

आयकर अपीलीय अधिकरण "J" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।
BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं/ ITA No. 484/Mum/2016

(निर्धारण वर्ष / Assessment Year 2011-12)

प्रत्याक्षेप सं. / CO No. 24/Mum/2016

(Arising in ITA No. 431/Mum/2016 for AY 2011-12)

Pangea3 Legal Database Systems Private
Limited, Level 3, Tower II, Phase II, Raiaskaran
Tech Park, Saki naka, Andheri-Kurla Road,
Andheri (East), Mumbai-400 072

..... Appellant
/ अपीलाथी

स्थायी लेखा सं / PAN - AADCP8581H

v/s

The Dy. Commissioner of Income Tax
Circle 10(3)(2), Room No. 271(1)(c), 2nd Floor,
Aayakar Bhavan, M.K. Road, Mumbai-400 020

.....Respondent
/ प्रत्यर्था

आयकर अपील सं/ ITA No. 431/Mum/2016

(निर्धारण वर्ष / Assessment Year 2011-12)

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अपीलार्थी की ओर से / Appellant by	:	Shri MP Lohia & Shri Hemen Chandariya, ARs
प्रत्यर्थी की ओर से / Respondent by	:	Shri Rajneesh Yadav, DR

सुनवाई की तारीख / Date of hearing:	16.09.2019
घोषणा की तारीख / Date of pronouncement :	16.09.2019

आदेश / ORDER

**महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:**

These cross appeals are arising out of the different orders of Dispute Resolution Panel-II, Mumbai [in short 'DRP'], in objection No. 33 vide direction dated 21.09.2015. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-10(3)(2), Mumbai (in short 'DCIT/AO') for the assessment year 2011-12 vide order dated 30.11.2015, under section 143(3) read with section 144C (13) of the Income Tax Act, 1961(hereinafter 'the Act).

2. The first ground in this appeal of assessee in ITA No. 484/Mum/2016 is against the order of AO / Transfer Pricing Officer and DRP in rejecting the comparables selected in the TP study report by the assessee. The following is the ground: -

"1. *Ground No 1:*

The Id. AO/ Transfer Pricing Officer /DRP have erred in law and on facts and in circumstances of the case in rejecting the

following companies which were selected in TP study as comparable companies:

1.1 R Systems International Ltd. ('R Systems')

The Ld. AO/ Transfer Pricing Officer/ DRP have erred in law and on facts and in circumstances of the case in rejecting functionally comparable company R Systems on the ground that the margin of this company for the year ended 31 March 2011 is not certified/ audited and certain other incorrect observations.

1.2 Allsec Technologies Ltd. ('allsec')

The Ld. AO/ Transfer Pricing Officer/ DRP have erred in law and on facts and in circumstances of the case in rejecting functionally comparable company allsec on the ground of "Consistent loss making" company without appreciating the facts of the case and submissions made by the appellant in this respect."

3. At the outset, the learned Counsel for the assessee stated that if the comparable R Systems International Ltd. is included as comparable as chosen by assessee in its TP study as comparable company, the assessee will be through within the

range of $\pm 5\%$ and assessee's operating margin will be at Arm's Length. The learned Counsel for the assessee stated that this R Systems International Ltd. is covered by Tribunal's decision in assessee's own case for AY 2009-10 in ITA No. 2128/Mum/2014 order dated 06.03.2017, wherein the Tribunal has considered this comparable and directed the AO not to exclude by observing in para 29.14 as under: -

"29.14. So far as the decision of Hon'ble Bombay High Court as relied upon by Ld. CIT DR is concerned, in that case the revenue was contesting that the difference between two financial years was only of three months, therefore, same should be ignored. It was not brought before the Hon'ble High Court or anything was on record that the data for relevant two months was available or can be worked out on the proportionate basis based on audited accounts; then in that case whether it can be ignored or not. Nothing is borne out that, whether the assessee has provided the audited accounts of the intervening period and the proportionate working of two consecutive calendars years in which the said quarter results fell, like in the present case. Here in this case, once the audited data is available for the quarter 01.01.2009 to

31.03.2009 then same is liable to be accepted. Accordingly, we hold that this company is to be accepted as comparable company for the purpose of benchmarking the assessee's margin."

The learned Departmental Representative relied on the Transfer Pricing Officer's order and DRP's order.

4. We further noted that R Systems International Ltd. was further considered by this Tribunal in assessee's own case for AY 2010-11 in ITA No. 1663/Mum/2015 order dated 25.06.2019, wherein Tribunal has considered this issue vide Para 5.3.1 as under: -

"5.3.1 R Systems International Ltd. This entity was selected by assessee in its TP study. However, Ld. TPO rejected the same on the ground that it had different financial year and the corresponding financials were not certified / audited and the revenue in BPO segment was only 10% of total revenue. The Ld. AR has drawn our attention to the fact that quarterly audited results of the entity were available and the revenue from BPO segment was quite comparable to assessee's revenue and therefore, the entity was comparable entity. We find

that all the aforesaid arguments of the revenue have duly been met by co-ordinate bench of Tribunal in assessee's own case for AY 2009-10 and this entity was directed to be included in final set of comparable. The observation of the bench, for ease of reference, could be extracted in the following manner: -

....."

5. From the above, we noted that the issue has been crystallized now and this comparable R Systems International Ltd. is to be included for bench marking the operating margin of the assessee for treating the assessee's transaction at Arm's length. Hence, we direct the AO to include this comparable and this issue of assessee's appeal is allowed.

6. The next issue in this appeal of assessee is as regards to the inclusion of Microland Ltd. to comparable selected by assessee in its TP study report, excluded by Transfer Pricing Officer/ AO and DRP. For this, assessee has raised the following ground No. 3: -

"3. Ground No 3

The Ld. AO/ Transfer Pricing Officer/ DRP have erred in law and on facts and in circumstances of the case and in rejecting functionally comparable company

Microland Ltd even though separate segment data of IT Enabled Services is available in its financials."

7. At the outset, the learned Counsel for the assessee drew our attention to Tribunal's order for AY 2009-10 in ITA No. 2128/Mum/2014 against the order dated 06.03.2017, wherein Tribunal has considered this comparable and directed the AO not to exclude this comparable by observing in Para 29.20 as under: -

"29.20. After considering the aforesaid submissions and on perusal of the relevant finding given in the impugned order, we find that this company has been rejected by the TPO for the reason that firstly, it was not selected by the assessee in its original TP Study Report; and secondly, it has incurred loss during the year. The Ld. CIT, DR has also pointed out that the ITES segment was into loss in earlier year also. As regard the contention that the assessee has not selected the company in the T.P. Study Report, therefore, it is precluded from being considered as comparable by assessee at a later stage, we are unable to subscribe to the views of the TPO, because once the TPO has rejected most of the comparables

and asked the assessee to furnish fresh comparables, then TPO is bound to consider the comparables as submitted by the assessee. Apart from that, once the separate segment of ITES services are available in public domain or made available, then such segment needs to be benchmarked with the assessee. Further, we are unable to subscribe to the view that, since this comparable company had incurred loss in this year as well as in the earlier year, the same should be excluded, because the loss making and profit is in the normal course of business and unless certain peculiar factors have not been pointed out for loss, a comparable company cannot be rejected simply on the ground that it is loss making company. Once a separate segment is available and the profitability of such a segment is determinable, then the same should be adopted for the comparability analysis. Hence, we uphold the order of the DRP for accepting the said comparable in the final list of comparables. Accordingly, the revenue's ground on this comparable is treated as dismissed."

8. Again this comparable was considered by Tribunal in AY 2010-11 in ITA No. 1663/Mum/2015 order dated 25.06.2019, and following the earlier years' order directed the AO for inclusion of the same by observing in Para 5.3.2 as under: -

"5.3.2 Microland Ltd. This entity was rejected by Ld. TPO on the ground of functional dissimilarity in view of the fact that the said entity was engaged in providing IT services. The Ld. DRP confirmed the same. However, Ld. AR has drawn our attention to the fact that segmental results of this entity are available on record and this entity has been found to be a comparable entity in AY 2009- 10 in the earlier order of the Tribunal. We find that this entity was found to be a comparable entity by Ld. DRP in AY 2009-10. The revenue contested the inclusion of this entity before this Tribunal wherein the revenue's plea was rejected by the Tribunal by making following observations: - (vi). Microland Ltd. (subject matter of Department's appeal):-

