

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES “ A ” BENCH: BANGALORE  
**BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER  
AND  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

IT (T.P) A. Nos.843 & 844/Bang/2013  
(Assessment Years : 2005-06 & 2008-09)

Income Tax Officer,  
Ward 11(1), Bangalore.

.....Appellant

Vs.

M/s. Ariba Technologies India Pvt. Ltd.,  
No.65/2, Laurel, C Block, RMZ Icon,  
51, Palace Road, Bangalore-560 052.

....Respondent

C.O.Nos.170 & 171/Bang/2015  
(In IT (T.P) A. Nos.843 & 844/Bang/2013)  
(Assessment Years : 2005-06 & 2008-09)  
(By Assessee)

Assessee/C.O. By:	Shri P.K. Prasad, Advocate. Shri Umashankar Gautam, Advocate.
Revenue By:	Shri C. H. Sundar Rao, CIT (D.R)

Date of Hearing :	05.09.2019
Date of Pronouncement :	27.09.2019

**ORDER**

**PER SHRI PAVAN KUMAR GADALE, JM :**

The Revenue has filed an appeal against different orders of  
Commissioner of Income Tax (Appeals)-IV, Bangalore for the

Asst. Years 2005-06 & 2008-09 and the assessee has filed Cross Objections in Revenue's appeals. Since the issues are common in both the appeals and C.Os, they are clubbed together and heard and consolidated order is passed.

2. At the time of hearing, it was brought to the knowledge of the Bench that the Revenue's appeal in ITA No.843/Bang/2013 for A.Y. 2005-06 where the tax effect in the appeal is below Rs.50 lakhs. Hence covered by CBDT Circular No.17/2019 Dt.8.8.2019. We find as per the CBDT Circular No.17/2019 Dt.8.8.2019, no appeal shall be filed by the Revenue before the Tribunal where the tax effect is below Rs.50 lakhs and ld. DR has accepted the Tax Effect. Accordingly, the tax demand raised by the Revenue authorities is below Rs.50 lakhs and circular is applicable to the pending appeals. Hence we dismiss the Revenue's appeal on maintainability and low tax effect.

3. In the result, appeal of the Revenue in IT (T.P) A No.843/Bang/2013 is dismissed for low tax effect.

4. The assessee has filed C.O. No.170/Bang/2015 for the Asst. Year 2005-06 in support of the CIT (Appeals) order. Since the

Revenue's appeal is not maintainable due to low tax effect and the C.O. is also not maintainable and accordingly dismissed.

5. Now we take up the Revenue's appeal in IT(TP)A No.844/Bang/2013 and the facts narrated therein. The Revenue has raised the following grounds of appeal :

1. The order of the Learned CIT (Appeals), in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.
2. The CIT(A) erred in directing the AO to recompute the deduction allowable u/s 10A of the I.T. Act after reducing the lease internet/line charges amounting to Rs.13,44,978/- from the total turnover also.
3. The Ld.CIT(A) erred in not appreciating the fact that there is no provision in section 10A which requires the concerned expenses, which are required to be reduced from the export turnover as per clause (iv) of the Explanation to Section 10A to be reduced from the total turnover also.
4. The Ld.CIT(A) erred in not considering the fact that the jurisdictional High Court decision relied upon by him has not been accepted by the department and appeals have been filed before the Hon'ble Supreme Court which is still pending.
5. The Ld. CIT(A) erred in rejecting the employee cost filter applied by the TPO to select companies which are predominantly into software development services.
6. The learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and consequently erred in excluding M/s Flextronics Ltd., iGate Global Solutions Ltd., Infosys Ltd., L&T Infotech Ltd. and Satyam Computers Ltd. as comparables in the case of the taxpayer.

