

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "K" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 7725/MUM/2012  
Assessment Year: 2008-09**

Dimension Data India  
(Formerly Datacraft India  
Ltd.) 2<sup>nd</sup> Floor, Trade View  
Building, Pandurang Bhudkar  
Marg, Kamala Mills  
Compound, Lower Parel,  
Mumbai-400013.  
**PAN No. AAACD2145G**  
**Appellant**

The Additional Commissioner of  
Income Tax-2(1), Mumbai.  
**Respondent**

Assessee by : Mr. Vijay Mehta/ Anuj Kisnadwala, AR  
Revenue by : Mr. Michael Jerald, DR

Last Date of Hearing : 06/03/2020  
Date of Pronouncement : 27/07/2020

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2008-09. The appeal is directed against the order dated 30.10.2012 passed by the Addl. Commissioner of Income Tax-2(1), Mumbai (hereinafter the 'AO') u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

1. On facts and circumstance of the case and in law, the AO grossly erred, in conformity with the directions of Dispute Resolution Panel ('DRP'), Mumbai u/s 144C(13) of the

Act, in making the transfer pricing adjustment of Rs.0.66 crores in respect of technical support services (I.T. enabled services) rendered by the appellant to its overseas associated enterprises. The Appellant submits that no transfer pricing adjustment is warranted in its case and wishes to raise the following grounds of appeal, which are without prejudice to each other :

- 1.1. The DRP/Transfer Pricing Officer ("TPO")/ AO erred in law and in facts by rejecting without giving specific and cogent reasons the search procedure undertaken by the appellant for finding out the comparable companies to benchmark the said technical support services revenue. Further, the fresh search conducted by the TPO itself was ad-hoc, selective and arbitrary without any reasonable and scientific basis.
- 1.2. The DRP/TPO/AO erred in not considering the analysis submitted by the appellant as regards the comparability or otherwise of few of the so called comparable companies selected by the TPO with respect to the following:
  - Companies that are functionally different ;
  - Companies with high profit margins having abnormal operating conditions during the year under consideration ;
  - Companies with related party transaction.
- 1.3. The DRP/TPO/AO in case of one of the alleged comparable companies chosen by the TPO viz. Mold Tech Technologies Ltd. erred in treatment of 'provision of derivative loss' as non-recurring expense in computing the operating margins of the said comparable.
- 1.4. The DRP/TPO/AO erred in applying a turnover filter of Rs.1 crore to Rs.60 crore which itself is ad-hoc, selective and arbitrary without any reasonable & scientific basis. Also, no opportunity of being heard was given to the appellant after modifying the set of comparable companies mentioned in the show-cause notice issued by the TPO.
- 1.5. The DRP/TPO/AO erred in not appreciating the need for adjustment required to the margins of comparable companies on account of differences in various factors such as differences in functions performed, risk assumed, accounting policies, etc.

1.6. The DRP/TPO/AO erred in not considering the fact that the said technical support services revenue accounts for less than 2% of the total revenue of the appellant company and as such the profits of the appellant company is not driven to a great extent by the international transactions with its associated enterprises.

2.1 On the facts and circumstances of the case and in law, the AO has erred in making further addition under section 14A to the extent of Rs.17,48,571.

2.2 The AO has erred in applying rule 8D without pointing out any defect in the correctness of disallowance u/s 14A offered by the Appellant having regard to the accounts of the assessee.

2.3 Without prejudice to the above ground, the AO has erred in incorrectly applying the provision of rule 8D by not excluding the investments which was producing partly taxable income and partly exempt income.

2.4 In view of the above, the additional disallowance of Rs.17,48,571/- made u/s 14A r.w. Rule 8D be deleted.

3. Briefly stated, the facts of the case are that the appellant filed its return of income for the assessment year (AY) 2008-09 on 27.09.2008 showing income of Rs.56,13,59,411/- under the normal provisions and Rs.54,94,24,812/- u/s 115JB of the Act. It is engaged in trading of the networking products and in providing services such as training, maintenance, installation, consultancy, facility management, outsourcing and systems integration in the area of information communication systems and computer networking and computer hardware and software.

The appellant is a part of Datacraft group which is engaged in providing IT services and solution that helps clients plan, build, support and manage their IT infrastructures.

