

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU**

**BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER
and
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

IT(TP)A No.2459/Bang/2017
(Assessment year: 2013-14)

M/s.Citrix R & D India Pvt.Ltd.
Prestige Dynasty, Ground Floor,
33/2, Ulsoor Road,
Bengaluru-560042.
PAN:AABCN 3639 C

... Appellant

Vs.

Deputy Commissioner of Income-tax,
Circle 2(1)(1),
Bengaluru.

... Respondent

Appellant by : S/Shri P.K.Prasad, Advocate & Umashankar
Respondent by : Shri C.H.Sundar Rao, CIT(DR)

Date of hearing: 05/09/2019
Date of pronouncement: 30/09/2019

O R D E R

Per PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the final assessment order dated 26/9/2017 passed u/s 143(3) r.w.s 144C(13) of the Income-tax Act,1961 ['the Act' for short] passed in pursuance to the directions of the DRP vide order u/s 144C(15) No.243/DRP/BNC/76-77 dated 23/08/2017.

2. At the time of hearing, Id. AR submitted that the Additional grounds of appeal filed on 7/6/2018 and 8/6/2018 are not pressed and made endorsement in the grounds of appeal. Whereas in the main grounds of appeal, the Id. AR has not pressed ground No.2 and the effective grounds of appeal are grounds No.1, 3, 4, 5 & 6 which are as under:

1. That the learned Deputy Commissioner of Income Tax, Circle 2(1)(1), Bangalore ("Assessing Officer" or "AO") and the learned Dispute Resolution Panel ("learned Panel") erred in upholding the rejection of Transfer Pricing (TP) documentation by the learned Deputy commissioner of Incometax, Transfer Pricing — Range 1(1)(2) (learned TPO) and in upholding the adjustment to the rejection of Transfer Pricing ("TP") documentation by the learned Deputy Commissioner of the transfer price of the Appellant in respect of software development services.

“3. The Ld. AO in pursuance of the directions of the learned Panel erred in law and on facts in including Larsen & Toubro Infotech Ltd. as a comparable to the Appellant on the ground of functional similarity whereas this comparable should have been excluded for the reason being functionally dissimilar and segmental data not available in the public domain.

4. The Ld. AO in pursuance of the directions of the learned Panel erred in law and on facts in including Persistent Systems Ltd. as a comparable to the Appellant on the ground of functional similarity whereas this comparable should have been excluded for the reason being functionally dissimilar, extra-ordinary events during the year, engaged in diversified operations,

engaged in software product development and having significant R&D expenditure.

5. The Ld. AO in pursuance of the directions of the learned Panel erred in law and on facts in excluding Akshay Software Technologies Ltd. as a comparable to the Appellant on the ground of functional dissimilarity whereas this comparable should have been included for the reason being functionally similar and passing all the filters applied by the Ld. TPO.

6. The Ld. AO in pursuance of the directions of the learned Panel erred in law and on facts in excluding Spry Resources India Pvt. Ltd. as a comparable to the Appellant on the ground of functional dissimilarity whereas this comparable should have been included for the reason being functionally similar and passing all the filters applied by the Ld. TPO.”

3. Brief facts of the case are that the assessee-company was incorporated as 100% export oriented unit under STPI of India Scheme at Bangalore, engaged in the products and works essentially in the nature of application acceleration solutions, management of congested Networks links and provides IT enabled services in the nature of order processing services technical support services to its Associated Enterprises. The assessee filed the return of income on 30/11/2013 with total income of Rs.48,33,37,510/-. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) were issued. In response, the Id. AR appeared from time to time and

furnished the details. The AO found that the assessee has international transactions in the relevant financial year exceeding Rs.15 crores and with prior approval of the Principal CIT, the matter was referred to the TPO. TPO observed that the assessee has management functions, software service functions and considered the financial results and PLI on operating cost/operating revenue as under:

