

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.575/Bang/2016
Assessment year : 2011-12

Assistant Commissioner of Income Tax, Circle-3(1)(1), Bengaluru.	Vs.	M/s. Fidelity Business Services India Pvt. Ltd., Pinehurst, Embassy Golf Links Business Park, Off Intermediate Ring Road, Bengaluru-560071. PAN:AAACF 6175 E
APPELLANT		RESPONDENT

C.O. No.24/Bang/2017 (In IT(TP)A No. 575/Bang/2016)
Assessment year : 2011-12

M/s. Fidelity Business Services India Pvt. Ltd., Bengaluru-560071. PAN:AAACF 6175 E	Vs.	Assistant Commissioner of Income Tax, Circle 3(1)(1), Bangalore.
CROSS OBJECTOR		RESPONDENT
Revenue by	:	Shri. Muzaffar Hussain, CIT (DR)(ITAT), Bengaluru
Assessee by	:	Shri. G. C. Srivastava, Shri. Uma Shankar, Advocates
Date of hearing	:	13.02.2020
Date of Pronouncement	:	13.03.2020

ORDER

PER SHRI A.K.GARODIA, AM

This appeal is filed by the Revenue and the C. O. is filed by the assessee and these are directed against the Assessment Order dated 29.01.2016 for Assessment Year 2011-12 passed by the AO under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 as per the directions of DRP.

2. The grounds raised by the Revenue in its appeal are as under:

- i) The directions of the Dispute Resolution Panel are opposed to law and facts of the case*
- ii) Whether the Hon'ble DRP has erred on fact in deleting M/s E-infochips as a comparable on the ground that it fails the filter of service income less than 75% of the sales, when the said company has service income being 100% of the sales.*
- iii) Whether the Hon'ble DRP has erred on fact in deleting M/s Persistent Systems Ltd. as a comparable on the ground that it follows different business model, when the said company has functionally similar activity.*
- iv) Whether the Hon'ble DRP has erred in interpreting that the company is into outsourcing of services while the Annual report states that the company is engaged in developing software products which have been outsourced by clients.*
- v) Whether the Hon'ble DRP has erred on fact in deleting M/s Persistent Systems Ltd. as a comparable, when the said company's employee cost is 55.32% of turnover evidencing clearly that its services are rendered in house and not outsourced.*
- vi) For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.*
- vii) The appellant craves leave to add, alter, amend and /or delete any of the grounds mentioned above.*

3. The assessee has filed revised grounds containing 14 grounds but in the course of hearing, it was submitted by learned AR of the assessee that only ground Nos.6, 8 and 11 are pressed and the remaining grounds of the CO are not pressed. Accordingly, we reproduce ground Nos.6, 8 and 11 as per the revised grounds of CO filed by the assessee and the remaining grounds of the CO are rejected as not pressed. These 3 grounds of CO i.e. ground Nos.6, 8 and 11 are as under:

6. *That the learned AO and the DRP erred in upholding the learned TPO's approach of including **Acropetal Technologies Ltd** as a comparable to the Appellant on the ground that it is functionally comparable, whereas this company should have been excluded on the grounds that it fails the employee cost filter applied by the learned TPO and is functionally dissimilar to the Appellant.*

(Corresponding to Original Ground of Cross Objection 7)

8. *That the learned AO and the DRP erred in upholding the learned TPO's approach of including **Infosys Limited** as a comparable to the Appellant on the ground that it is functionally comparable, whereas this company should have been excluded on the grounds that it has diversified operations , non-availability of segmental data, large scale operations, significant brand value and presence of **IPR** .*

(Corresponding to Original Ground of Cross Objection 7)

11. *That the learned AO and the DRP erred in upholding the learned TPO's approach of including **Sasken Communication Technologies Limited** as a comparable to the Appellant on the ground that it is functionally comparable, whereas this company should have been excluded on the grounds that it is functionally dissimilar to the Appellant.*

(Corresponding to Original Ground of Cross Objection 7)

4. In the course of hearing, it was submitted by learned AR of the assessee that as per the appeal of the Revenue, the Revenue is objecting regarding exclusion of 2 comparables by DRP i.e., M/s. E-Infochips Ltd. and M/s. Persistent Systems Ltd. As per the 3 grounds of the CO being pressed by the assessee, the assessee is requesting for exclusion of 3 more comparables i.e., M/s. Acropetal Technologies Ltd., M/s. Infosys Ltd., and M/s. Sasken Communication Technologies Ltd. He submitted a chart and pointed out that his arguments about the exclusion of all these 5 comparables i.e., 2 comparables already excluded by DRP for