7. The Ld CIT(A) erred in rejecting companies on the basis of Abnormal Profit without defining what constitutes abnormal profit filter and how the same is determined and consequently erred in excluding M/s Exensys Software Solutions Ltd and Thirdware Solutions Ltd. as comparables in the case of the taxpayer.
  8. The Ld. CIT(A) erred in rejecting the diminishing revenue filter or persistent losses filter used by the TPO to exclude companies that do not reflect the normal industry trend.
  9. The learned CIT(A), on the facts and circumstances of the case erred in holding that M/s Bodhtree Consulting Ltd., cannot be taken as comparable in the case of the taxpayer.
  10. The Ld. CIT(A) on the facts and circumstances of the case erred in holding that M/s Geometric Software Solutions Co. Ltd. cannot be taken as comparable in the case of the taxpayer.
  11. The learned CIT(A) , on the facts and circumstances of the case erred in holding that M/s Tata Elxsi Ltd., cannot be taken as comparable in the case of the taxpayer.
  12. The Ld. CIT(A), on the facts and circumstances of the case erred in directing the AO to include M/s VJIL Consulting Ltd. as a comparable in the case of the taxpayer.
  13. The Ld. CIT(A), on the facts and circumstances of the case, erred in holding that the set of 8 companies should be considered for determination of the average margin of comparables and appropriate working capital adjustment provided.
  14. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.
  15. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.
6. The brief facts of the case are that the assessee is engaged in software development services and also in the business of providing data process, computer programming and IT Enabled Services to Ariba Inc., USA. The assessee company filed its Return of Income for the Asst. Year 2008-09 on 29.09.2008 with

total income of Rs.22,669/-. Subsequently the case was selected for scrutiny and Notice under Section 143(2) was issued. In compliance the ld. AR of the assessee appeared before the Assessing Officer from time to time and submitted the details. Whereas the Assessing Officer on perusal of the financial statements found that the assessee conducted business operations from STPI units and claimed deduction under Section 10A of the Act of Rs.3,63,25,870 from the profits of STPI units. Whereas the Assessing Officer considering the total turnover and profit and further has restricted the claim under Section 10A of the Act to the extent of Rs.3,56,66,576 with observations / findings at pages 2 & 3 of the assessment order. Similarly the Assessing Officer on perusal of the tax Audit Report in Form 3CD found that an amount of Rs.66,95,186 is payable towards leave encashment and Rs.6,77,741 towards the bonus payment as was not paid till the date of audit report and the assessee has not provided proof of payments and the Assessing Officer made disallowance of Rs.70,72,927. Further, in the F.Y. 2007-08, the assessee has international transactions and the ld. A.O referred the matter to the TPO with the prior approval of CIT. Whereas the TPO has made

an adjustment of ALP of Rs.2,19,04,893 and passed order under Section 92CA of the Act on 31.10.2011. Subsequently, the Assessing Officer has passed the Draft assessment order on 23.12.2011 and was received by the assessee. Further the assessee company has filed a letter on 18.01.2012 mentioning that the assessee is not filing the objections with Dispute Resolution Panel (DRP) in respect of Transfer Pricing Adjustments and prefers to file an appeal before the CIT(A). The Assessing Officer find that the adjustment towards leave encashment payable and bonus is considered by the assessee in the computation of income therefore no addition is proposed under Section 43B of the Act and finally the Assessing Officer assessed the total income with disallowance of claim under Section 10A of the Act and TPO adjustment under Section 92CA of Rs.2,25,86,856 and passed the order under Section 143(3) r.w.s. 92CA of the Act on 17.02.2012. Aggrieved by the order, the assessee company has filed an appeal with the CIT (Appeals) whereas the CIT (Appeals) considering the submissions and the grounds of appeal, transfer pricing issues and corporate tax and other grounds has granted partial relief and

partly allowed the assessee's appeal. Aggrieved by the order of CIT (Appeals), the Revenue has filed an appeal with the Tribunal.

7. At the time of hearing, the learned Departmental Representative submitted that the CIT (Appeals) has erred in directing the Assessing Officer to recompute deduction under Section 10A of the Act in respect of telecommunication expenses and foreign currency incurred for foreign travel on total turnover whereas the Revenue has challenged the decision of jurisdictional High Court and SLP is pending before the Hon'ble Supreme Court and argued on the grounds of appeals 2 to 4. Whereas the learned Departmental Representative also emphasized and argued on the Transfer Pricing Adjustment of exclusion of comparables in Ground of appeal Nos.5 to 14 and prayed for allowing the Revenue's appeal. Contra, the learned Authorised Representative supported the orders of the CIT (Appeals).