**3. THE ENTITY LEVEL FINANCIAL RESULTS FOR THE F Y 2012-1
COMPUTED BY THE TPO**

Particulars	Amount
Total Revenue	314,94,32,203
Less: Other income	1,20,09,335
Operating Revenue	313,74,22,868
Total Expenditure	287,34,31,162
Less: Finance cost (Interest costs - ECB + Interest on Income Tax)	2,54,27,138
Less: Loss on Sale of fixed assets	49,227
Operating Expenditure	284,79,54,797
Operating Profit/Loss	28,94,68,071
OP/OC	10.16%
OP/OR	9.23%



The TPO also dealt on segmental financials at para 3.1, 3.2 and foreign exchange loss in operating nature. Whereas in the said financial year the assessee has international transactions which are as under:

3.3. INTERNATIONAL TRANSACTIONS (AS MENTIONED IN THE 3CE REPORT)

Particulars	Amount (Paid)	Amount (Recd)	Method
Purchase of Fixed Assets	1,69,49,038		Other
Software Research and Development Services		261,14,78,022	TNMM
Order Processing Services		4,93,52,200	TNMM
Technical Support Services		47,65,92,646	TNMM
Borrowing	2,33,18,920		Other
Reimbursement of Expenses	27,68,111		Other

Particulars	Amount (Paid)	Amount (Recd)	Method
Cross Charge of Expenses		13,11,75,191	Other
Reimbursement of ESPP Contribution		24,287,164	Other
Total	4,30,36,069	329,28,85,223	333,59,21,292

The TPO has called for documents-maintained u/s 92D of the Act along with Annual reports and copies of agreements whereas the TP study of the assessee contains 26 comparables in software development activity and 10 comparables of IT enabled services. TNMM is the most appropriate method. Whereas the TPO considered the TP documents and was not satisfied and rejected the TP study report and applied the filters for software development and IT enabled services segment. On usage of current year data Revenue and RPT. Further, comparables selected by the tax-payer failed filters and the final set of comparables for software development services at para.8.6 at page 31. Whereas the TPO has selected 7 comparables for inclusion. The TPO in IT enabled services, has

applied filters to 10 comparables selected by the assessee at para.9 page 32 and adopted final set of comparables for determination of ALP at page 47 para.9.7 as under:

9.7. FINAL SET OF COMPARABLES CONSIDERED BY THE TPO:

9.7.1. After considering the objections of the taxpayer to the comparable propose the show-cause notice, perusal of relevant annual reports and examination of additi comparable suggested by the taxpayer on the touchstones of filters and functionality margin computation, the final set of comparable are arrived as per the discussions in forgoing paragraphs.

Sl. No.	Company Name	PLI (OP/OC)
1	Acropetal Technologies ltd	24.16
2	Microgenetic Systems Ltd.	16.34
3	Jindal Intellicom Ltd.	-3.01
4	Hartron Communications Limited(seg)	44.07
5	Microland Ltd.	8.62
6	Capgemini Business Services (India) Pvt. Ltd.	26.78
7	Tech Mahindra Ltd. (Seg)	22.27
8	E4E Healthcare business private limited	17.26
9	Infosys B P O Ltd.	29.28
AVERAGE		20.64

Finally, TPO determined adjustments u/s 92CA for Both segments of software development services (SDS) and IT enabled services (ITeS) of Rs.17,84,82,272/- and passed the order u/s 92CA dated 24/10/2016.

4. Subsequently, the assessee filed rectification petition u/s 154 dated 18/11/2016 in respect of erroneous computation of TP adjustment as against the original assessment u/s 92CA by the TPO in the order dated 24/10/2016. Hence, revised

adjustment has been worked out to Rs.16,85,38,618/- and passed the order u/s 92CA(5) r.w.s. 154 dated 6/4/2017. AO, on receipt of the order of TPO has passed Draft assessment order with adjustments u/s 92CA with total income of Rs.66,18,19,782/- and passed the order u/s 143(3) r.w.s. 144C(1) dated 21/11/2016 and objections were filed in Form 35A with DRP and on receipt of order of DRP u/s 144C(5) dated 23/8/2017 . AO passed final assessment order u/s 144(3) r.w.s.144C(13) of the Act dated 26/9/2017.