During the year under consideration, the appellant reported various international transactions which were categorized into distribution segment (Rs.56.97 crore) and technical support service function (Rs.6.15 crore). The subject matter of objection before the DRP related to technical support service segment. The international transaction reported in Form 3CEB was provision of technical support services for Rs.6,14,65,690/-. As per the agreement, the appellant was remunerated at cost plus 10%. It adopted Transactional Net Margin Method (TNMM) as the most appropriate method with OP/Cost as the profit level indicator (PLI) and with the assessee as the tested party. The appellant had selected 6 companies as comparable and found the arithmetic mean of the comparables to be 14.27% and therefore, it was stated that it had *suo motu* offered additional 5% so that its cost plus mark-up is 15%. The *suo motu* adjustment made was Rs.27,32,259/-. It was stated that the margin of cost plus 15% meets the arm's length price (ALP) requirement.

However, the TPO determined the ALP margin at 29.92% based on the arithmetical mean of the following 14 comparables:

Sr. No.	Company Name	Turnover (In crores)	OP to TC (%)
1.	Accentia Technologies Ltd.	40.72	41.76
2.	Acropetal Technologies (seg)	20.80	35.30
3.	Asit C. Mehta Financial services Ltd.	4.24	9.42
4.	Caliber Point Business Solutions Ltd.	53.13	10.97
5.	Coral Hubs Ltd. (formerly Vishal Information Technologies Ltd.)	38.08	50.68
6.	Cosmic Global Ltd.	5.87	23.30
7.	Cross Domain Solutions Ltd.	26.60	26.96

8.	Datamatics Financial Services Ltd. (seg)	6.19	34.87
9.	E4e Healthcare Solutions	25.82	16.72
10.	Genesys International Corporation Ltd.	47.19	47.40
11.	IServices India Pvt. Ltd.	13.4	9.58
12.	Mold-Tek Technologies Ltd.	17.85	96.66
13.	R Systems International Ltd. (Seg.)	21.33	4.30
14.	Spanco Ltd. (Seg.)	41.7	11.04
	<b>Average</b>		<b>29.92%</b>

Thus the TPO by determining the margin at 29.92% based on the arithmetical mean of above 14 companies, determined the ALP at Rs.7,25,96,567/-, making an adjustment of Rs.83,98,618/- after considering the *suo motu* adjustment made by the appellant of Rs.27,32,259/-.

The appellant objected the above adjustment before the DRP. We find that *vide* order dated 07.09.2012, the DRP directed the AO to recompute the adjustment on the basis of the following 12 comparables :

Sr. No.	Company Name	NCP %
1.	Accentia Technologies Ltd.	41.76
2.	Acropetal Technologies (seg)	35.30
3.	Asit C. Mehta Financial services Ltd.	9.42
4.	Caliber Point Business Solutions Ltd.	10.97
5.	Cosmic Global Ltd.	23.30
6.	Cross Domain Solutions Ltd.	26.96

7.	Datamatics Financial Services Ltd. (seg)	34.87
8.	E4e Healthcare Solutions	16.72
9.	IServices India Pvt. Ltd.	9.58
10.	Mold-Tek Technologies Ltd.  Subject to the observation that if satisfies the filter export earnings >75%	96.66
11.	R Systems International Ltd. (Seg.)	4.30
12.	Spanco Ltd. (Seg.)	11.04

Based on the above direction of the DRP, the AO reduced the adjustment from Rs.83,98,618/- to Rs.66,21,701/-.

4. Before us, the Ld. counsel for the appellant submits that Accentia Technologies Ltd. and Cosmic Global Ltd. are to be excluded from the list of comparables selected by the AO in view of the decision of the order of the Hon'ble Bombay High Court in the case of *PCIT v. Aptara Technology (P.) Ltd.* for AY 2008-09 reported in 303 CTR 805.

Further, it is stated by him that Accentia Technologies Ltd., Mold Tek Technologies Ltd. and Acropetal Technologies Ltd. are to be excluded from the list of comparables selected by the AO in view of the order of the Tribunal in *Goldman Sachs (I) Securities P. Ltd. v. Addl. CIT* (ITA No. 6912/Mum/2012) dated 22.07.2016 for AY 2008-09 and *Capital India Pvt. Ltd. v. DCIT* (ITA No. 7674/Mum/2012) dated 15.01.2019 for AY 2008-09.

In respect of the another comparable M/s Datamatics Financial Services Ltd., the Ld. counsel refers to the order of the Tribunal in *M/s Datamatics*

*Financial Services Ltd. v. DCIT* (ITA No. 1469/Mum/2012) for AY 2008-09 dated 26.06.2013 and submits that in the said case, the assessee (Datamatics) had not properly apportioned common expenses between the eligible and ineligible units. The Tribunal has held that the taxing authorities have rightly apportioned expenses amounting to Rs.13.28 lakhs as not eligible for deduction u/s 10A of the Act. Thus it is submitted by the Ld. counsel that M/s Datamatics Financial Services Ltd. be rejected as a comparable to the present appellant.

