

आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "आई-1", नई दिल्ली में

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-1', NEW DELHI**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं डॉ. बी आर आर कुमार, लेखा सदस्य के समक्ष

**BEFORE MS. SUSHMA CHOWLA, JUDICIAL MEMBER &  
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं. / ITA No. 4706/Del/2018

निर्धारण वर्ष / Assessment Year: 2014-15

Alcatel Lucent India Ltd.  
DLF Cyber Greens, 14<sup>th</sup> and 15<sup>th</sup>  
Floors Tower-C, Phase III,  
DLF City, Gurgaon  
PAN-AAcca8667N

.....अपीलार्थी / Appellant

vs

The Addl. CIT,  
Special Range-1, New Delhi

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by :Sh. Deepak Chopra,

Sh. Ankul Goyal &

Ms. Manasvini Bajpai, Advocates

प्रत्यर्थी की ओर से / Respondent by :Sh. Sanjay I. Bara, CIT DR

सुनवाई की तारीख / Date of Hearing : 24.09.2019	घोषणा की तारीख / Date of Pronouncement: 29.11.2019
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, JM:**

The present appeal filed by assessee is against the order of Assessing Officer, New Delhi dated 30.05.2018 relating to Assessment

year 2014-15 passed u/s 144C r.w.s. 143(3) of the Income tax Act, 1961 (in short “the Act”).

2. The assessee has raised the following grounds of appeal which read as under:-

1. *That on the facts and circumstances of the case and in law, the Ld. AO, has erred in determining the taxable income of the appellant for the subject assessment year at INR 1,65,94,40,010/- as against the returned income of INR 1,19,59,22,340/-.*
- 1.1 *That on the facts and circumstances of the case and in law, the Ld. AO has erred in making several additions based on mere conjunctures and surmises, ignoring the factual matrix of the company as well as the nature of the transactions undertaken by the appellant.*
- 1.2 *That the Ld. AO has failed to appreciate the submissions made/ contentions raised by the appellant and further erred in making several observations and inferences in the impugned assessment order which are factually incorrect and legally untenable.*

**Transfer Pricing (“TP”) Grounds**

2. *That, in framing the impugned assessment order, the reference made by the Ld. AO under Section 92CA(1) of the Act suffers from jurisdictional error, as the Ld. AO had not recorded any reasons nor he had any material whatsoever on the basis of which he could even reach a prima-facie opinion, that it was ‘necessary or expedient’ to refer the matter to the learned Deputy Commissioner of Income Tax, Transfer Pricing Officer -1(1)(1), New Delhi (hereinafter referred to as “Ld. TPO”) for computation of arm’s length price (“ALP”).*
3. *That on the fact of the case and in law, the Ld. AO/ Ld. TPO / Hon’ble Dispute Resolution Panel (“Hon’ble DRP”) has erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962 (“the Rules”), and conducting alternate comparability analysis for the determination of the ALP of the Appellant’s international transaction pertaining to provision of contract software development (“CSD”) services by the Appellant to its associated enterprises (“AEs”) and holding that the said international transaction is not at arm’s length.*
4. *That on the facts of the case and in law, the Ld. TPO / Hon’ble DRP has erred in rejecting the Appellant’s claim to use multiple year data for computing the arm's length price and, instead, has adhered to the use of single year updated data to conclude the ALP of the*