8. We heard the rival submissions and perused the material on record. On the disputed issue of claim of deduction under Section 10A of the Act, the learned CIT (Appeals) has considered the jurisdictional High Court decision in the case of CIT Vs. Tata

Elxsi Ltd. 349 ITR 98 (Kar), the CIT (Appeals) in paras 171 to 175 which read as under and allowed the ground of appeal of the assessee :

171. Hence, the definition was abundantly clear that total turnover should exclude telecommunication charges attributable to delivery of computer software outside India. The definition of total turnover in sections 80HHC and 80HHF also excluded expenses relating to sale of goods or provision of services.

172. This view in respect of both nature of services and exclusion of certain charges directly attributable to the delivery of computer software was adequately supported by many decisions of the Bengaluru bench of the hon'ble Income Tax Appellate Tribunal (ITAT) in the cases of Infosys Technologies Ltd. and Tata Elxsi Ltd. Decisions of the other benches of the hon'ble ITAT included DCIT v. Binary Systems Ltd. [2007] 109 TTJ (Del) 556, Patni Telecom (P.) Ltd. v. ITO [2008] 22 SOT 26 (Hyd) and DCIT v. Softsol India Ltd. [2008] 122 SOT 271 (Hyd). Further, the judiciary had in several pronouncements very clearly spelt out that all components included under export turnover should be included in determining total turnover also.

173. The hon'ble Supreme Court had categorically decided in the case of CIT v. Lakshmi Machine Works (290 ITR 667) that in the event of any changes being made to export turnover, similar adjustments were required to be carried out to Total Turnover also. It was abundantly clear from these case laws that if the amount of telecommunication expenses incurred by the assessee were reduced from export turnover, then the same sum should necessarily be reduced from total turnover.

174. I have carefully considered the appellant's contention and find that the AO's action cannot be sustained. All the case laws cited by the appellant, including the recent judgment of the hon'ble jurisdictional High Court in the case of Tata Elxsi (supra), are unanimous that export turnover, being a part of total turnover, should figure in both the numerator and the denominator of the formula prescribed for computing profit exempt under section 10A and that once something is excluded from the numerator, it is imperative to exclude the same from the denominator as well.

175. The decision in Tata Elxsi (supra) is squarely applicable to the facts of the present case and the hon'ble jurisdictional High Court's decision is binding, notwithstanding the appeal pending in the hon'ble Supreme Court. In view of this and following the ratio of the other decisions discussed earlier, I direct the AO to exclude from the appellant's total turnover expenses he has excluded from its export turnover and accordingly modify the computation of relief allowable under section 10A. These grounds of appeal are allowed.

We found the jurisdictional High Court in the case of CIT Vs. Tata

Elxsi Limited 349 ITR 98 held as under :

" There should be uniformity in the ingredients of both the numerator and the denominator of the formula, since otherwise it would produce anomalies or absurd results. Sec. 10A is a beneficial section. It is intended to provide incentives to promote exports. The incentive is to exempt profits relating to exports. In the case of combined business of an assessee, having export business and domestic business, the legislature intended to have a formula to ascertain the profits from export business by apportioning the total profits of the business on the basis of turnovers. Apportionment of profits on the basis of turnover was accepted as a method of arriving at export profits. In the case of s. 80HHC, the export profit is to be derived from the total business income of the assessee, whereas in s. 10A, the export profit is to be derived from the total business of the undertaking. Even in the case of business of an undertaking, it may include export business and domestic business, in other words, export turnover and domestic turnover. The export turnover would be a component, or part of a denominator, the other component being the domestic turnover. In other words, to the extent of export turnover, there would be a commonality between the numerator and the denominator of the formula. In view of the commonality, the understanding should also be the same. In other words, if the export turnover in the numerator is to be arrived at after excluding certain

expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. The reason being the total turnover includes export turnover. The components of the export turnover in the numerator and the denominator cannot be different. Therefore, though there is no definition of the term 'total turnover' in s. 10A, there is nothing in the said section to mandate that, what is excluded from the numerator that is export turnover would nevertheless form part of the denominator. Though when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to the same, the said ordinary meaning to be attributed to such word is to be in conformity with the context in which it is used. When the statute prescribes a formula and in the said formula, 'export turnover' is defined, and when the 'total turnover' includes export turnover, the very same meaning given to the export turnover by the legislature is to be adopted while understanding the meaning of the total turnover, when the total turnover includes export turnover. Therefore the formula for computation of the deduction under s. 10A, would be as under :

$$\frac{\text{Profits of the business of the undertaking} \times \text{Export turnover}}{(\text{Export turnover} + \text{domestic turnover}) \text{ total turnover}}$$

We considering the provisions and the jurisdictional High Court decision, are of the opinion that though the Revenue has filed SLP against the jurisdictional High Court decision before the Hon'ble Supreme Court, the Tribunal is bound by the decision of the Hon'ble jurisdictional High Court and Accordingly we are of the substantive opinion that the learned CIT (Appeals) considered the provisions and the jurisdictional High Court decision and took a reasonable view and we uphold the same and dismiss the ground of appeal of Revenue on this disputed issue.

9. The learned Departmental Representative argued on the Grounds of appeal Nos.5 to 14 in respect of inclusion of comparables considering the size and turnover of the business and revenue filter. We found that the learned CIT (Appeals) has dealt on these issues and passed a reasoned and logical order and further it was brought to the notice of the Bench that the assessee has filed C.O. in the said appeal in respect of functionality test which was not decided by the CIT (Appeals). Though the learned CIT (Appeals) has considered the functional profile but there is no observation on these aspects. We heard the submissions of the learned Authorised Representative and we are of the substantive opinion that the matter has to be relooked on the basis of functional aspect which was not decided by the learned CIT (Appeals) and we restore these grounds of appeal to the file of CIT (Appeals) to adjudicate afresh and pass reasoned and speaking order and allow the grounds of appeal of the Revenue for statistical purposes.

10. In the result, the Revenue's appeal is partly allowed for statistical purposes.

11. The assessee has filed Cross Objection No.171/Bang/2017. At the time of hearing, the learned Authorised Representative has filed revised grounds of Cross Objection and has submitted that the Ground Nos.1 to 7 are general in nature except Ground Nos.6 & 8 where the learned Authorised Representative has made submissions. The learned Authorised Representative submitted that the learned CIT (Appeals) has not given any findings or observations in respect of the functionality aspect and made submission in Revenue's appeal and referred to the Ground No.9 of grounds of appeal filed before the CIT (Appeals) which is as under :

*“9. That the Ld. A.O./Ld. TPO erred in including companies in the comparability analysis of software development services which do not satisfy the test of comparability.”*

12. We on perusal of the learned CIT (Appeals) order found that these aspects have not been dealt in the course of appellate proceedings on the functionality as rightly pointed out by the learned Authorised Representative. Therefore we found it is proper to restore entire disputed issues raised by the assessee in the C.O. to the file of learned CIT (Appeals) for findings on the functionality aspect and since the Revenue's appeal on the grounds of comparable was restored to the file of learned CIT (Appeals). The C.O. of the assessee on this grounds are also restored to CIT (Appeals) to pass speaking order on functionality

test and the grounds of objections of the assessee are allowed for statistical purposes.

13. In the result, appeal of the Revenue in ITA No.843/Bang/2013 and C.O. 171/Bang/2015 are dismissed and Revenue's appeal No.844/Bang/2013 and C.O. No.171/Bang/2015 are partly allowed for statistical purposes.

Order pronounced in the open court on 27th Sept., 2019.

Sd/-

**(A.K. GARODIA)**  
**ACCOUNTANT MEMBER**

Sd/-

**(PAVAN KUMAR GADALE)**  
**JUDICIAL MEMBER**

Dated: 27.09.2019.

\*Reddy GP

Copy to

i)The Appellant	ii)The Respondent	iii)CIT (Appeals)
iv) Pr. CIT	v)DR, ITAT, Bangalore	vi)Guard File

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore