



Sybase Software (India) Private Limited  
Assessment Years: 2010-11 & 2011-12

**आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।  
IN THE INCOME TAX APPELLATE TRIBUNAL  
“J” BENCH, MUMBAI**

**माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं  
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।  
BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND  
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.2658/Mum/2015  
(निर्धारण वर्ष / Assessment Year:2010-11)  
&

आयकर अपील सं./ I.T.A. No.1126/Mum/2016  
(निर्धारण वर्ष / Assessment Year:2011-12)

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| <b>Sybase Software (India) Private Ltd</b><br>4 <sup>th</sup> Floor, Platina, C-59, G-Block<br>Bandra Kurla Complex<br>Bandra (East), Mumbai-400 098. | <b>बनाम/<br/>Vs.</b> | <b>DCIT-Range 14(3)(1)</b><br>Mumbai. |
| स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. <b>AAHCS-5015-K</b>  |                      |                                       |
| (आपीलार्थी/ <b>Appellant</b> )  | :                    | (प्रत्यर्थी / <b>Respondent</b> )     |

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| <b>Appellant by</b>  | : | S/Shri Dhanesh Bafna and<br>Arpit Aggarwal- Ld. ARs |
| <b>Respondent by</b> | : | Shri Anand Mohan - Ld.CIT-DR                        |

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| सुनवाई की तारीख/<br><b>Date of Hearing</b>       | : | 11/09/2019 |
| घोषणा की तारीख /<br><b>Date of Pronouncement</b> | : | 11/11/2019 |

**आदेश / ORDER**

**Manoj Kumar Aggarwal (Accountant Member): -**

1. Aforesaid appeals by assessee for Assessment Years [in short referred to as ‘AY’] 2010-11 & 2011-12 primarily contest certain Transfer Pricing (TP) Adjustments made in final assessment orders of those years. Since identical issues are involved, we proceed to dispose-off the



appeals by way of this common order for the sake of convenience & brevity.

**ITA No.2658/Mum/2015, AY 2010-11**

2.1 This appeal contest TP adjustments made in final assessment order dated 31/12/2014 passed by Ld. Deputy Commissioner of Income Tax-Circle 14(3)(1) (AO) u/s 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 pursuant to the directions of Ld. Dispute Resolution Panel-IV, Mumbai u/s 144C(5) dated 19/12/2014 on following grounds of appeal: -

1. On the facts and in the circumstances of the case and in law, the learned Deputy Commissioner of Income-tax, Range-14(3)(1), Mumbai ('the AO'), erred in making an adjustment in relation to the international transaction of provision of software research and development (IT or 'software R&D') to the Associated Enterprises of Rs. 2,79,79,018. In doing so the AO erred in the following:

1.1. not adhering to the directions of the Hon'ble Dispute Resolution Panel ('DRP'), whereby the Hon'ble DRP had directed the AO to exclude one comparable (M/s Infosys Technologies Limited). This leads to reduction of adjustment to Rs. 2,31,83,646 thereby relief of Rs. 47,95,373. However, the learned AO disregarded the DRP directions, and made the adjustment of Rs. 2,79,79,018.

1.2. considering various companies in the comparables set which are functionally not comparable to the Appellant;

1.3. considering companies in the comparables set which have substantially high turnover as compared to the Appellant;

1.4. considering bad debts written off as non-operating in case of one comparable M/s Teledata Marine Solutions Limited while recalculating the operating margin; and

1.5. not granting the adjustment for the differences in the level of risk profile of the Appellant as compared with the comparable companies.

It is prayed that the learned AO be directed to consider the international transaction of the Appellant as arm's length and accordingly the transfer pricing adjustment of Rs. 2,79,79,018 should be deleted.

2. On the facts and in the circumstances of the case and in law, the learned AO erred in granting short credit of tax deducted at source of Rs. 31,03,807 (Tax deducted at source of Rs. 4,57,24,375 was claimed in the by the Appellant in the return of income, out of which the learned AO has granted credit for only Rs. 4,26,20,568).

The Appellant prays that the learned AO be directed to grant full credit for the tax deducted at source claimed by the Appellant in the return of income.

The above grounds are without prejudice to each other."

2.2 The income of the assessee, in the final assessment order, was determined at Rs.1036.45 Lacs under normal provisions, *inter-alia*, after Transfer Pricing (TP) adjustment of Rs.279.79 Lacs as against returned



income of Rs.756.45 Lacs e-filed by the assessee on 30/09/2010. The assessee being resident corporate assessee was stated to be engaged in providing software development services to its Associated Enterprises (AE) i.e. Sybase Inc. and also engaged in carrying out the distribution of Sybase Inc. products in India.