5. Aggrieved by the final assessment order, the assessee has filed appeal before the Tribunal.

6. At the time of hearing, Id. AR has made submissions on grounds of appeal 3 to 6, whereas ground No.1 is general in nature. The Id. AR's contention that two comparables considered by the TPO in the final list viz., M/s.Larson & Toubro Infotech Ltd., and M/s. Persistent Systems Ltd., are to be excluded and 2 comparables viz. M/s.Akshay Software Technologies Ltd., and M/s.Spry Resources India Pvt. Ltd. are to be included and filed chart to support his stand.

Whereas the learned DR supported the order of the TPO and the DRP and raised objections for excluding and including comparables.

7. We heard rival submissions and perused the material on record. On the first disputed issue of exclusion of comparables, Id. AR submitted that comparable company Larsen & Toubro Infotech Ltd. has adopted the margin of 24.60% and is functionally different and segmental data is not available. Id. AR emphasized on functionality and is in engineering services and should be excluded and supported the stand relying on the decision in the case of *CGI Information Systems Management Consultant Pvt. Ltd. vs. DCIT* in IT(TP)A No.2460/Bang/2017 for assessment year 2013-14.

Whereas the learned DR argued that in the case of *M/s.Advice America Software Development Center Pvt. Ltd. vs. ITO* in IT(TP)A No.2531/Bang/2017 dated 23/5/2018 in page 6 para.11

“11. As far as the objection by the Assessee that this company owns intangibles, it is seen from the order of the TPO that the intangibles are nothing but Operating systems, office tools, development tools, testing tools etc., that are used in the process of rendering SWD services by the IT(TP)A No.2531/Bang/2017 Assessee and therefore cannot be the basis to hold that this company is functionally not comparable with the Assessee. We agree with this reasoning of the TPO which was confirmed by the DRP.”

8. The Id. AR in reply submitted that the above decision relied by the Revenue was considered in the decision of *CGI*

Information Systems Management Consultant Pvt. Ltd. at page

14 para 9 which is as under:

“9. The learned AO and the learned DRP have erred in law and on facts in upholding the actions of the TPO by including Larsen & Toubro Infotech Ltd. as a comparable to the Appellant on the ground that it is functionally comparable, whereas this company should have been excluded on the grounds that it is functionally dissimilar to the Appellant and has significant intangible assets and brand value.”

9. After considering the decisions relied by the Id. AR and the learned DR, we found that the decision in the case of *M/s. Advice America Software Development Center Pvt. Ltd.* (supra) was brought to the knowledge of the Tribunal in the subsequent decision in the case of *CGI Information Systems Management Consultant Pvt. Ltd.* (supra) and dealt. Accordingly, we are of the opinion that comparable selected viz., M/s. Larsen & Toubro Infotech Ltd. Infotech has to be excluded and remitted to the file of the AO/TPO for fresh consideration for determination of ALP. The Ld. AR made submissions on comparable M/s. Persistent Systems Ltd. which is functionally dissimilar and has extraordinary events and is engaged in sale of goods and earns service tax and VAT has royalty income and engaged in OPD and software development services and has various segments and has huge intangibles and no segmental data is available. We find the above

comparable was dealt by the co-ordinate bench of Tribunal for exclusion in the case of *M/s.Metric Stream Infotech (India) Pvt. Ltd. vs. DCIT* in IT(TP)A Nos.1418 & 2735/Bang/2017 at page 6 para.11 which read as under:

“11. As far as L&T Infotech Ltd. and Persistent Systems Ltd. are concerned, our attention was drawn to the decision of ITAT Hyderabad Bench in the case of *M/s. EPAM Systems (I) P. Ltd. v. ACIT*, ITA No.2122/Hyd/2017 for AY 2013-14, order dated 20.11.2017. Vide para 12 of the decision, the Tribunal took the view that Persistent Systems Ltd. was into software products and software solutions and no segmental details were available and therefore the profit margin in the software development services segment could not be compared with the assessee's profit margin. As far as L&T Infotech Ltd. is concerned, the Tribunal vide para 17 of the aforesaid order came to a similar conclusion to hold that L&T Infotech should not be regarded as a comparable company. In the light of judicial precedents which remain uncontroverted, we are of the view that the aforesaid two comparable companies should be excluded from the list of comparable companies.”

Whereas the learned DR raised objection for exclusion relying on the decision of the co-ordinate bench in *M/s.Advice America Software Development Center Pvt. Ltd.(supra)* We find the decision rendered by co-ordinate bench on exclusion of comparable Persistent Systems Ltd., in the case of *M/s.Metric Stream Infotech (India) Pvt. Ltd* (supra) is a subsequent decision where technical and financial profile has been considered. Therefore, we, considering the judicial decisions and the material filed in the paper book and supported with the

annual reports, are of the considered view and follow judicial precedent and Restore the disputed matter to the file of the TPO to verify/examine and exclude from the list of comparables for determination of ALP. Further Id. AR argued the comparable M/s.Akshay Software Technologies Ltd. be included where the adopted margin is 8.91% and functionally similar to the assessee profile. The Id. AR referred to assessee's own case in ITA 1289/Bang/2014 at page 3 the comparable was included in the final list of comparables by the TPO and also in the case of M/s.Labvantage Solution Pvt. Ltd. in ITA 1051/Cal/2015 the Tribunal has included the above comparable referred at page 29 at para. 8.5 which read as under:

“8.5. Inclusion of Akshay Software Technologies Ltd We find that this company had reported NCP of 10.38%. It is not in dispute that the assessee is engaged in software development. Hence comparable should also be in the companies engaged in the similar sector. We find that the Id TPO had rejected this comparable on the ground that it provides technical support for integration of SWIFT software to its clients of the user of SWIFT in financial industry. We find from the annual report of this comparable enclosed in the paper book, that it is also engaged in software development activity which is quite evident from the income schedule of the said comparable. We find that the USA based subsidiary of the company i.e Akshay Software International Inc. (Akshay US) is a registered partner of SWIFT selling SWIFT solutions and products as an extended arm of SWIFT in North America. Thus the contention of the Id TPO / Id AO is erroneous since it is clearly evident from the annual report of the comparable company itself that it is engaged in rendering software development activity only. We find that this comparable i.e Akshay Software Technologies Ltd had been accepted as

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comparable in IT sector in the Co-ordinate Bench decision of Delhi Tribunal in the case of Qualcomm India Pvt Ltd vs ACIT in ITA No. 5239/Del/2010 dated 10.6.2013 , wherein it was held that :-

26. On perusal of the order of the Ld. T.P.O. , we find that the Ld. T.P.O. has rejected Akshay Software as a comparable to the assessee for determining the assessee's ALP on the basis that the Akshay Software is functionally different to the assessee. He has observed that Akshay Software is engaged in SAP and remote infrastructure management software applications, as against design work on embodied software, DSP an integrated circuit hardware design and systems and also for the reasons that sales of Akshay Software is only Rs. 6.21 crores against sales of Rs. 125 crores to the assessee. We, however, find that the Ld.T.P.O in the assessment year 2007-08 as it is clear from the TPO order for the said assessment year made available at Page No-69 of the paper book volume 3 , has accepted that Akshay Software is comparable in the light of identical functions. On perusal of profit and loss account of the Akshay Software, we find that Schedule -12 of it shows break up of the sales of the company as Rs. 4,97,88,191 towards exports of Software services, Rs. 1,17,29,263/- towards domestic software services and Rs. 6,30,000/- towards sale of product. Under these circumstances, we find substance in the contention of the Ld. A.R. that Akshay Software should have been accepted as comparable to bench mark the international transaction of the assessee also because in the assessment year 2007-08, the Ld. T.P.O himself has accepted the company as comparable. We accordingly direct the Ld. T.P.O to accept Akshay Software as comparable to determine the Arms Length Price of the assessee.

