

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT  
AND  
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.2777/PUN/2016  
निर्धारण वर्ष / Assessment Year : 2010-11

eGain Communications Pvt. Ltd., Office No.702, 7 <sup>th</sup> Floor, B-1, The Cerebrum IT Park, Vadgaon Sheri, Kalyani Nagar, Pune – 411014 PAN : AAACN9946R	Vs.	DCIT Circle-1(2), Pune
Appellant		Respondent

ITA No.535/PUN/2017  
निर्धारण वर्ष / Assessment Year : 2011-12

DCIT Circle-1(2), Pune	Vs.	eGain Communications Pvt. Ltd., Office No.702, 7 <sup>th</sup> Floor, B-1, The Cerebrum IT Park, Vadgaon Sheri, Kalyani Nagar, Pune – 411014 PAN : AAACN9946R
Appellant		Respondent

ITA No.511/PUN/2017  
निर्धारण वर्ष / Assessment Year : 2011-12

eGain Communications Pvt. Ltd., Office No.702, 7 <sup>th</sup> Floor, B-1, The Cerebrum IT Park, Vadgaon Sheri, Kalyani Nagar, Pune – 411014 PAN : AAACN9946R	Vs.	ACIT Circle-1(2), Pune
Appellant		Respondent

Assessee by  
Revenue by

Shri Madhur Agarwal  
Shri T. Vijaya Bhaskar Reddy

Date of hearing

10-02-2020

Date of pronouncement

14-02-2020

आदेश / ORDER

PER R.S.SYAL, VP :

This batch of three appeals comprises of one appeal by the assessee for the assessment year 2010-11 and two cross appeals for the assessment year 2011-12. For the sake of convenience, we have clubbed these appeals for disposal by this consolidated order.

**A.Y. 2010-11**

2. The ld. AR submitted at the very outset that the assessee filed appeal after the filing of the appeal by the Revenue against the order passed by ld. CIT(A). Since the Revenue's appeal has already been dismissed because of low tax effect, the ld. AR submitted that the assessee was not interested in prosecuting the instant appeal. He made prayer for withdrawal of the appeal. The ld. DR did not raise any objection to the request of the ld. AR. We permit the assessee to withdraw the appeal.

3. In the result, appeal is dismissed as withdrawn.

**A.Y. 2011-12**

4. The assessee has preferred the instant appeal against the order passed by ld. CIT(A) on 29.12.2016 giving certain

directions *qua* the transfer pricing addition made by the Assessing Officer (AO) pursuant to the order of the Transfer Pricing Officer (TPO). The Revenue, in its appeal, is also aggrieved by the exclusion of five companies from the list of comparables.

5. Briefly stated, the facts of the case are that the assessee is a wholly owned subsidiary of eGain Communication Corporation, USA ('eGain, USA'). It was incorporated in India in 1999. The assessee is engaged as captive software development support service provider to eGain, USA. The work done by the assessee belongs to the parent company. The assessee is remunerated at cost plus 10% markup. The only activity carried out by the assessee is that of rendering product software development services to its Associated Enterprise (AE). The assessee filed its return reporting, *inter alia*, an international transaction of rendition of 'Software development services' with transacted value of Rs.17,86,79,337/-. The AO made a reference to the TPO for determining the Arm's Length Price (ALP) of the international transaction. The TPO observed that the assessee adopted the Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the

international transaction. The assessee declared its Profit Level Indicator (PLI) of Operating Profit / Operating Cost (OP/OC) at 13.56% as against that of comparables at 5.54%. In the light of this factual panorama, it was claimed that the international transaction was at ALP. The TPO did not disturb the application of the TNMM as most appropriate method nor the PLI. He simply made certain inclusions and exclusions in/from the list of comparables put forth by the assessee and accordingly proposed transfer pricing adjustment of Rs.2,58,17,445/- in the transaction. The Id. CIT(A) gave certain directions including upholding the inclusion of E-Infochips Ltd. and directing to exclude FCS Software Solutions Ltd., L&T Info Tech Ltd., Persistent Systems Ltd., Infosys Technologies Ltd. and Sasken Communication Technologies Ltd. Whereas, the assessee is aggrieved by the inclusion of E-Infochips Ltd. in the list of comparables, the Revenue has trained its guns against the exclusion of the above noted five companies.