which the Revenue is in appeal and 3 comparables which are not excluded by DRP for which the assessee is in appeal are contained in this chart. He placed reliance on the Tribunal order rendered in the case of M/s. Salesforce.com India P. Ltd. Vs. DCIT in IT(TP)A No.697/Bang/2016 dated 21.12.2018. He submitted a copy of this Tribunal order and pointed out that the relevant page Nos. of this Tribunal order are given by the assessee in the chart filed by him. He pointed out that for exclusion of all these five comparables, pages 9 and 10 of this Tribunal order cited by him are relevant . He submitted that the Assessment Year in the present case of the assessee and in this Tribunal order is same i.e., Assessment Year 2011-12 and the functional profile is also same. Regarding functional profile of M/s. Salesforce.com India Pvt. Ltd., Vs. DCIT (supra), it is submitted that the Tribunal has noted on page No.4 of this Tribunal order that M/s. Salesforce.com India Pvt. Ltd., (SIPL) provides marketing and after sales support services for Salesforce.com Singapore Pte Ltd (SSPL) and on the same page, it is also noted by the Tribunal that during Financial Year 2010-11 i.e., relevant to Assessment Year 2011-12, SIPL also started rendering Contract Software R & D Services to its AE and worked out the ALP of this segment. The TPO selected 13 comparables including these 5 comparables for which we have to decide as to whether the same should be excluded or not i.e., (1) M/s. Acropetal Technologies Ltd., (2) E-Infochips Ltd., (3)Infosys Ltd., (4) Persistent Systems Ltd., (5) M/s.

Sasken Communication Technologies Ltd. and these 5 comparables along with 6th comparable i.e., M/s. Tata Elxsi Ltd., were excluded by the Tribunal in that case as per para No.11 of this Tribunal order. Learned DR of the Revenue supported the order of DRP and AO regarding appeal of the assessee and he supported the draft Assessment Order passed by the AO with regard to the appeal filed by the Revenue.

5. We have considered the rival submissions. We have already seen that Assessment Year involved in the present case and in the case of SIPL (supra) is same and the functional profile is also same because both are engaged in providing software development services. Now we reproduce paras 7 to 11 of this Tribunal order as per which these comparables were excluded by the Tribunal in that case by following another Tribunal order rendered in the case of M/s. AT & T Global Business India Pvt. Ltd., in IT(TP)A No.190/Bang/2016 dated 13.01.2016 for the same Assessment Year i.e., Assessment Year 2011-12:

7. Now, we examine and decide about three inclusions being requested by the assessee. Regarding Intertec Communications Technologies Ltd., DRP has followed a tribunal order rendered in the case of Navisite India Pvt. Ltd. in ITA No. 5329/D/2012 and a judgment of Hon'ble Delhi high Court rendered in the case of Rampgreen Solutions Pvt. Ltd. in ITA 102/2015. Learned AR of the assessee could not point out any difference in facts and therefore, exclusion of this company by TPO and DRP is approved.

8. Regarding MYM Technologies Ltd., we find that this comparable was excluded on this basis that data for current financial year are not available. Before us, it was submitted that page 2244 of (ARC) is relevant. We find that on this page, Directors Report is available containing brief Financial result for

12 months ending on 30.06.2010 and 9 months ending on 31.03.2011 but in this ARC, the corresponding audited Balance Sheet and P & L Account are not available. Hence, we find no merit in the assessee's request for inclusion of this comparable.

9. Regarding FCS Software Solutions Ltd., it is seen that it is noted by DRP on page 8 of its directions that revenue of Rs. 115.99 Crores has been shown from Software Development and other services and there is no segmental information available in respect of Software Development. It is also noted by DRP that it is not possible to ascertain as to whether this company passes employees cost filter or not. It is also noted that this company is predominantly engaged in onsite development of software. Learned AR of the assessee has placed reliance on the tribunal order rendered in the case of Marvell India Pvt. Ltd. (Supra) and our attention was drawn to page 2466 of case Law Compendium. In this tribunal order, only this aspect was considered and decided that only for this reason that working capital adjustment is high, a comparable cannot be excluded but there is no discussion or decision on this aspect that there is no segmental information available and regarding employees cost filter and onsite revenue filter etc. In the present case, TPO and DRP's objections include these aspects also in addition to high working capital adjustment. On these other aspects, this tribunal order does not render any help to the assessee. There is no other argument raised in respect of these other aspects. Hence, we decline to interfere in the direction of DRP in respect of this comparable. The request of the assessee for inclusion of all three comparables is rejected.

10. In the appeal of the revenue, there is one issue in respect of corporate tax regarding reduction of some expenses from total turnover also while computing deduction u/s 10A by following the judgment of Hon'ble Karnataka High Court rendered in the case of Tata Elxsi Ltd., 349 ITR 98. This judgment is now approved by Hon'ble apex court also. Hence, we find no infirmity in the directions of DRP on this issue.

11. In the result, both the appeals of the assessee and revenue are partly allowed in the terms indicated above.

6. By respectfully following this Tribunal order, we hold that these 5 comparables are not good comparables for the present case and out of the same, 2 comparables are already excluded by DRP i.e.,

M/s. E-Infochips Ltd., and M/s. Persistent Systems Pvt. Ltd. and we confirm their exclusion and the remaining 3 comparables i.e., M/s. Acropetal Technologies Ltd., M/s. Infosys Ltd., and M/s. Sasken Communication Technologies Ltd., are also excluded and the AO/TPO are directed to exclude these 5 comparables from the final list of comparables.

7. In the result, Revenue's appeal is dismissed and the assessee's appeal is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

(BEENA PILLAI)
Judicial Member

Bangalore,

Dated: March, 2020.

/NS/*

(A.K. GARODIA)
Accountant Member

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|---------------|-------------------------|---------------|
| 1. Appellants | 2. Respondent | 3. CIT |
| 4. CIT(A) | 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.