In view of the aforesaid findings and judicial precedent relied upon, we direct the ld TPO to include the aforesaid comparable i.e Akshay Software Technologies Ltd as functionally comparable with the assessee company.

Further, Id. AR also argued for inclusion of comparable M/s.Spy Resources Pvt. Ltd., where functionality is similar and referred to Annual Report at pages 71 and 74 and also supported the stand relying on the decision in the case of *M/s.WM Global Technology Services (India) P.Ltd. vs. ACIT* in IT(TP)A No.1963/Bang/2017 dated 28/2/2018 where the Tribunal has held at para.21 page 21 :

“21. We have heard the rival contentions and perused the material. It is an admitted position that the assessee has raised the ground for inclusion of these four companies before the DRP and filed the supporting documents / evidence which show that these four companies are functionally comparable with that of the assessee. However, the DRP has dismissed the contention of the assessee on the ground that these were not raised before the TPO. In our considered opinion approach of the DRP was not correct as is clear from the scheme of Income-tax Act, the proceedings before the DRP is a continuation of the assessment proceedings and the purpose of providing the proceedings before the DRP is to ensure due and fair adjudication of the ALP by comparing the operating profit / operating cost of the assessee with that of the functionally comparable companies. Firstly it is the duty of the TPO to bring on record the functionally comparable companies and in case both the parties failed to bring on record at the TPO level, then for that purposes even the DRP can also bring in companies which are functionally comparable with that of the assessee with a small caveat that in case the assessee is bringing in a new comparable then in both the cases the TPO / DRP should be given opportunity to deal with those comparables. In the present case needful has not been done, therefore in the considered opinion of the bench these aspects of examining the functional profile of these four companies, namely, Acropetal Technologies Ltd. Cigniti Technologies Ltd, Sasken communications Ltd and Spry Resources India Pvt Ltd, is required to be remanded back to the file of the TPO for examining afresh. In any case, we are remitting back the two companies, namely Persistent

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Systems Ltd (seg) and Larsen & Toubro Infotech Ltd to the file of the TPO. Therefore these four companies are also directed to be remanded back to the file of TPO for the purposes of due adjudication. Needless to say that the TPO shall give opportunity to the assessee before finalizing the inclusion / exclusion of these comparables after applying the same filters. Accordingly this ground is allowed for statistical purpose. Summary of the result of TP grounds :

- i) The assessee ground for exclusion of CG-VAK Software and Exports Ltd, is rejected
- ii) Larsen & Toubro Ltd & Persistent Systems Ltd, are remitted back to the file of TPO to decide afresh;
- iii) The ground for inclusion of Akshay Software Technologies Ltd is rejected;
- iv) The ground for inclusion of Thinksoft Global Services Ltd is rejected
- v) The four comparables namely, Acropetal Technologies Ltd, Cigniti Technologies Ltd, Sasken Communications Ltd and Spry Resources India P. Ltd are remitted back to the file of the TPO for fresh examination.”

Considering the submissions of the Id. AR and the material filed and the judicial decisions discussed above, we restore the disputed issue to the file of the TPO for fresh examination and Direct the TPO to include M/s.Akshay Software Technologies Ltd. and M/s.Spry Resources India Pvt. Ltd. as comparable in the final list of comparables for determination of ALP. The Id. AR restricted his arguments to exclusion and inclusion of comparable only. Accordingly, we allow the grounds of appeal of the assessee for statistical purposes.

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

Order pronounced in the open court on 30th September, 2019.

Sd/-
(A.K.GARODIA)
ACCOUNTANT MEMBER

Place : Bengaluru
Dated : 30/09/2019
srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
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- 5 DR, ITAT, Bangalore.
- 6 Guard file

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore