calling upon to file economic details regarding international transactions in Form 3 CEB.

Ld.TPO observed that assessee is 100% subsidiary of mPortal Inc. USA, to carry business of software development and testing system integration. Assessee did not file any TO study before Ld.TPO. From submissions filed, Ld.TPO observed that assessee in an agreement with its AE agreed to perform following functions:

- software development and testing ;
- system integration
- technical product and competitive marketing.

Ld.TPO observed that assessee is engaged in providing software development services which include development of products, applications, modifications, corrections, enhancement etc assessee used TNMM as most appropriate method and OP/OC as PLI thereby computing its margin at 12.91%. Ld.TPO recorded that assessee had not selected any comparables and therefore TPO's comparables consisted of following 13 comparables with an average margin of 24.82%.

Sl.No.	Name	PLI
1	Acropetal Technologies Ltd (Seg.)	31.98%
2	e-Zest Solutions Ltd(from capitaline)	21.03%
3	E-Infichips Ltd	56.44%
4	Evoke (capitaline)	8.11%
5	ICRA Techno Analytics Ltd.(in 000)	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 margin	<b>24.82%</b>

Ld.TPO thus computed differential margin at Rs.1,50,36,917/- as proposed adjustment.

3. Aggrieved by proposed adjustment assessee filed objections before DRP, wherein assessee objected for 6 comparables on functional dissimilarities which was rejected.

On receipt of DRP directions, Ld.AO passed final assessment order computing addition in the hands of assessee at Rs.1,61,80,531/-.

4. Aggrieved by order of Ld.AO, assessee is in appeal before us now.

5. DR submitted that only relevant ground for consideration is **Ground No. 7 (a)-(d)**, and remaining grounds are not pressed.

At the outset, Ld.AR submitted that assessee intends to seek exclusion of 3 comparables being:

1. Acropatal Technologies Ltd., (segmental)
2. E-Zest Solutions
3. E-Infochips Ltd.,

Assessee for exclusion of aforesaid comparables, placed reliance upon decision of this Tribunal in case of *Symphony marketing solutions India (P) Ltd vs ITO* reported in 38 *Taxmann.com* 55.

We do not have transfer pricing study before us, to analyse FAR of assessee. Details in respect of functions performed by assessee as been reproduced Ld.TPO, as under:

**“As per the agreement**

A. *Company is engaged in the business of developing application and infrastructure software for wireless markets.*

B. *Company wishes to retain the services of Developers to perform services, which shall include, but not be limited to, the following:*

*Software Development and Testing*

*System Integration*

*Technical product and Competitive Marketing*

c. *Developer has represented to company that is has the facilities, personnel, technical capabilities and expertise to perform such services, and is willing to performs such services o n the terms and conditions set forth herein.*

**As per the TP document**

*No TP study Filed. As per Note on Transfer Pricing submitted vide letter dated 9/4/2014 mPortal (India) Wireless Solutions Pvt.Ltd. is a 100% subsidiary of mPortal Inc.USA incorporated during 2003 to carry business of software development & testing system integration”.*

It is observed that Ld.TPO analysed functions performed by assessee to be engaged in software development serviced which may include development of products, applications, modifications, corrections, enhancements etc.,

Ld.TPO categorically observed that assessee had not produced TP study at all. From DRP order also it is observed that assessee has not produced TP study, and even before us no such documents have been filed by Ld.AR. Ld.AR has also not placed before us annual accounts of comparables sought to be excluded.

It is observed that decision relied upon Ld.AR in case of *Symphony marketing solutions India (P) Ltd vs ITO (supra)* are on different facts as, therein assessee is a BPO company that provides market analytics and data management services. It was under those circumstances that these comparables carrying on with export of Software services were excluded. Whereas in present case assessee has been categorised by Ld.TPO to be providing service under Software development segment, wherein assessee is into development of products.

6. Ld.CIT DR, relied on decision passed by this *Tribunal* in case of *Electronic Imaging India Pvt. Ltd., vs DCIT* reported in (2017) 85 *Taxmann.com* 124, wherein all these comparables were considered with assessee therein for software development service segment.

7. On perusal of objections filed by assessee before DRP, it is observed that assessee categorises itself to be providing Software Development Services with a margin of 12.91%. In the absence of annual accounts of alleged comparables, and TP study report of assessee, we are unable to ascertain similarities/dissimilarities in FAR of alleged comparables as well as assessee

We are therefore set aside limited issue regarding comparables to DRP with a direction to assessee to file its TP Study along with annual reports of all comparables. DRP shall analyse FAR and then decide exclusion/inclusion.

Accordingly this issue is set aside to DRP for re-verification.

**Accordingly this ground of assessee is allowed for statistical purposes.**

**In the result, appeal filed by assessee stands partly allowed.**

Order pronounced in open court on

**(J.SUDHAKAR REDDY)  
ACCOUNTANT MEMBER**

**(BEENA PILLAI)  
JUDICIAL MEMBER**

Dated: the

**\*am**

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