6. We have heard both the sides and gone through the relevant material on record. Before embarking on the comparability or otherwise of the companies challenged by

both the sides, it is imperative to first understand the functional profile of the assessee. The TPO has recorded on page 1 of his order that the assessee is a captive software development and support service provider to its USA based AE. He has further recorded that the assessee is engaged in providing low end software development services to its parent, which are, in turn, based on high level design supplied by the latter. Thus, it is apparent that the assessee is engaged in providing software development services to its parent company, which then combines the assessee's effort in making out a final software product.

7. The TPO proposed the inclusion of E-Infochips Ltd. in the list of comparables, which was resisted by the assessee submitting that E-Infochips Ltd. is a global product design services and solutions company providing end-to-end product engineering and semiconductor services and hence, ceased to be comparable. The TPO did not accept the assessee's contention by finding that more than 50% of the revenue of E-Infochips Ltd. was from the provision of software and software consultancy services and hence, was comparable. The Id. CIT(A) echoed the assessment order on this score.

8. The TPO has drawn a chart at page 25 of his order containing break-up of the figures of revenue by E-Infochips Ltd., which transpires income from software services at Rs.19.21 crore (74%); consultancy charges at Rs.2.90 crore (11%); and hardware maintenance at Rs.3.92 crore (15%). We have gone through the Profit & Loss Account of this company, a copy of which is available at page 773 of Paper Book. It can be seen that the figure of total revenue given in the income matches with the figures adopted by the TPO. When we look at the figures of expenses, it turns out that as against Employees related costs of Rs.6.85 crore, this company incurred Manufacturing and other operating expenses of Rs.12.56 crore. This shows that this company is not only engaged in rendering software development services but also substantially into the manufacturing activity, which position is further corroborated from the amount of Inventories shown by this company under the head 'Current Assets' in its balance sheet at Rs.1.24 crore. The segmental information has been given in the Annual report, which states that the company is primarily engaged in the software development and IT Enabled Services and products, which is considered the only reportable business segment as per

Accounting Standards-AS17. It is further provided in para 7 that: “The company is engaged in development and maintenance of computer software and software development consulting and also manufacturing EVM and VDB Electronic Board (Hardware Division)”. On going through the above extracts from the Annual report of this company, it is beyond any shadow of doubt that this company is also substantially engaged in manufacturing software products and the figures of profit and other expenses are on a consolidated basis. In other words, there is no segmental information available *qua* rendition of software development services, similar to that of the assessee. In view of the fact that this company, apart from rendering software development services, is also engaged in manufacturing hardware products, we hold that it loses its comparability with the assessee company, which is engaged in providing software development services only and that too, as a captive service provider. We therefore, order to exclude this company from the list of comparables.

9. The Id. AR submitted that if E-Infochips Ltd. is excluded from the list of comparables, then there is no need to argue further on other issues taken up by the assessee in its appeal.

10. Now, we espouse the appeal of the Revenue in challenging the exclusion of five companies, viz., FCS Software Solutions Ltd., L & T Info Tech Ltd., Persistent Systems Ltd., Infosys Technologies Ltd. and Sasken Communication Technologies Ltd.

**FCS Software Solutions Ltd.**

11. The TPO included this company in the list of comparables. The assessee objected to the inclusion by contending that this company made sales at Rs.115.99 crore, which is several times higher than the turnover of the assessee company at Rs.17.87 crore. In addition, the assessee also gave certain other reasons justifying its exclusion, which did not find favour with the TPO. He included this company in the tally of comparables. The Id. CIT(A) directed to exclude the same.