- international transaction which was not available to the Appellant at the time of undertaking transfer pricing study required to be maintained under Section 92D of the Act.*
5. *That on fact of the case and in law, the Ld. TPO/ Hon'ble DRP has erred in application of inappropriate filters based on different financial year end, export service income and employee cost for identifying companies comparable to the Appellant.*
  6. *That on the facts of the case and in law, the Ld. TPO/ Hon'ble DRP has erred in selection of functionally non-comparable companies and rejection of comparable companies, for the purpose of determination of ALP of the international transactions pertaining to provision of CSD services by the Appellant on an adhoc basis, thereby resorting to cherry picking of comparable.*
    - 6.1 *The Ld. TPO/ Hon'ble DRP, in particular, erred in arbitrarily selecting Infobeans Technologies Limited, Persistent Systems Limited, Acropetal Technologies Limited and Mindtree Limited as comparables companies without conducting any scientific search process and without appreciating that these companies are not functionally comparable to the Appellant in relation to the international transaction pertaining to provision of CSD services.*
    - 6.2 *The Hon'ble DRP, in particular, erred in upholding the rejection of Cat Technologies Limited selected by the Appellant as a comparable company, on the ground that the company made losses in two years and is functionally different from the Appellant in relation to the international transaction pertaining to provision of CSD services.*
  7. *That on facts of the case and in law, the Ld. TPO/ Hon'ble DRP has erred in selecting companies like Infobeans Technologies Limited and Persistent Systems Limited which are earning super normal profits.*
  8. *That on the facts of the case and in law, the Ld. TPO has erred in committing certain computational errors while computing operating margin of Persistent Systems Limited.*
  9. *That on the facts of the case and in law, the learned TPO has grossly erred in treating foreign exchange gain/ loss as non-operating item while determining the arm's length price of the international transaction of the Appellant without considering the terms & conditions of the intercompany transactions of the Appellant with its associated enterprises.*
  10. *That on the fact of the case and in law, the Ld. TPO / Hon'ble DRP has erred in not allowing a risk adjustment to the Assessee on account of the fact that the Appellant is a captive service provider for its associated enterprises in relation to provision of CSD services and is remunerated on a cost plus basis irrespective of the outcome of the services provided and hence undertakes no market risk, product/ service liability risk, credit risk, capacity utilization risk etc. as against comparable companies that are the full- fledged risk taking entrepreneurs.*

### **Corporate Tax Grounds**

11. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in disallowing the liquidated damages of INR 3,38,13,041/- incurred by the Appellant pursuant to breach of its contractual arrangements on the grounds that the same could not be verified.*
  - 11.1 *That on the facts and circumstances of the case and in law, the Ld. AO has erred in making several observations and inferences in the impugned assessment order which are factually incorrect and legally untenable.*
12. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in disallowing] an amount of INR 75,41,071/- under Section 37(1) of the Act on account of prior period expenditure.*
  - 12.1 *That on the facts and circumstances of the case and in law, the Ld. AO has erred in summarily ‘ rejecting the appellant’s contentions and not considering the binding judicial precedents which squarely applies to the facts of the appellant’s case.*
13. *That on the facts and circumstances of the case, the Ld. AO has erred in levying interest under Section 234B and Section 234C of the Act.*
14. *That on facts in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under Section 271(l)(c) of the Act mechanically and without recording any adequate satisfaction for its initiation.*

3. Briefly in the facts of the case the assessee was engaged in the business of distribution and sale of digital switching equipment, cellular exchange equipment, and other telecommunication equipment and provision of related services. It also provided intra-group marketing, technical support and contract software development services. The assessee had entered into various international transactions with its Associated Enterprises (in short “AE”). The Assessing Officer made reference u/s 92CA(1) of the Act to the Transfer Pricing Officer (in short “TPO”). The TPO noted that the international transaction undertaken by the assessee and adjustment

was made in respect of the segment of provision of software development services and receipt of technical services. The assessee had selected Transactional Net Margin Method (in short "TNMM") with Profit Level Indicator (in short "PLI") of Operating Profit to total cost (in short OP/TC) for analysis. The margin of the assessee worked out to 7.99% as against mean margin of the comparables selected by assessee at 7.20%. The TPO noted that the assessee had adopted weightage average margins of the comparable companies and he proposed different set of filters and also proposed that only the data of contemporaneous period was to be applied. In this regard, show cause notice was issued to the assessee and as against 07 comparables selected by the assessee, 03 were accepted and the balance were rejected. The TPO in final analysis selected 16 comparables whose mean margin worked out to 23.92%. The assessee filed its objection against the same and the TPO after considering various aspect of the issue including filters to be applied in final analysis selected 14 comparables and proposed an upward adjustment of Rs.70,29,58,610/-.

