

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA 'C' BENCH, KOLKATA**

**[Before Shri J. Sudhakar Reddy, Accountant Member & Shri Aby T. Varkey, Judicial Member]**

**I.T.A. No. 161/Kol/2016  
Assessment Year: 2011-12**

***Atlas Healthcare Software India Pvt. Ltd.....Appellant  
[PAN: AAGCA 7623 JJ]***

***Vs.***

***DCIT, Circle-2(1), Kolkata.....Respondent***

**Appearances by:**

*Sh. J.P. Khaitan, Adv. &  
Sh. Pratyush Jhunjunwala, Adv., appeared on behalf of the Assessee.*

*Dr. P.K. Srihari, CIT(DR), appeared on behalf of the Revenue.*

Date of concluding the hearing : August 29<sup>th</sup>, 2019  
Date of pronouncing the order : November 8<sup>th</sup>, 2019

**ORDER**

**Per J. Sudhakar Reddy, AM :-**

This is an appeal filed by the assessee directed against the order of the Assessing Officer ('AO' for short) passed u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 ('the Act' for short) for the AY 2011-12.

*"1. Atlas Healthcare Software India Private Limited ("the appellant") is an Indian company engaged in the business of providing software development services. The appellant is a captive software service provider and caters to the requirements of its Associated Enterprise ("AE"). During the previous year relevant to the assessment year 2011-12, the appellant had provided software development services to its AE for Rs. 7,75,64,883/-. The Assessing Officer in his order dated December 7, 2015, passed after directions dated October 26, 2015 of the Dispute Resolution Panel ("DRP"), made a transfer pricing adjustment of Rs. 1,05,70,181/- to the appellant's income. Being aggrieved, the appellant preferred the instant appeal before this Hon'ble Tribunal.*

*2. The appellant in its Transfer Pricing Study Report had benchmarked the transactions with its AE by applying "Comparable Uncontrolled Price" method ("CUP") and in this regard used the transaction between its AE and Inteq Software Ltd. as an Internal CUP [Reference- Pgs 10-13 of CUP Compilation Paperbook]. However, the Transfer Pricing Officer ("the TPO") rejected CUP as the most appropriate method and instead applied the Transactional Net Margin Method ("TNMM") (Pg 241 of PB 1); and selected certain companies as comparables (Pg 242 of PB 1). In the proceedings before the DRP, the appellant objected to the adoption of TNMM as the most appropriate method and reiterated its submissions on CUP as being the most appropriate*

*method. Without prejudice, the appellant also objected to the comparables selected by the TPO and proposed other comparables. The DRP rejected the submissions of the appellant on the selection of the most appropriate method but gave limited relief with regard to selection of comparables and computation of margin.*

*3. The contentions in the appeal, inter alia, are that CUP is the most appropriate method; in any event, the revenue's comparables under TNMM should be rejected, the assessee's comparables be accepted and the arm's length price be correctly determined. An additional ground has also been raised for selection of "Other Method" prescribed under rule 10AB of the Income Tax Rules, 1962, as the most appropriate method for computing the arm's length price."*

2. The Id. Counsel Sr. Advocate, Mr. J.P. Khaitan submitted that, the transfer pricing adjustment cannot be sustained, even if arm's length price ('ALP' for short) is computed as per Transactional Net Margin Method ('TNMM' for short), though the assessee challenges TNMM as Most Appropriate Method ('MAM' for short). He submitted that the assessee's stand is that Comparable Uncontrolled Price Method ('CUP' for short) is the MAM. He requested that this issue as to which is the MAM be open for adjudicating at a latter year when the occasion arises. He submitted that, if certain comparable companies are excluded from the list of comparable companies on merits for the computation of ALP and if Working Capital Adjustment ('WCA' for sort) is provided, then the ALP will be within the range of  $\pm 5\%$  margin.

3. Ld. Sr. Counsel submitted that the following companies which were considered as comparables by the TPO, while computing the ALP, have to be excluded, on merits as they are not comparable due to various reasons.

4. He submitted that the company, LUCID Software Limited has to be excluded as the functional profile of this company is different when compared with the functional profile of the assessee company and that this issue is covered by the decision of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd. vs. DCIT, Circle-2(2), Kolkata (ITA Nos. 284/Kol/2016 and 485/Kol/2016) order dated 26.10.2018.*

5. On the same basis he submitted that, *Sagarsoft (India) Ltd., Prelude Sys (India) Ltd., E-Infochips Bangalore Ltd., Acropetal Technologies Ltd. and Axis IT & T Ltd.* have to be eliminated from the list of comparable companies, for various reasons by relying on the order of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.(supra)*. In the case of *Zylog Systems (India) Ltd.* he relied on the decision of the ITAT Delhi Bench in the case of *Alcatel-Lucent India Ltd. vs. DCIT, Circle-2(1), New*

Delhi, order dated 24.08.2016 and submitted that the company is functionally different and also fails to Employee Cost Filter ('ECF' for short) of 20%, as the filter of a minimum ECF of 25% was applied by the TPO.

6. In the case of *8K Miles Software Services Ltd.* he submitted that, the functional profile of the company is stated as providing cloud consulting, cloud regulations, cloud application development etc., which requires specialised skill set and are materially and functionally different from the services provided by the assessee. He further contended that in this case it was an exceptional year of operation, as this company had made numerous acquisitions as it is seen in Annual Report, and that it has to be excluded from the list of comparables.

7. The ld. Sr. Advocate further requested for inclusion of the following companies as comparables for the purpose of computation of the ALP: i) Akshay Software Technologies Limited, ii) Maveric Systems Limited, iii) Thinksoft Global Services Limited and for this proposition he relied on the decision of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.*(supra).

8. He further submitted that WCA has to be provided as directed by the DRP. He contended that the TPO is bound by the directions given by the DRP and despite the assessee asking for WCA by filing a rectification petition, no such benefit has been given to the assessee. For the proposition that WCA has to be provided, he once again relied on the order of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.*(supra).

9. The ld. DR on the other hand, opposed the contention of the assessee and submitted that he may be directed to approach the AO for WCA by furnishing the required data. He submitted that WCA cannot be provided unless proper data is given, while agreeing that the directions of the DRP are binding on the TPO.

10. On the issue of exclusion and inclusion of various companies from the list of comparable companies for the purpose of computation of the ALP, he submitted that merely relying on the decision in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.*(supra) and in the case of *Alcatel-Lucent India Ltd.*(supra) is not sufficient and that the assessee has to demonstrate on facts as to how their

decisions are applicable to it. He relied on the order of the TPO as well as the DRP on each of the disputed comparables and argued that the decision taken by the DRP be upheld. He submitted that the argument of the assessee that Related Party Transaction ('RPT' for short) filter has been wrongly applied, be tested by restoring the issue to the file of the AO for fresh adjudication.

11. In reply the Id. Counsel for the assessee submitted that in case Tribunal comes to a conclusion that the decision in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.*(supra) is to be followed for the purpose of inclusion and exclusion of comparable companies from the list, one more opportunity may be provided to the assessee for leading further arguments on merits.

12. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the orders of the authorities below, as well as case law cited we hold as follows.

13. Both the parties agreed that the Tribunal need not adjudicate the issue whether CUP or TNMM is the MAM for determination of ALP for the assessee company's international transactions in this appeal and that the issue may be let open for adjudication in an appropriate year. Thus we proceed to consider the issue of inclusion and exclusion of companies from the list of comparable companies determined by the TPO for the determination of the ALP.

- i. **Lucid Software Ltd.:** This comparable has to be excluded as it is engaged in both development of software products as well as services and as the segmented data is not available. Thus the functional profile is different from the functional profile of the assessee. This Bench of the Tribunal under identical circumstances, in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra), has directed exclusion of this company as a comparable on the ground that its main stream of revenue was out of sale of software products in addition as to software development. Consistent with the view taken therein we direct the TPO to exclude this company from the list of comparable companies.
- ii. **Sagarsoft (India) Limited:** Consistent with the view taken therein by the coordinate Bench of the Tribunal in the case of *Nomura Research Institute*

- Financial Technologies India (P) Ltd.* (supra) we direct this company be excluded from the list of comparable companies for determining ALP, as it is engaged in full software development cycle and has the RPT 56.49% of the operating revenue, when the filter applied by the TPO was 20% of the operating revenue in the case of the assessee.
- iii. **Prelude Sys India Limited:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) we direct this company be excluded from the list of comparable companies for the reason that this company provides multiple services like custom software development in addition to cloud computing, application services and mobile technology, enterprise application services, QA and testing, BPO and strategic sourcing. The RPT is 87% of the operating revenue as compared to the filter of 20% applied in the case of the assessee company by the TPO.
- iv. **E-infochips Bangalore Ltd.:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) we direct this company to be excluded from the list of comparable companies for the reason that this company provides software development and IT enabled services like hardware designing, complete product lifecycle development, application development, enterprise IT consulting. The RPT is 37.96% of the operating revenue as compared to the filter of 20% applied by the TPO in the case of the assessee company.
- v. **Acropetal Technologies Limited:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) we direct this company to be excluded from the list of comparable companies for the reason that this company has Employee cost percentage of 11.51% and whereas the filter applied by the TPO was 25% of Employee cost in the case of the assessee company.
- vi. **Axis IT & T Ltd.:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) we direct this company be excluded from the list of comparable companies for the reason that this company provides software services. The RPT is 43.18% of the operating revenue while a filter of 20% has been applied by the

TPO. The TPO wrongly applied the entire revenue of ₹37.16 crores as from software services whereas the fact is that only ₹3.01 crores was from software services and the balance is ₹34.15 crores from engineering design charges.