12. Having heard both the sides and perused the relevant material on record, it is observed that the Id. CIT(A) has recorded an uncontroverted categorical finding that this company earned 37% of its revenue from IT Consulting (Software development); 36% from Education; and 27% from Infrastructure Management and further that the segmental revenue breakup has not been provided in the Annual report.

We have gone through the Annual report of this company. A copy of standalone Profit & Loss Account of this company has been placed at page 56 of the Annual report, which gives information about the revenue from “Software development and other services” at Rs.115.99 crore, which is the figure of total revenue. A close look at the Expenditure side of the Profit & Loss Account indicates that out of total expenditure of Rs.106.85 crore, software development expenses are only Rs.67.61 crore. Thus, it is evident that the company, at standalone basis, is not only engaged in providing Software Development Services but also earning revenue from Education and Infrastructure Management. Nature of activity pursued under Infrastructure Management has been outlined at page 24 of the Annual report, which indicates that this company: “has expanded the scope of the Infrastructure management services being provided by it by managing the client services either on client sites or at Data Centers or in our premises in 24x7 environment. We also set up data centers for clients globally, on which, our engineers remotely or onsite manage all Hardware, Network, LAN/WAN, Data and voice networks in accordance of the client needs to run their applications’.

Revenue under the head 'Education' is at 36%. This company has its clients along with their employees, vendors and dealers to better their performance to deal with fast engineering environment. It has been awarded a large project to train police in Madhya Pradesh, management of 6 ITIs in Haryana, Delhi and Punjab and five senior secondary schools in Punjab. A brief description of the nature of services rendered by this company in Education and Infrastructure management spheres goes to show that it is functionally miles apart from the nature of software development services rendered by the assessee to its AE. We therefore, uphold the exclusion of this company from the list of comparables.

**L & T Info Tech Ltd.,**  
**Persistent Systems Ltd.,**  
**Infosys Technologies Ltd. and**  
**Sasken Communication Technologies Ltd.**

13. The TPO included the above four companies in the list of comparables. The Id. CIT(A) directed to exclude them by observing that these did not satisfy the turnover filter. For excluding these companies, he relied on the judgment of Hon'ble Delhi High Court in the case of CIT Vs. Agnity India Technologies Pvt. Ltd. (2013) 219 Taxman 26 (Del).

14. The Hon'ble Delhi High Court in the case of *CIT Vs. Agnity India Technologies Pvt. Ltd. (supra)* ordered to exclude Infosys being a giant company when seen in comparison with Agnity India Technologies Pvt. Ltd., a captive service provider like the extant assessee. The ld. CIT(A) directed to exclude the other three companies by observing that their turnover was several times higher *vis-à-vis* assessee company. In this regard, we find that the view taken by the ld. CIT(A) echoes with that of the Hon'ble jurisdictional Bombay High Court in *CIT Vs. Pentair Water India Pvt. Ltd. (2016) 381 ITR 216 (Bom)*, in which the view of the Tribunal in excluding certain companies on the basis of higher turnover has been approved by the Hon'ble Bombay High Court. Since the facts of the instant case are similar in as much as the TPO included these four companies in the list of comparables, which were having their respective turnovers several times more than that of the assessee, respectfully following the precedent, we hold that no exception can be taken to the view taken by the ld. CIT(A) in directing their exclusion. We therefore, uphold the impugned order on this score.

15. To sum up, the impugned order is set aside and the matter is restored to the file of the AO / TPO for determining the ALP of international transaction afresh in the light of above observations and directions. Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

16. In the result, both the appeals are allowed for statistical purposes.

Order pronounced in the Open Court on 14<sup>th</sup> February, 2020.

Sd/-  
**(S.S. VISWANETHRA RAVI)**  
**JUDICIAL MEMBER**

Sd/-  
**(R.S.SYAL)**  
**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 14<sup>th</sup> February, 2020  
 GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-13, Pune
4. The Pr. CIT -I, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे  
 “सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary  
 आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	10-02-2020	Sr.PS
2.	Draft placed before author	10-02-2020	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

\*