2.3 The international transactions of software development services stated to be carried out by the assessee with its AE and as reported in Form No. 3CEB were subjected to determination of Arm's Length Price (ALP) u/s 92CA (1) by Ld. Transfer Pricing Officer-II(1), Mumbai (TPO). The assessee was in receipt of aggregate amount of Rs.41.46 Crores on account of software development services and reflected margin (OP/TC) of 15% as against mean margin of 14.35% reflected by 16 comparable entities in its Transfer Pricing Study Report. The Ld. TPO show-caused the assessee to include 5 comparable entities which were rejected by the assessee in Accept/ Reject Matrix. Although the assessee contested the exclusion of the same, however, Ld. TPO finally proposed inclusion of 4 comparable entities viz. (i) Infosys Technologies Ltd.; (ii) KALS Information Systems Ltd.; (iii) Persistent Systems Ltd.; (iv) Wipro Ltd.(segment). Further, 2 entities viz. Crazy Infotech Ltd. and Reliance Info Solutions Ltd. as selected by the assessee, were rejected.

2.4 Accordingly, adopting comparable matrix of 18 entities, Ld. TPO recomputed mean margin of 22.76% and thus, proposed adjustment of Rs.279.79 Lacs against these transactions which were subjected to objections before Ld. DRP.

2.5 Before Ld. DRP, the assessee furnished additional evidences assailing the proposed adjustments, however, the same could not find



favor of Ld. TPO in the remand proceedings. The assessee, while accepting the exclusion of 2 entities which were accepted by the assessee in the original matrix, objected to 4 comparable entities as freshly introduced by Ld. TPO. However, the said objections were rejected by Ld. DRP except the objection to exclude one comparable entity viz. Infosys Technologies Limited. The other objections viz. grant of working capital / risk adjustment etc. were also rejected. In other words, the comparable analysis carried out by Ld. TPO was accepted except to the extent of inclusion of one comparable entity viz. Infosys Technologies Limited, which was directed by Ld. DRP to be excluded. Aggrieved, the assessee is under further appeal before us.

3.1 The Ld. Authorized Representative for Assessee (AR) has drawn our attention to the fact that although Ld. DRP had directed for exclusion of one comparable entity viz. Infosys Technologies Limited, however, Ld.AO, in the final assessment order, did not carry out the said directions and added the proposed TP adjustment in its entirety. It has also been submitted that the rectification application filed by the assessee, in this regard, is already pending before Ld. AO. In view of the admitted fact, we direct Ld. AO to exclude this entity in the final list of comparable.

3.2 Proceeding further, Ld. AR, during the course of hearing, restricted his argument towards exclusion of following remaining 3 entities as introduced by Ld. TPO viz. (i) KALS Information Systems Ltd.; (ii) Persistent Systems Ltd.; (iii) Wipro Ltd. (segment). The Ld. AR sought exclusion of these entities by drawing our attention to the favorable orders of the Tribunal for same AY rendered in the case of other assessee under similar factual matrix and having similar functional



profile. The Ld. DR submitted that final set of comparable would not require any interference on our part.

4.1 We have duly considered the rival submissions, perused relevant material on record and deliberated on various judicial pronouncements as cited before us. As per the arguments advanced by Ld. AR, our findings shall be restricted to selection of 3 comparable entities only.

#### 4.1.1 KALS Information Systems Ltd.

The prime argument of Ld. AR revolves around the fact that this entity was engaged in software development as well as products and the segmental results relating to the aforesaid two segments were not available in its annual report. Drawing our attention to the financial statement of the company, the learned AR submitted that 27% of the total current asset of this entity comprises of inventories which demonstrates that the company is into development of software products. Reliance has been placed on following decisions in support of the said submissions: -

- (i) *CIT V/s Principal Global Services P. Ltd. (Hon'ble Bombay High Court ITA No. 57 of 2016, AY 2009-10)*
- (ii) *Lionbridge Technologies Pvt. Ltd. V/s ITO (Mumbai Tribunal, ITA No. 668/Mum/2014, AY 2010-11)*
- (iii) *DCIT V/s Electronics of imaging India (Bangalore Tribunal, ITA No. 212/Bang/2015, AY 2010-11)*
- (iv) *Dialogic Networks India P. Ltd. V/s ACIT (Mumbai Tribunal, ITA No.7280/Mum/2012 AY 2008-09)*

Further, this comparable entity is stated to have been excluded by Tribunal in assessee's own case for 2006-07. After going through the submissions, we concur with the stand of Ld. AR that this entity could not



be a comparable entity for the assessee. Therefore, we direct for exclusion of the same.