4. In the second segment of provision of technical support services, the TPO again proposed revised filters and applied the date for contemporaneous period and proposed an adjustment of Rs.24,58,39,400/-. The Assessing Officer issued draft assessment order to the assessee, against which objections were filed before the

Dispute Resolution Panel (in short “DRP”). Vide directions dated 02.04.2018, the DRP directed the TPO to re-compute the Arm's Length Price and on re-computation, adjustment made to the software development segment was restricted to Rs.42,21,63,560/-. No adjustment was made to the technical support services segment. The Assessing Officer passed the final assessment order against which the assessee is in appeal before us.

5. The Ld.AR for the assessee at the outset, pointed out that grounds of appeal Nos. 1 to 5 are not pressed and ground of appeal Nos. 6.2 & 7 to 10 are irrelevant and not pressed. He further stated the ground Nos. 6 & 6.1 against selection of comparables need to be adjudicated.

6. The limited issue which has been raised is with regard to the final selection of comparables. The Ld.AR for the assessee referred to the order of the TPO, wherein at page 5, the list of comparables totaling 16 is provided. He first pointed out that the TPO in the first instance applied the current year data of comparables against which there is no dispute. Consequently, out of the final selection of 14 concerns, there is no dispute with regard to the companies at Sl.No.2 to 6. The final list of comparable is available at page 31 of the order of the TPO. It was pointed out by the Ld.AR for the assessee that as against the margin of the assessee at 7.99%, the mean margin of 10

comparables was applied, after direction of DRP. He referred to the directions of the DRP and finding of the TPO, copy of which is placed at pages 661 to 663 of the Paper Book of Annual Report Compilation. He also pointed out that in the final list of the comparables, the total no. of companies were 10 whose average margin worked out to 15.56%. The Ld.AR for the assessee stressed that the assessee company was aggrieved by the inclusion of the concern Persistent Systems Ltd. and Mindtree Ltd. In this regard, he also pointed out that the Tribunal in the preceding year had excluded the above concerns being functionally not comparable to the assessee. He also pointed out that the Hon'ble High Court in Assessment Year 2011-12 upheld the order of the Tribunal in this regard. He further stated that the said concerns had same functional profile during the year and these needed to be excluded from the final list of the comparables. He pointed out that the concern, Persistent Systems Ltd. was a software product company and was also carrying on the business of software development services but no segmental were available, hence the margin of the said concern need to be excluded. In this regard, he placed reliance on the order of the Tribunal in assessee's own case in ITA No.6979/Del/2017 relating to 2013-14 order dated 09.05.2019. He further pointed out that the concern Mindtree Ltd. was also engaged in diversified field. He fairly submitted that the said concern was selected because it was engaged in the provision of software

services, but no segmentals were available and in the absence of the same, the said concern could not be applied. He also placed reliance on the order of the Tribunal in this regard and he further invited attention to the financials of the said concern and prayed for its exclusion.

7. Coming to the next concern, which as per the assessee needs to be excluded is i.e. Acropetal Technologies Ltd. The Ld.AR for the assessee pointed out that the said concern was not functionally comparable to the assessee as it was engaged in providing both software services and product development. Our attention was drawn to the financials of the said concern at page 376 & 377 of Paper Book of Annual Report Compilation and it was pointed out that the concern had booked significant selling and marketing and administration expenses, which constitute 84% of the cost. The Ld.AR for the assessee also pointed out that the TPO while adopting margins of the said concern never allowed any opportunity to the assessee to explain its case. The last concern to be excluded was Infobeans Technologies Ltd. on the ground that it was engaged in sale of software and no segmentals were available in respect of the various fields, it was engaged in.

8. The Ld.DR for the Revenue placed reliance on the orders of the authorities below and also referred to the financials of the said

concerns and objected to the submissions raised by the Ld.AR for the assessee.

9. We have heard rival contentions and perused the record. The assessee has not pressed the grounds of appeal Nos. 1 to 5 and hence, the same are dismissed as not pressed. Ground Nos. 6.2 & 7 to 10 are also not pressed, hence, dismissed.

10. Now coming to the issue raised vide Ground Nos.6 & 6.1, the limited issue which arises is the selection of comparables. The segment which needs to be bench-marked in the present case is the provision of software development services by the assessee to its AE. The assessee had selected TNMM method as the most appropriate method and there is no dispute with regard to the same. The PLI of the assessee was OP/TC and the margin of the assessee was 7.99% which has also been applied by the Assessing Officer/TPO. Now coming to the benchmarking of the international transaction, the assessee in the transfer pricing report had applied weighted margins of the comparables, which was rejected by the TPO. He was of the view that the data of contemporaneous period need to be applied and the Ld.AR for the assessee fairly admitted that current year data had to be applied to benchmark the international transaction undertaken by the assessee. The limited issue which is raised before us, is against the final selection of the comparables and the objection of the

assessee is with regard to 04 of the concerns as against 10 concerns finally selected by the Assessing Officer/DRP/TPO. The final list of comparables read as under:-

<i>Sl.No.</i>	<i>Company Name</i>
1.	<i>Akshay Software Technologies Ltd.</i>
2.	<i>C G-V A K Software &amp; Exports Ltd.</i>
3.	<i>Infobeans Technologies Ltd.</i>
4.	<i>Persistent Systems Ltd.</i>
5.	<i>Sagarsoft (India) Ltd.</i>
6.	<i>T V S Infotech Ltd.</i>
7.	<i>Mindtree Ltd.</i>
8.	<i>Sasken Communication Technologies Ltd.</i>
9.	<i>Maveric Systems Ltd.</i>
10.	<i>Acropetal Technologies ltd.</i>

11. The first objection which has been raised by the assessee is against the inclusion of the concern, Persistent Systems Ltd. The annual report of the said concern is placed at pages 183 to 260 of the Annual Report Compilation. The Revenue has been shown from operations and the said concern has recognized sale of software services at Rs.11,841 million. The said company in the notes forming

part of financial statements under the head 'segment information' had reported as under:-

26. *Segment Information*

*"The company's operations predominantly relate to providing software products, services and technology innovation covering full life cycle of product to its customers. The primary reporting segments are identified based on review of market and business dynamics based on risk and returns affected by the type or class of customers for the services provided which are as follows:-*

- a. *Telecom and Wireless*
- b. *Life science and Healthcare*
- c. *Infrastructure and Systems*

12. The segmentals of the said division are not available and in such facts and circumstances where the concern picked up had different functional profile, the margins of the said concern cannot be applied in order to benchmark the international transaction undertaken by the assessee. The Tribunal in assessee's own case in Assessment Year 2013-14 vide para 4 has observed that the said concern was engaged in both product and development of software development services and hence, needs to be excluded from the final set of comparables. The functional profile of the said concern continues to be same and consequently, we direct its exclusion from the final list of comparables.

13. Now coming to the next concern i.e. Mindtree Ltd. The financials of the said concern are placed at pages 1 to 182 of the Annual report Compilation and the said concern is engaged in diversifying field whose segmental were also not available. The assessee had selected the said concern because of its engagement in providing software services to its AE; but the TPO for the year under consideration had applied the entity level results of the said concerns as no segmental were available. We have perused the Annual Report Compilation at page 69 of the Paper Book under which the Revenue is recognized from different services/manufacturing etc. but bifurcation of revenue is industry-wise and not function-wise. In the absence of the same, there is no merit in the observation of the TPO that the segmentals were available and hence, can be applied for benchmarking the international transaction of provision of software services. We find no merit in the order of the Assessing Officer/TPO in this regard and hold that in the absence of the segmentals being available, the said concern cannot be selected as functionally comparable to the assessee. The Tribunal in Assessment Year 2013-14 had also excluded the said concern from final list of comparables. Accordingly, we direct the Assessing Officer to exclude the said concern i.e. Mindtree Ltd. from the final list of the comparables.

14. The next concern which has been argued for its exclusion is Acropetal Technologies Ltd. The financials of the said concern are

available at pages 356 to 449 of the Paper Book of Annual Report Compilation and it transpires that the said concern recognized revenue from both software services and products. The reporting under the head 'income from operations' was from software services/products/solutions. Under the head 'direct cost', the assessee had debited cost of materials, project expenses and selling and marketing expenses, which constitute 84% of the total cost. In such facts and circumstances, the concern Acropetal Technologies Ltd. cannot be held to be functionally comparable to the assessee, which is purely engaged in providing software services to its AE. Hence, we direct its exclusion.

