

IN THE INCOME-TAX APPELLATE TRIBUNAL "J" BENCH MUMBAI
BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.4546/Mum/2017 (Assessment Year 2010-11)

Xoriant Solutions Pvt. Ltd Windchester, 4 th Floor, High Street, Hiranandani Corporate Park, Powai, Mumbai-4007076. PAN: AAACX0146P	Vs.	ITO-8(3)(4) Aayakar Bhavan, Mumbai-400020.
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Appellant

Respondent

ITA No.4274/Mum/2017 (Assessment Year 2010-11)

ITO-11(3)(4) Room No. 429, 4 th Floor, Aayakar Bhavan, M.K. Marg, Mumbai-400020.	Vs.	Xoriant Solutions Pvt. Ltd Windchester, 4 th Floor, High Street, Hiranandani Corporate Park, Powai, Mumbai-4007076. PAN: AAACX0146P
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Appellant

Respondent

Appellant by : Shri Pankaj R. Toprani with
Miss. Krupa P. Toprani (AR)

Respondent by : Shri Udal Raj Singh (DR)

Date of Hearing : 09.01.2020

Date of Pronouncement : 15.01.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These cross appeal are directed against the order of Id. Commissioner of Income-Tax (Appeals)-58, Mumbai [the Id. CIT(A)] dated 20.03.2017 for Assessment Year 2010-11. The assessee has raised the following grounds of appeal:

I. Upward adjustment in the Arm's Length Price

1. On the facts and in the circumstances of the case, the Ld. CIT(A), the Ld. Transfer Pricing Officer (TPO) and the Ld. Assessing Officer (A.O), erred in making adjustment of Rs.2,34,30,468/- to the total income of the Appellant in respect of international transactions entered into by the Appellant with its Associated Enterprises.

2. On the facts and in the circumstances of the case, the Ld. CIT(A),Ld.TPO/A.O erred in disregarding the Cost plus method followed by the Appellant in respect of its international transactions entered into with its Associated Enterprises, and instead followed TNMM method.

3. On the facts and in the circumstances of the case, the Ld. CIT(A), the Ld.TPO/A.O erred by disregarding the fact that for previous two assessment years 2007-08 and 2008-09, CPM method was followed by the appellant and was accepted by the Department and therefore, on the principle of consistency, CPM method should have been accepted as there are no change in the facts. Further, we would like to draw your kind attention to the fact that in Asst year 2008-09, the case was handled by the same A.O and the ALP was duly allowed by him. Thus, in the given year there arises no question of any disallowance since the total facts remains the same. Further we would also like to bring to your notice that there has no addition / adjustment done by the TPO since Asst Year 2002-03.

4. On the facts and in the circumstances of the case, the Ld. CIT(A),the Ld.TPO/A.O erred by not giving any reasons as to why CPM method was not accepted and TNMM method was accepted without giving any reasons for deviating from the immediately two preceding assessment years wherein CPM method was accepted.

The principle of consistency to be followed by the Department has been accepted by the Supreme Court in the celebrated case of Radha Saomi Satsang vis. CIT (193 ITR 321).

5. Without prejudice to the above grounds, while applying TNMM method, to exclude the PLI of the following multinationals as they cannot be considered as comparable with the Appellant:

Sr. No.	Name of the Company	PLI%
1	M/s Infosys Technologies Ltd.	45.01
4	M/s. Persistent Systems Ltd.	28.87
5	M/s. Sonata Software	35.20
6	M/s. Tata Consultancy Services Ltd.	36.52
11	M/s. VishwaVikas Services Ltd.	65.87
13	M/s. Thirdware Solutions Ltd.	33.72
14	M/s. Mindtree Ltd. (Segmental)	65.87
15	M/s. Wipro Ltd.	25.88
16	M/s. i-Gate Global Solutions Ltd.	31.40
17	M/s. Sasken Communication Technologies Ltd	26.50
18	M/s. Cornpucom Software Ltd. (Segmental)	94.21
18	M/s. KALS Information Systems Ltd.	34.31
	Arithmetic Mean	43.62%

6. The appellant relies on the Bombay High Court in the case of CIT vis. Pentair Water India Pvt. Ltd. 381 ITR 216 and claims that the aforesaid companies are no doubt large and distinct companies and as such the profit earned there from cannot be benchmarked or equated with the Appellant.