5. On the other hand, the Ld. Departmental Representative (DR) submits that in the case of Accentia Technologies Ltd. (Seg.), the company is mainly engaged in providing medical transcription, billing and coding services, which are clearly IT enabled services, along with software development and implementation services. About 80% of the revenue during the year has come from medical transcription, coding and billing services. Therefore, it is stated by him that the company can be considered as predominantly an IT enabled service provider.

Referring to Acropetal Technologies (Seg.), it is explained by the Ld. DR that the company is engaged in providing engineering services and has been classified as ITeS and therefore, it is comparable to the appellant.

Referring to Cosmic Global Ltd., the Ld. DR submits that this comparable was accepted by both the appellant and the Revenue before the DRP.

Referring to Datamatics Financial Services Ltd. (Seg.), it is stated that the appellant did not raise any specific objection as to the functional comparability of this company before the DRP.

In respect of Mold Tek Technologies Ltd., the Ld. DR submits that as per the annual report, the revenue generated is from ITeS segment and there is no direct bearing on the profit due to demerger of the plastic division. It is stated that the amalgamation of Tech-men Tool Pvt. Ltd. has taken effect from October 2006 and has not impacted the operation of the company. Further, it is explained by him that the DRP has rightly rejected the contentions of the appellant that foreign exchange loss (derivative loss) should be considered as operating in nature, as these expenses are not incurred on account of the functional operations of the company.

6. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In *Aptara Technology (P.) Ltd.* (supra), the Hon'ble Bombay High Court has held in case of *Accentia Technologies Ltd.* that the Tribunal has after rendering a finding of fact that the activities of the tested party and comparable are functionally different, also records a finding of fact that extraordinary event such as merger/amalgamation would have an impact/effect on the profitability of M/s *Accentia Technologies Ltd.*; therefore, on both the above grounds, it was held to be not a comparable to the transaction of the respondent (*Aptara*) with its AE.

Further, in *Aptara Technology (P.) Ltd.* (supra) by the Hon'ble Bombay High Court has confirmed the order of the Tribunal excluding *Cosmic Global Ltd.* as comparable after rendering a finding that the business model adopted by *Cosmic Global Ltd.* was outsourcing business model as against respondent

(Aptara) having an in-house business model and thus the profit margin would necessarily not be comparable.

In *Goldman Sachs (I) Securities P. Ltd.* (supra), the Tribunal for AY 2008-09 has held in the case of Mold Tek Technologies Ltd. as under :

“53. We have considered the submissions of the parties and perused the material available on record. We find that the Tribunal, Mumbai Special Bench in *Maersk Global Centres India Pvt. Ltd.* (supra) while specifically dealing with the comparability of the aforesaid company to a ITES service provider has held that since the company is engaged in providing engineering design service which is a high end service in the nature of KPO it cannot be treated as comparable. The ratio laid down by the Special Bench as aforesaid has been consistently followed in the other decisions of the Tribunal cited by the learned Sr. Counsel wherein it has been held that the company cannot be treated as comparable as it is involved in providing KPO service which is functionally different from low end ITES service provider. Further, it is seen that in case of *Symphony Marketing Solutions India Pvt. Ltd.* (supra) this company has been rejected on the ground of more than 25% RPT as well as merger and acquisitions made during the relevant previous year. In view of the aforesaid decisions of the Tribunal including the Special Bench decision, we are persuaded to hold that this company cannot be treated as comparable to the assessee. Accordingly, we direct the Assessing Officer / Transfer Pricing Officer to exclude the same from the list of comparables.”

In the above order, the Tribunal has also considered the issue of comparability of *Acropetal Technologies Ltd.* which is produced below:

“67. We have considered the submissions of the parties and perused the material available on record. We have noted that the Tribunal, Bangalore Bench, in *Symphony Marketing Solutions India Pvt. Ltd.* (supra), after perusing the annual report of this company found that major source of income is from providing

engineering design service which is not comparable to ITES / BPO functions. The Bench observed, provision of engineering design service is a high end service amongst the BPO which requires high skill, hence, it can be regarded as KPO service. The bench, therefore, excluded the company as a comparable to ITES / BPO segment. The Tribunal, Hyderabad Bench, in M/s. Market Tools Research Pvt. Ltd. v/s DCIT, following co-ordinate bench decision in Symphony Marketing Solutions India Pvt. Ltd. (supra) has also held that the company cannot be treated as comparable to a company performing ITES / BPO functions. As these decisions rendered by the Tribunal are for the very same assessment year, respectfully following the same, we direct exclusion of this company from the list of comparables.”