15. The last concern which is under adjudication is Infobeans Technologies Ltd. The Annual report of the said concern is at pages 261 to 282 of the Paper Book of Annual Report Compilation. At page 267 of the Paper Book of Annual Report Compilation, the Revenue is recognized from operations and at page 274 of the Paper Book of Annual Report Compilation, the break-up is given up for sale of export as revenue from operations. Further, for the year under consideration, Infobeans Technologies Ltd. had declared that it was engaged in providing custom development services to offshore and was engaged in software engineering services in different fields. No segmentals were available. In such facts and circumstances, we find no merit in inclusion of the said concern in the final list of

comparables. We direct its exclusion and also direct the Assessing Officer to re-compute the arms length price of the international transaction, if any in the hands of the assessee, after excluding 04 concerns as directed in the para above. Thus, Ground Nos. 6 & 6.1 raised by the assessee are allowed.

16. Now coming to the corporate issues raised vide Ground Nos.11 & 11.1. The Assessing Officer while completing the assessment had noted that the assessee had claimed deduction on account of liquidated damages amounting to Rs.3.38 crores. The assessee was show caused as to why this expenditure should not be treated as penalty on account of default made by the assessee under the statute and why the same should not be disallowed under section 37(1) of the I.T.Act, 1961. The assessee explained that these Liquidated damages referred to the contractually stipulated compensation to be recovered by one party from another if the other party breaches the contract and these damages were quantified on the basis of the contractual terms agreed upon between the parties.

17. The Assessing Officer did not find favour with the submissions of the assessee and observed as under:-

*“(i) The quantum of liquidated damages claimed in respect of transaction could not be established as a fix amount for a*

*particular period is claimed as liquidated damages and no direct connection could be substantiated by the assessee.....”*

18. Accordingly, the Assessing Officer proposed the addition which was confirmed by the DRP and addition was finally made by the Assessing Officer in the final assessment order.

19. The Ld.AR for the assessee pointed out that it was a contractual obligation, which was not complied with but the Assessing Officer/DRP called it penalty; in fact it was a contractual liability on delay and supply of equipment. It was further pointed out by the Ld.AR that similar issue arose before the Tribunal in the preceding year and the issue has been remitted back to the Tribunal vide para 5 at pages 28 & 29. We find that similar issue has arisen in the preceding years and the matter has been remanded back to the file of Assessing Officer for deciding the issue afresh. Following the same parity of reasoning, we remit this issue back to the file of Assessing Officer to follow the directions of the Tribunal in the preceding year. Reasonable opportunity of hearing should be provided to the assessee. The Ground Nos.11 & 11.1 raised by the assessee are allowed for statistical purposes.

20. Now coming to ground of appeal No.12 & 12.1 raised by the assessee which is against claim of expenditure on account of TDS paid during the year. The plea of the Ld.AR before us was that the

said expenditure related to earlier years, was claimed during the year, as the TDS was deposited during the year under consideration and hence, the same has to be allowed as deduction. In view of the provision of section 40(a)(ia) where the assessee does not deposit the TDS, then such expenditure is not to be allowed as deduction in the hands of the assessee. However, in case the TDS is deposited in the succeeding year, then that expense needs to be allowed as deduction in the year when TDS is deposited. The said facts need to be examined by the Assessing Officer. Hence, we remit this matter back to the file of Assessing Officer to allow the claim of the assessee after due verification and after allowing reasonable opportunity of hearing to the assessee. Thus, Ground Nos. 12 & 12.1 raised by the assessee are allowed for statistical purposes.

21. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 29<sup>th</sup> day of November, 2019.

**Sd/-**

**Sd/-**

**(B.R.R. KUMAR)**

**लेखा सदस्य/ACCOUNTANT MEMBER**

**(SUSHMA CHOWLA)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

**दिल्ली / दिनांक** Dated : 29<sup>th</sup> November, 2019.

*\*Amit Kumar\**

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, आयकर अपीलीय अधिकरण ,दिल्ली  
Assistant Registrar, ITAT, Delhi