7. Further. The appellant humbly notes that in Asst. Year 2009-10, the Hon'ble ITAT vide its order dated 22.4.2016 has sent the matter back to the AO/TPO. It is pertinent to note that wordings of ITAT in its order "The TPO changed the method to TNMM without giving proper reasoning and effective opportunity of hearing to the assessee. It had been brought to our notice that during the transfer pricing proceedings for the preceding years i.e. 2007-08 and 2008-09, CPM has been accepted as the most appropriate method by the TPO in the transfer pricing orders passed for these two years. It was submitted that no reason has been given by the lower authorities to justify as to why a deviation in the year was needed in the facts of this case and especially when the business was same in all these years."

8. The costing figures are very well derived from the costing data maintained by the appellant. Thus, in the event of Cost records available by the appellant, CPM is believed to be the MAM. The appellant relies on the Hon'ble Mumbai

IT AT decision in the case of Diamond Dye Chem Ltd. v. Dy. CIT [ITA o. 6873 of 2006, May I, 2011] held that "in cases where cost data is available, CPM is the most appropriate method. The Tribunal rejected application of TNMM on grounds that there was 110 substantial difference in the junctions and risk profiles of the activities undertaken by the appellant in case of exports made to AEs and non-AEs. Since the cost data was available as per cost audit report, the reliability of data was assured and CPM was to be upheld."

II. Levy of Interest under section 234B, 234C & 234D of the Act

1. The Appellant submits that after giving relief on the grounds raised in this appeal, the interest levied in the impugned order would undergo a change.
2. The Appellant prays that it be granted relief in respect of the above grounds and consequently directions be given to reduce the interest levied under section 234B, 234C & 234D of the Act.

The Appellant prays that reliefs on the aforesaid grounds be allowed and the order of the CIT(A)/ TPO/A.O. be set aside/quashed/ modified accordingly.

2. The revenue in its cross appeal has raised the following grounds of appeal:

1. (a) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting several comparables selected by the TPO by applying turnover filter. "
- (b) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting Compusom Software Ltd (Segmental) as a comparable by holding that it is in the field of supplying educational products."
2. "The appellant prays that the order of the CIT (A) on the above grounds be set aside and that of the A.O. be restored."

3. Brief facts of the case are that the assessee is a company engaged in the business of software development solely for its Associates Enterprises (AE's) based in USA & UK. The assessee while filing return of income reported international transaction with its associated enterprises (AE) in its report furnished under section Form 3CEB on account of software development project application. Consequent upon reporting the

international transaction the assessing officer made reference to Transfer Pricing Officer (TPO) for determining of Arms Length Price (ALP) of international transaction. The assessee reported the following international transactions:

Sr. No.	Name of the AE	Nature of the international Transaction	Value of the International Transaction (In Rs.)	Paid/Received	Method adopted by the Assessee
1	Xoriant Corporation USA	Software development of products and appliances	308700000	Received	CPM
2	Y. Point UK Ltd.	Software development of products and appliances	3900000	Received	CPM

4. The assessee adopted Cost Plus Method (CPM) for benchmarking its international transaction with its AE's. On receipt of reference, the TPO required the assessee to furnish certain information and to justify the CPM as most appropriate method adopted by assessee. The TPO officer after receiving the explanation from assessee took the view that the cost claimed by assessee attributable towards rendering software services to its AE are not certified by way of segmental account audited and duly certified by Auditor and claim of assessee is not verifiable. The TPO vide show-cause notice dated 05.12.2013 show-caused the assessee as to why international transaction entered by assessee with its AE should not be benchmarked under transactional net margin method (TNMM) in place of CPM. The assessee objected for substitution of most appropriate method vide its reply

dated 12.12.2013. The contention of assessee was not accepted by TPO by taking view that the assessee has not established its cost under CPM and has not produced interval and extraordinary comparable transaction having similar services rendered by them. The TPO after rejecting the objection of the assessee carried out its independent investigation and selected 22 following comparable companies for benchmarking the international transaction.

