

IN THE INCOME TAX APPELLATE TRIBUNAL

“A” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND  
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No. 1997/Bang/2016
Assessment Year : 2012-13

M/s. Open Silicon Research Pvt. Ltd., No. 139/26, Ground Floor, Amar Jyothi Layout, Domlur Intermediate Ring Road, Bangalore – 560 071. <b>PAN: AAACO5915B</b>	Vs.	The ACIT, Circle – 5 (1) (2), Bangalore.
APPELLANT		RESPONDENT
Assessee by	:	Shri Prashanth .G.S, CA
Revenue by	:	Shri C.H. Sundar Rao, CIT (DR)
Date of hearing	:	21.08.2019
Date of Pronouncement	:	28.08.2019

**ORDER**

*Per Shri A.K. Garodia, Accountant Member*

This appeal is filed by the assessee which is directed against the assessment order dated 29.09.2016 passed by the AO u/s. 143(3) r.w.s. 144C (13) of the IT Act, 1961 as per the directions of DRP.

2. The assessee has raised several grounds and several additional grounds. But in course of hearing, it was submitted by Id. AR of assessee that only ground nos. 4 and 5 and additional ground no. 1 is to be decided and the remaining grounds and the remaining additional grounds may be rejected as not pressed. Accordingly, we reproduce ground nos. 4 and 5 and additional ground no. 1 below and decide the same in the following paras and the remaining grounds and remaining additional grounds are rejected as not pressed.

*“Ground nos. 4 & 5:-*

*4. The authorities below ought to have applied the turnover filter of Rs. 1 crore to Rs.200 crores for selection of comparables as held by the Bombay High Court in the case of CIT vs. M/s. Pentair Water India Pvt. Ltd., reported in 381 ITR 216 and Jurisdictional Tribunal in the case of Aptean Software India (P.) Ltd. vs. ITO, reported in 60 taxmann.com*

49.

*5. Without prejudice. the authorities below ought to have restricted the upper limit of turnover at 10 times that of the appellant as held by the Jurisdictional Tribunal in the case of ACIT vs. McAfee Software (India)(P.) Ltd., reported in 68 taxmann.com 293.”*

Additional Ground no. 1:-

*“The appellant begs to submit the under mentioned additional grounds of appeal which were not urged specifically in the original grounds of appeal filed at the time of institution of appeal. These grounds do not involve any investigation of any facts otherwise on the record of the department and therefore, it is prayed that the additional grounds may kindly be admitted and disposed off on merits for the advancement of substantial cause of justice. Reliance is placed on the decision of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs. CIT reported in 229 ITR 383 and on the decision of Mysore High Court in the case of Gundathur Thimmappa & Sons vs. CIT reported in 70 ITR 70.*

*1. The authorities below erred in treating Genesys International Corporation Limited as a comparable company though it is functionally different to that of the appellant on the facts of the case.”*

3. Regarding these grounds, various submissions were made but ultimately, it was submitted that in Assessment Year 2011-12, the appeal of the assessee with similar issues was decided by the Tribunal in IT(TP)A No. 149/Bang/2016 dated 06.07.2018 and copy of this Tribunal order was submitted and kept on record. Our attention was drawn to para no. 5.2.3 of this Tribunal order and it was pointed out that as per this para, the matter was restored back by the Tribunal to the file of AO/TPO with the direction to decide the issue afresh regarding characterization of the functions of the assessee and then decide the whole issue regarding TP adjustment afresh. It was submitted that in the present year also, the issue may be restored back to the file of AO/TPO for fresh decision with similar directions. The Id. DR of revenue supported the orders of authorities below.

4. We have considered the rival submissions. First of all, we reproduce para no. 5.2.3 from this Tribunal order in assessee's own case for Assessment Year 2011-12. The same reads as under.

*“5.2.3 As can be seen from the aforesaid order of the co-ordinate bench, the Tribunal has referred to the service Agreement dated 9/7/2004; the same agreement referred to by the TPO, whose clauses were interpreted by the authorities below to conclude that the assessee is a KPO service provider. When the same agreement has been interpreted by the Tribunal (Supra) and the authorities below to characterize the assessee as a software development provider in earlier*

*years, it does not appears appropriate for the authorities below to now use the same Agreement to hold that the assessee is a KPO service provider. We also observe that the AO/1 PO, on the same set of facts, have characterized the assessee company as a 'software development service provider' in three later years, namely, asst. years 2012-13, 2013-14 and 2014-15. In view of the factual matrix of the case, as discussed above, we deem it necessary to set aside the orders of the authorities below in this regard and remand the issue of characterization of the functions of the assessee to the file of the TPO, with a direction to examine and decide the issue afresh, after considering the above observations and providing the assessee adequate opportunities of being heard in the matter and to file details/submissions; which shall be duly considered. We hold and direct accordingly. Consequently ground No: 8 of the assessee's appeal is allowed for statistical purposes."*

5. From the above para, it is noted by the Tribunal in this year has referred to the service agreement dated 09.07.2004 and it was noted that earlier, it was accepted that the assessee is a software development service provider and therefore, this is not appropriate for the authorities below to now use the same agreement to hold that the assessee is KPO service provider. After noting these facts, the Tribunal in Assessment Year 2011-12, restored the matter back to the file of AO/TPO with the direction to examine and decide the issue afresh after considering the above observation of the Tribunal and after providing the assessee adequate opportunity of being heard in the matter to file details / submissions which shall be duly considered. Respectfully following this Tribunal order, we hold that in the present year also, the orders of authorities below is set aside and the matter is restored back to the file of AO/TPO for fresh decision with the same directions as were given by the Tribunal in Assessment Year 2011-12. In view of this decision, no further adjudication on merit is called for at the present stage.
6. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-  
(BEENA PILLAI)  
Judicial Member

Sd/-  
(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 28<sup>th</sup> August, 2019.  
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Bangalore.