Similar view has been taken by ITAT ‘J’ Bench Mumbai in *Capital India Pvt. Ltd.* (supra) in respect of Mold Tek Technologies Ltd. and Acropetal Technologies Ltd..

Then we decide the issue of comparability of M/s Datamatics Financial Services Ltd. with the appellant. A perusal of the order dated 26.06.2013 passed by the Tribunal in the case of the above company for the AY 2008-09 clearly indicates that the assessee (M/s Datamatics Financial Services Ltd.) had not properly apportioned common expenses between the eligible and in eligible units. The Tribunal has confirmed the order of the taxing authorities in respect of apportionment of expenses or treatment of other income amounting to Rs.13.28 lakhs as not eligible for deduction u/s 10A of the Act. Thus M/s Datamatics Financial Services cannot be considered as a comparable to the appellant-company.

We may again mention here that the judgment of the Hon’ble Bombay High Court in *Aptara Technology (P.) Ltd.* and the order of the Tribunal in

*Goldman Sachs (I) Securities P. Ltd.* and *Capital India Pvt. Ltd.* are for the same assessment year i.e. 2008-09.

Since *Accentia Technologies Ltd.*, *Cosmic Global Ltd.*, *Mold Tek Technologies Ltd.*, *Acropetal Technologies Ltd.* and *M/s Datamatics Financial Services P. Ltd.* are excluded by us, we direct the AO to compute the arithmetic mean margin of the remaining comparables and pass consequential order. Needless to say, the AO would give a reasonable opportunity of being heard to the appellant before passing the order.

7. The next issue relates to disallowance of Rs.17,48,571/- made by the AO u/s 14A r.w. Rule 8D.

In the assessment order dated 30.10.2012, the AO has mentioned that the assessee has received dividend of Rs.2,94,47,744/- from its investment in mutual funds, which is claimed exempt. Further, the AO has observed as under:

“It is seen that the assessee whereas showing gross receipts as per P&L Account at Rs.325.03 crores, has shown expenditure, at Rs.269.54 crores. A look at the operating and other expenses details show that the assessee has incurred expenditure amounting to Rs.77.51 crores under various sub-heads, which include items such as rent, rates and taxes, repairs & maintenance, salaries & bonus, gratuities, professional fee, telephone and similar expenses. Thus, the assessee's logic that it has not incurred any expenditure whatsoever for earning this exempt income of Rs.2,94,47,744/- is not acceptable.”

Thereafter, he has computed the disallowance at Rs.17,48,571/-.

8. Before us, the Ld. counsel submits that the AO has not recorded his finding with the correctness of the claim of the assessee as per Rule 8D and therefore, the disallowance of Rs.17,48,571/- be deleted. It is further stated by him that the appellant has *suo motu* made a disallowance of Rs.6,00,000/- u/s 14A which should be accepted.

On the other hand, the Ld. DR supports the order passed by the AO.

9. We have heard the rival submissions and perused the relevant materials on record. In the case of *Maxopp Investment Ltd. v. CIT* (2018) 91 taxmann.com 154 (SC), the Hon'ble Supreme Court has held that :

“41. Having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, we also make it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the kind of the assessee, *suo motu* disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment. In that eventuality, it will have to record its satisfaction to this effect. Further, while recording such a satisfaction, nature of loan taken by the assessee for purchasing the shares/making the investment in shares is to be examined by the AO.”

In the instant case the AO has failed to record even elementary satisfaction that having record to the contentions of the appellant, *suo motu* disallowance of Rs.6,00,000/- u/s 14A was not correct. Therefore, following the above decision of the Hon'ble Supreme Court, we delete the disallowance of Rs.17,48,571/- made by the AO.

10. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on

06.03.2020, this order thereon is being pronounced today, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, a nationwide lockdown was imposed for 21 days to prevent the spread of Covid-19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid-19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial work all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and *vide* order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this

Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".

The Hon'ble Bombay High Court itself has, vide judgment dated 15<sup>th</sup> April 2020, held that "while calculating the time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly".

Viewed thus, the exception to 90 day time limit for pronouncement of orders inherent in Rule 34(5)(c) clearly comes into play in the present case.

11. In the result, the appeal filed by the assessee is allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;  
Dated: 27/07/2020  
Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**