- vii. **Zylog Systems (India) Ltd.:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Alcatel-Lucent India Ltd.* (supra) we direct this company be excluded from the list of comparable companies for the reason that this company provides broadband services and wireless internet-based communication services as well as enterprise computing, mobile computing. Employee cost filter of 25% is not met as the assessee's employee cost percentage is only 20.14%.
- viii. **8K Miles Software Services Limited:** Consistent with the view taken by the coordinate Bench of the Tribunal in the case of *Alcatel-Lucent India Ltd.* (supra) we direct this company be excluded from the list of comparable companies for the reason that its functional profile of this company is cloud consulting, cloud regulations, cloud application development etc. Such functions require a totally different set of skills as compared to the functional profile of the assessee company which is engaged in the business of providing software development services. We also notice that this company has during the year acquired a number of other businesses. This is clear from the Director's Report, wherein it is stated that, the company has purchased the entire business of M/s. Mentor Minds Solutions & Services Inc., a US based company and its subsidiary M/s. Mentor Minds Solutions & Services, Canada. This aspect was not considered and adjudicated upon by the DRP. Hence we direct the AO to exclude this company from the list of comparable companies for the purpose of computation of ALP.
14. We now consider the following companies for inclusion in the list of comparable companies for the purpose of computation of ALP.
- i. **Akshay Software Technologies Limited:** The TPO excluded this company on the ground that it has a negative net worth for the previous financial years and is a persistent loss making company. On facts we find that the TPO was incorrect. This company has a positive net worth. It is not a loss making enterprise and has reported profits in two of the previous three years i.e. 2008-09, 2009-10 and

2010-11. This Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) has directed the inclusion of this company as a comparable company. Consistent with the view taken therein we direct the AO to include this company as a comparable company.

- ii. **Maveric Systems Limited:** The TPO excluded this company on the ground that it is functionally different and that the project expenses is 70% higher when compared with the same expenses of the previous year and hence FAR analysis is not possible. The DRP has not commented on this issue. We find that the company is engaged in software development and testing services and it is the only reportable segment. 99% of the operating revenue for the period ending 31.03.2011 was received from software development. This Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) considered this company as a comparable company on similar facts. Consistent with the view taken therein we direct the AO to include this company as a comparable company for the purpose of computation of ALP.
- iii. **Thinksoft Global Services Limited:** The TPO excluded this company on the ground that it is engaged in software services and not in development activity and hence not functionally comparable. We find that this company is a software service provider primarily delivering software validation and verification services to the banking and financial services industry worldwide. This Bench of the Tribunal in the case of *Nomura Research Institute Financial Technologies India (P) Ltd.* (supra) has held that this company can be included as a comparable company as the function of the company is recognized as software development services. Consistent with the view taken therein we direct the TPO to include this company as a comparable company while computing the ALP.

15. We now take up the issue of working capital adjustment. The DRP has directed the AO/TPO to provide the benefit of WCA to the assessee. It is well settled that such directions are binding on the TPO. Hence we direct the TPO to implement the DRP directions in this regard. The assessee shall provide the necessary data to the TPO in this regard. In the result this ground of the assessee is allowed for statistical purposes.

16. All the other grounds of the assessee are not adjudicated as it would be an academic exercise. Hence we do not dispose off the same.

17. In the result, the appeal of the assessee is allowed in part.

***Kolkata, the 8<sup>th</sup> November, 2019.***

Sd/-  
[Aby T. Varkey]  
Judicial Member

Sd/-  
[J. Sudhakar Reddy]  
Accountant Member

Dated: 08.11.2019  
*Bidhan*

*Copy of the order forwarded to:*

1. ***Atlas Healthcare Software India Pvt. Ltd., BIPL Omega Building, 5<sup>th</sup> Floor, Block-EP & GP, Sector-V, Salt Lake, Kolkata-700 091.***
2. ***DCIT, Circle-2(1), Kolkata.***
3. CIT(A)- , Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through mail)

True copy

By order

Assistant Registrar  
ITAT, Kolkata Benches