Sr.No.	Name of the Company	The PLI(OP/OC)%
1	M/s. Infosys Technologies Ltd.	45.01
2	M/s. Onward eservices Ltd.	- 2.97
3	M/s. Nucleus Software Exports Ltd.	17.82
4	M/s. Persistent Systems Ltd.	28.87
5	M/s. Sonata Software Ltd.	35.20
6	M/s. Tata Consultancy Services Ltd.	36.52
7	M/s. Digicomp Complete Solutions Ltd.	12.22
8	M/s. Indus Networks Ltd.	2.44
9	M/s. Powersoft Global Solutions Ltd.	11.86
10	M/s. Te ledata Marine Solutions Ltd.(segmental)	- 2.72
11	M/s. Vishwa Vikas Services Ltd.	65.87
12	M/s. Winfoware Technologies Ltd.	4.81
13	M/s. Thirdware Solutions Ltd	33.72
14	M/s. Mindtree ltd(Segmental)	65.87
15	M/s. Wipro Ltd 25.88	
16	M/s. i- Gate Global Solutions Ltd	31.40
17	M/s. Sasken Communication Technologies Ltd	26.50
18	M/s. Compucom Software Ltd (Segmental)	94.21
19	M/s. KALS Information Systems Ltd. (Segmental)	34.41
20	M/s. Kerala Ayurveda Ltd. (Segmental)	13.77
21	M/s. SQL Star International Ltd. (Segmental)	0.84
22	M/s. Mukta Arts Ltd. (Segmental)	-13.15
	Arithmetic Mean	25.84
	The tested party	17.62%

5. The TPO adopted TNMM, the most appropriate method. The TPO concluded that arithmetical mean margin of 22 comparable is at 25.84%.

The PLI of assessee is 17.62% and made the Arms Length Adjustment in the following manner:

The sale value of the international transactions as reported by the assessee (A)	Rs.31,26,00,000
Operating cost (as calculated above)	Rs.26,70,29,933
The Arm's Length Margin	125.84% of Cost
The Arms' Length Price – (B)	Rs. 33,60,30,467
The Arm's Length Adjustment (C)=(B)-(A)	Rs. 2,34,30,468
105% of the sale value of the international transactions	Rs. 32,82,30,000

6. On receipt of report of TPO, the Assessing Officer made adjustment of Rs. 2.34 crore in respect of ALP with regard to international transaction reported by assessee. The assessee exercised its option to file appeal before the Id. CIT(A), therefore, the Assessing Officer on the basis of report of TPO, passed the final assessment order dated 10.04.2014. Aggrieved by the addition/upward adjustment, the assessee filed appeal before the Id. CIT(A). The Id. CIT(A) granted the partial relief to the assessee in deleting certain comparable. The Id. CIT(A) directed to retain the following set of comparable.

Sr. No.	Name of the Company	PLI(OP/OC) % FY 2009-10
7	Digicomp Complete Solutions Ltd.	12.22
9	Powersoft Global Solutions Ltd.	11.86
11	Vishwa Vikas Services ltd.	65.87
12	Winfoware Technologies Ltd.	4.81
13	Thirdware Solutions	33.72
14	Mindtree Segmental	65.87
19	M/s Kals Information systems Ltd.	34.41
20	M/s Kerala Ayurveda Ltd. (Segmental)	13.77
21	SQL Star International Ltd.	0.84

7. Further, aggrieved by the order of Id. CIT(A), both the parties have filed their appeal by raising grounds of appeal as narrated above.