#### 4.1.2 Persistent Systems Ltd.

Similar argument of functional non-comparability has been raised for this entity and it has been submitted that this entity was providing software development services and engaged in development of software products. However, segmental results were not available to facilitate desired comparison. Further, the revenue of this entity include revenue from licensing of products & royalty which are in the nature of R & D services and therefore, this entity could not be held to be comparable entity. Reliance has been placed on following decisions in support of submissions: -

- (i) *CIT V/s Cashedge India P. Ltd. (Hon'ble Delhi High Court ITA No. 279 of 2016, AY 2010-11)*
- (ii) *Lionbridge Technologies Pvt. Ltd. V/s ITO (Mumbai Tribunal, ITA No. 668/Mum/2014, Ay 2010-11)*
- (iii) *DCIT V/s Electronics of imaging India (Bangalore Tribunal, ITA No. 212/Bang/2015, AY 2010-11)*
- (iv) *Dialogic Networks India P. Ltd. V/s ACIT (Mumbai Tribunal, ITA No.7280/Mum/2012 AY 2008-09)*

Since the revenue is unable to controvert these decisions, we direct for exclusion of this entity.

#### 4.1.3 Wipro Ltd.(segment)

The Ld. AR asserted that this entity was a market leader and had brand value associated with it. It worked as a full-fledged risk-taking entrepreneur and its revenue during the year were more than 547 times than that of assessee. This entity is stated to be engaged in diversified activities such as IT services, BPO services, IT products, BPO services,



Consumer Care etc. and segmental results were not available. Our attention is further drawn to the fact that this entity owned know-how, patents, brands etc. and also had huge year-end inventories. Reliance has been placed on following decisions in support of submissions: -

- (i) *Dialogic Networks India P. Ltd. V/s ACIT (Mumbai Tribunal, ITA No.7280/Mum/2012 AY 2008-09)*
- (ii) *CIT V/s Pentair Water India P. Ltd. (Bombay High Court, ITA No. 18 of 2015)*

Finding force in aforesaid submissions, we direct for exclusion of this entity.

4.2 No other arguments have been advanced by respective representatives before us and therefore, the same are not being delved into. Ground No.1 of the appeal stands partly allowed.

4.3 In Ground No. 2, the assessee is aggrieved by short grant of credit for TDS to the extent of Rs.31.03 Lacs. For the same, we direct Ld. AO to verify the claim of the assessee, in this regard and grant credit of TDS as per law after due verification. Ground No. 2 stands allowed for statistical purposes.

4.4 The appeal stands partly allowed in terms of our above order.

### **ITA No.1126/Mum/2016, AY 2011-12**

5.1 Facts are *pari-materia* the same in this AY as in AY 2010-11. The Ld. TPO, by disturbing the comparable matrix, has proposed TP adjustment of Rs.331.46 Lacs. The stand of Ld. TPO, upon confirmation by Ld. DRP, is under appeal before us. Before us, Ld. AR has sought exclusion of 2 entities viz. (i) Infosys Technologies Ltd.; (ii) Wipro Ltd. Reliance has been placed on the decision of this Tribunal in **Ness Technologies India P. Ltd. V/s DCIT (188 TTJ 8 Mum)** and Delhi



Tribunal in the case of **Agilent Technologies (I) Ltd. V/s ITO (91 Taxmann.com 59)** for exclusion of these two entities. We find that the first entity i.e. Infosys Technologies Ltd. was already excluded by Ld. DRP in AY 2010-11 in view of the fact that the said entity was found to be a well-diversified entity and non-comparable to the assessee. The second entity i.e. Wipro Limited has been excluded by us in AY 2010-11 for the reasons stated therein. Therefore, following the same, we direct for exclusion of both these entities. No other arguments have been advanced before us in this year for TP adjustment. The TP ground stand partly allowed.

5.2 In Ground No. 2, the assessee is aggrieved by short grant of credit for TDS to the extent of Rs.4.42 Lacs. For the same, we direct Ld. AO to verify the claim of the assessee, in this regard and grant credit of TDS as per law after due verification. Ground No. 2 stands allowed for statistical purposes. The other grounds are consequential in nature.

5.3 The appeal stands partly allowed in terms of our above order.

### **Conclusion**

6. Both the appeal stands partly allowed.

*Order pronounced in the open court on 11th November, 2019.*

**Sd/-**

**(Mahavir Singh)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 11/11/2019  
Sr.PS, Jaisy Varghese



**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**