29.18 This comparable was selected by the assessee which has been rejected by the TPO but reinstated

by the DRP. Such an inclusion of this comparable has been challenged by the department in its appeal. The TPO rejected this company mainly on the ground that ITES activity is not its main activity and the said company is primarily engaged in infrastructure management function which generates 80% of its revenue. This company has been reinstated by the DRP for the reason that separate profitability of ITES segment was available. Ld. CIT, DR pointed out that margin of this company's ITES segment is (-) 19.51% and this company has been consistent loss making company in the subsequent year, i.e., year ending 2010 and even prior to this year also this company was into loss. She pointed out that this comparable company has come up for consideration before ITAT, Hyderabad and Bangalore Benches in the following cases: S. No. Name of the Ruling Citation Revenue's paper book Reference Relevant para of judgment (i) S & P Capital IQ

(India) (P.) Ltd. v. Dy. CIT [2016] 72 taxmann.com 326 (Hyd. - Trib.) III-1 Para 28.2 (ii) ITO v. Interwoven Software Services (India) (P.) Ltd. [2016] 74 taxmann.com 103 (Bang. - Trib.) III-2 Para 26 29.19 On the other hand, Ld. Counsel submitted that TPO has rejected the Microland on the ground that it was not selected by the assessee in its TP Study Report and income from ITES business is less than 75% of the total turnover. The DRP has upheld the selection of this company, because the supplementary data of ITES segment was available. Hence, this comparable company cannot be ignored for the reasons given by the TPO or by the Ld. CIT, DR. 29.20 After considering the aforesaid submissions and on perusal of the relevant finding given in the impugned order, we find that this company has been rejected by the TPO for the reason that firstly, it was not selected by the assessee in its original TP Study Report; and

secondly, it has incurred loss during the year. The Ld. CIT, DR has also pointed out that the ITES segment was into loss in earlier year also. As regard the contention that the assessee has not selected the company in the T.P. Study Report, therefore, it is precluded from being considered as comparable by assessee at a later stage, we are unable to subscribe to the views of the TPO, because once the TPO has rejected most of the comparables and asked the assessee to furnish fresh comparables, then TPO is bound to consider the comparables as submitted by the assessee. Apart from that, once the separate segment of ITES services are available in public domain or made available, then such segment needs to be benchmarked with the assessee. Further, we are unable to subscribe to the view that, since this comparable company had incurred loss in this year as well as in the earlier year, the same should be excluded, because the loss making

and profit is in the normal course of business and unless certain peculiar factors have not been pointed out for loss, a comparable company cannot be rejected simply on the ground that it is loss making company. Once a separate segment is available and the profitability of such a segment is determinable, then the same should be adopted for the comparability analysis. Hence, we uphold the order of the DRP for accepting the said comparable in the final list of comparables. Accordingly, the revenue's ground on this comparable is treated as dismissed.

Taking a consistent view in the matter, we direct for inclusion of the same.”

The learned Sr. Departmental Representative however relied on the order of the Transfer Pricing Officer and DRP.

9. After considering both the sides and going through the precedence in assessee's own case for earlier years i.e. AYs 2009-10 and 2010-11, we direct the AO to include this comparable i.e. Microland Ltd. while computing the operating

margins of the assessee at Arm's Length. This issue of the assessee appeal is allowed.

10. The next issue raised by assessee by way of additional ground is regarding exclusion of eClerx services Ltd. This inclusion was also challenged originally vide ground No. 4.2, which read as under: -

"4.2 eClerx Services Ltd. ('eClerx'):

The Ld. AO/Transfer Pricing Officer/DRP have erred in law and on facts and in circumstances of the case in selecting eClerx as comparable without appreciating that turnover filter as applied by the assessee is important in comparability analysis and that eClerx has earned abnormal profits during FY 2010-11."