8. At the outset of hearing, the ld. AR of the assessee submits that he is pressing only ground nos. 4 & 5 and not pressing any other ground may be dismissed as not pressed. The ld. AR of the assessee in his all fairness further submits that he is confining his submission for exclusion of comparable nos. 11, 13, 14, 18 & 19 i.e. Vishwa Vikas Services Ltd., Thirdware Solutions, Compucom Software Ltd. (segmental), M/s Kals Information Systems Ltd. and Mindtree Ltd. (segmental) only. It was submitted that inclusion of Compucom Software Ltd., the revenue has filed its cross appeal. If the exclusion of this comparable is upheld, the appeal filed by revenue would become infructuous.
9. The ld. AR of the assessee further submits that assessee is a captive software provider offering services to its two AEs only. M/s Vishwa Vikash Services Ltd. (Vishwa Vikash) is not functionally comparable with the assessee. **Vishwa Vikash** is engaged in the business of providing computer related activities like maintaining website for its clients, creation of multimedia presentation to its clients and the same is not comparable with the assessee. For **Thirdware Solutions**, the ld. AR of the assessee submits that this comparable is a product company. This comparable was excluded by Delhi Tribunal in Agnity India Technologies Pvt. Ltd. vs. DCIT (147 ITD 0417) while considering its comparability with software provider assessee. For **Compucom Software Ltd.** (segmental). The ld. AR of the assessee submits that this comparable company is in the business of

providing software for education. The Id. AR of the assessee also placed the copy of part of annual report for this comparable for A.Y. 2009-10 showing the functions performed by this comparable. The Id AR for the assessee prayed for affirming the exclusion of this comparable. For M/s **Kals Information Systems Ltd.**, the Id. AR of the assessee submits that this comparable is not functionally comparable with the assessee; this comparable is a product company and engaged in the business of software services and software product. This comparable was executed by Delhi Tribunal in Agnity India Technologies Pvt. Ltd. (supra) while comparing its comparability with software provider (assessee). For Mindtree (Segmental), the Id. AR of the assessee submits that turnover of this comparable company is about Rs. 700 crore and is liable to be excluded on the basis of turnover filter. In support of his submission, the Id. AR of the assessee relied upon the decision of Bangalore Tribunal in Bearing Point Business Consulting (P.) Ltd. vs. DCIT (57 SOT 0244 (Bangalore Trib.)).

10. In alternative submission, the Id. AR of the assessee submits that CPM was accepted by revenue in earlier AYs. The Assessing Officer made similar treatment in AY 2009-10, as done in the year under consideration, by rejecting CUP Method and adopting TNMM and on appeal before the Tribunal, the matter was remanded back to the file of Assessing Officer in ITA No. 1840/Mum/2014 dated 22.04.2016.

11. The ld. AR of the assessee finally submits that if four comparable companies are excluded and exclusion of Compucom Software Ltd. (segmental) is upheld by Tribunal, the other grounds of appeal raised by assessee would become infructuous.
12. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR for the revenue submits that case for earlier year i.e. AY 2009-10 has been restored to the file of Assessing Officer for benchmarking of international transaction afresh. Therefore, the matter may be restored to the file of Assessing Officer. For comparability of various comparable, the ld. DR for the revenue supported the order of ld. CIT(A) and inclusion of Compucom Software Ltd., the ld. DR relied upon the order of Assessing Officer.
13. We have considered the submission of both the parties and have gone through the orders of lower authorities. We have also deliberated on various case law relied by ld. AR of the assessee. There is no dispute that the assessee is providing software development services to its AEs in USA & UK. The assessee in its Transfer Pricing Study Report has adopted CPM as most appropriate method for benchmarking of its transaction. The CPM was not accepted by Assessing Officer. The Assessing Officer benchmarked the transaction by adopting TNMM and selected the 22 comparable as mentioned in para 4 (supra).

14. The PLI of 22 comparable was at 25.84% whereas PLI of tested party (assessee) was at 17.62% accordingly, the Assessing Officer suggested upward adjustment of Rs. 2.34 crore before the Id. CIT(A), the assessee not only objected about the rejection of CPM and adoption of TNMM method. The assessee also urged that CPM has been accepted by department in AY 2007-08 & 2008-09 only in AY 2009-10, 2010-11 & 2011-12. The Assessing Officer has taken a different view and followed TNMM method. It was also stated that for A.Y. 2009-10, the Tribunal has restored the matter back to file of Assessing Officer/TPO on the ground that method of TNMM was taken without giving proper reasoning and effective opportunity. The Id. CIT(A) while referring the paragraph no. 3.4 of the order of Tribunal for AY 2009-10 took his view that the Tribunal has not merely faulted with the finding of AO/TPO but when the assessee also while remitting back the matter to the file of Assessing Officer. The Id. CIT(A) after referring the certain OECD guidelines concluded that CPM is suitable only in cases where gross margin is sufficient to compensate the parties and that assessee was not able to justify the selection of comparable in Transfer Pricing Study Report. The Id. CIT(A) after considering the submission of assessee excluded 13 comparable and retained only 9 following comparable and directed the Assessing Officer to recompute the ALP accordingly.

15. Now before us, the Id. AR of the assessee confined his submission for the exclusion of comparable no. 11,13,14 & 19 to support the exclusion of

Compucom Software Ltd. (segmental) (supra). For exclusion of Compucom Software Ltd. (segmental) (supra), the Id. AR of the assessee vehemently submitted that this comparable is engaged in the business of providing software for education. The Id. AR of the assessee placed the extract of annual report for AY 209-10 of this comparable showing segmental information for providing software for education. The Id. DR has not disputed the segmental information about providing software for education. Considering the fact that this comparable is not functionally comparable with the assessee, therefore, we affirmed the exclusion of this comparable.

16. Now advertent to the exclusion of comparable in assessee's appeal. (1) Vishwa Vikas Services Ltd. This comparable was included by Assessing Officer. The Id. CIT(A) affirmed this inclusion of this comparable. The Id. AR of the assessee claimed that this comparable is engaged in providing computer related activities like maintenance of website for its clients, creation of multimedia presentation of its client. This fact is not disputed by Id. DR for the revenue. In our view this comparable is not functionally comparable with the software development services of assessee, therefore, we direct the Assessing Officer to exclude this comparable from final set of comparable.

17. Now coming to Thirdware Solutions & M/s Kals Information Systems Ltd., these comparable were included/selected by Assessing Officer and their inclusion were affirmed by Id. CIT(A). Both the comparable are a product

company were examined by co-ordinate bench of Mumbai Tribunal in Agnity India Technologies Pvt. Ltd. (supra) wherein both the company were held to be Product Company. Considering the decision of Tribunal, we direct the Assessing Officer to exclude both the comparable from final set of comparable.

18.Mindtree Ltd. (segmental). This comparable was selected/included by Assessing Officer and inclusion of this comparable was affirmed by Id. CIT(A). The Id. AR of the assessee while making submission vehemently argued that this comparable is not comparable due to high turnover having sales of about Rs. 700 crore. We have noted that Co-ordinate bench of Bangalore Tribunal in Bearing Point Business Consulting (P.) Ltd. (supra), this comparable was rejected/excluded due to high turnover filter. Considering the decision of Tribunal, we direct the Assessing Officer to exclude Mindtree Ltd. (segmental) from final set of comparable.

19.In view of the aforesaid discussion, we direct the Assessing Officer to exclude Vishwa Vikas Services Ltd. (supra), Thirdware Solutions, M/s Kals Information Systems Ltd. (supra) & Mindtree Ltd. (segmental) and re-compute the ALP of international transaction afresh. In the result, ground no. 4 & 5 of the appeal are allowed. Considering the facts that we have accepted the primary contentions/ submissions of the Id AR for the assessee on exclusions and affirmed the exclusion of comparable, excluded by Id

CIT(A), therefore, other grounds of appeal raised by the assessee have become academic.

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

ITA No. 4274/Mum/2017 by revenue

21. As noted above that while discussing the comparability of comparable, we have affirmed the exclusion of Compucom Software Ltd. (segmental) difference, therefore, appeal of the revenue is dismissed.

22. In the result, appeal of the assessee is partly allowed and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 15/01/2020.

**Sd/
R.C. SHARMA
ACCOUNTANT MEMBER**

Mumbai, Date: 15.01.2020
SK

**Sd/-
PAWAN SINGH
JUDICIAL MEMBER**

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "J" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**