11. At the outset, the learned Counsel for the assessee drew our attention to Tribunal's order for AY 2009-10 in ITA No. 2128/Mum/2014 order dated 06.03.2017, wherein Tribunal in para 29.10 after considering the facts of the case set aside the matter to the file of the Transfer Pricing Officer with direction to examine the outsourcing activity of this comparable and analyze the same vis-à-vis the business model of the assessee. Similarly, this comparable was again set aside by the Tribunal in assessee's own case for AY 2010-11 in ITA No. 1663/Mum/2015 order dated 25.06.2019 at Para 5.3.4 as under: -

"5.3.4 Eclerx Services Ltd. This comparable was introduced by Ld. TPO. The assessee's plea to exclude the same has been rejected by Ld. DRP. The Ld. AR has submitted that this entity's operating income was approx. 51 times than that of the assessee and therefore, the same could not be termed as proper comparable. Reliance has been placed on the decision of Hon'ble Bombay High Court in CIT V/s Pentair Water India (P.) Ltd. [2016 69 taxmann.com 180] as followed by Mumbai Tribunal in Integreon Managed Solutions India Pvt. Ltd. Vs ACIT [2019 101 Taxmann.com 289]. Another point raised is the fact that this entity has outsourced substantial work to the third parties whereas the assessee as done work in-house. Therefore, there was difference in business model. We find that the issue of this comparable was restored back to the file of Ld. TPO by the earlier order of the Tribunal in assessee's own case. The Ld. AR has submitted that in the set aside proceedings, this entity has been found to be non-comparable. In view of the said fact, we direct Ld. TPO to

verify the said fact and exclude this entity if found non-comparable in AY 2009-10."

On the other hand, the learned Sr. Departmental Representative relied on the Transfer Pricing Officer and DRP's order.

12. After hearing both the sides and going through the Tribunal's order for earlier years on this very comparable i.e. eCelrx services Ltd., we exactly on similar directions remand the matter back to the file of the Transfer Pricing Officer, who after considering all the aspects will decide the issue as directed by Tribunal. This issue of the assessee's appeal is allowed for statistical purposes.

13. The learned Counsel for the assessee filed complete detail chart for computing arithmetic means, wherein AOK in house BPO services Ltd. and Eclerx Services Ltd. is to be rejected and only R Systems International Ltd. and Microland is re-instated or included, the operating margin of the assessee be at Arm's Length, he gave the following details: -

Sr. No.	Company Name	Operating margin of comparable companies
1.	AOK In-house BPO Services Ltd.	
2.	Cosmic Global Ltd	9.81%
3.	Professional Management Consultants Pvt. Ltd	1.69%
4.	R Systems International Ltd.	-5.56%
5.	Accentia Technologies Ltd.	29.18%
6.	Eclerx Services Ltd.	-
7.	E4e Healthcare Business	13.48%

	Services Pvt. Ltd.	
8.	Jindal Intellicom Pvt. Ltd.	11.03%
9.	Microland Ltd.	-0.22%
Arithmetic mean		8.49%
Operating margin of the Appellant		14.36
Conclusion		At arm's length

In view of the above, we direct the AO accordingly, as directed above.

14. Coming to Revenue's appeal in ITA No 431/Mum/2016, the learned SR Departmental Representative stated that the DRP has wrongly directed the AO to include AOK in-house BPO service Ltd. For this Revenue has raised the following ground No 2: -

"1. Whether on the facts and circumstances of the case and in law, the Hon'ble DRP erred in directing to include AOK in House BPO Services Pvt. Ltd. as a comparable in the set of comparables to be used for benchmarking, without appreciating that even though AOK in House BPO Services Pvt. Ltd. fails the RPT filter test used by the assessee, while selecting the comparables, the same was wrongly selected by the assessee."

15. At the outset, the learned Counsel for the assessee, Shri MP Lohia fairly conceded that this issue of Revenue's appeal is to be allowed and this comparable AOK in house BOP Services Ltd. is to be removed from the comparables. As the assessee's

Counsel has conceded this position, we allow this issue of Revenue's appeal.

16. Coming to the cross objection filed by the assessee i.e. CO No. 24/Mum/2016, the learned Counsel for the assessee has not pressed this CO and the same is dismissed as not pressed.

17. In the Result, the appeal of assessee is partly allowed, the CO of the assessee is dismissed as not pressed and the appeal of Revenue's is allowed.

Order pronounced in the open court on 16.09.2019.

Sd/-

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)

(महावीर सिंह / MAHAVIR SINGH)

(लेखा सदस्य / ACCOUNTANT MEMBER)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 16.09.2019

सुदीप सरकार, व. निजी सचिव / Sudip Sarkar, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai