

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT
MEMBER**

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.490/Bang/2017

Assessment Year : 2012-13

M/s IMS Health Analytics Services Pvt. Ltd., (IMS Health Technology Solutions India Pvt. Ltd., merged with M/s IMS Health Analytics Services Pvt. Ltd.,) Embassy Tech Square, Omega, Embassy Techsquare, Marathahalli, Sarjapur Ring Road, Kadubeesanahalli, Bengaluru-560 103. PAN : AABCD 9297 J	Vs.	The Asst. Commissioner of Income Tax, Circle-3(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R Vasudevan, Advocate
Respondent by	:	Ms. Neera Malhotra, CIT (DR)

Date of Hearing	:	23-06-2020
Date of Pronouncement	:	04-09-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 29/12/2016 passed by Ld.AO under section 143(3)

r.w.s 144C(13) of the Act, for assessment year 2012-13, on following revised ground of appeal:

“The grounds mentioned hereinafter are without prejudice to one another.

1. The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable Dispute Resolution Panel ("Hon'ble DRP") grossly erred in adjusting the transfer price by INR 3,55,53,274/- with respect to the international transactions rendered by the taxpayer u/s 92CA of the Income-tax Act, 1961.

2. The learned AU/learned TPO/Hon'ble DRP erred in rejecting the TP documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.

3. The learned AU/learned TPO/Hon'ble DRP erred in rejecting comparability analysis carried in the TP documentation and in conducting a fresh comparability analysis by introducing various filters while determining the Arm's Length Price ("ALP").

4. The learned AU/learned TPO/Hon'ble DRP erred in not considering the previous two years financial data of the comparable companies while determining the ALP.

5. The learned AO/learned TPO/Hon'ble DRP erred in applying different financial year ending filter while selecting the comparable companies, thereby not considering the fact that the relevant data for the concerned financial year could be deduced from the corresponding financials

6. The learned AU/learned TPO/Hon'ble DRP erred in applying export earning filter of 75% instead of 25% of the total sales, leading to a narrower comparable set.

7. The learned AU/learned TPO/Hon'ble DRP erred in applying related party filter of 25% without giving any cogent reason for doing so.

8. The learned AU/learned TPO/Hon'ble DRP erred in not applying the upper limit on turnover while selecting the comparable companies.

9. The learned AO/learned TPO/Hon'ble DRP erred in not appreciating the fact that since the lower limit on turnover has already been applied mutually by the Appellant as well as the learned TPO while carrying out their respective comparability analysis, upper limit on turnover should also have been provided based on the similar principle.

10. Hon'ble DRP has given conflicting directions while adjudicating on the accept/reject of the comparable companies, being, Datamatics Global Services Ltd., Genesys International Services Ltd., ICRA Techno Analytics Ltd., Infosys Ltd., Sasken Communication Technologies Ltd. and Spry Resources India Pvt. Ltd.. In doing so, the Hon'ble DRP has erred in:

a. Not appreciating the fact that ALP can be computed even on the basis on a smaller set of comparables.

b. Holding that a larger set of comparables takes care of the differences between the comparables as compared to a smaller set of the comparables selected based on strict comparability

c. Holding that the companies selected by the learned TPO are appropriate comparables for determination of the ALP.

11. The learned AO/learned TPO/Hon'ble DRP has grossly erred in not rejecting the following companies the list of comparable companies:

- Larsen and Toubro Infotech Ltd.*
- Persistent Systems Ltd.*
- R S Software Ltd.*
- Mindtree Ltd.*

12. The learned AO/learned TPO/Hon'ble DRP has grossly erred in rejecting companies that ought to have been included as comparables:

- Acropetal Technologies Ltd.*
- Akshay Software Technologies Pvt. Ltd.*
- CAT Technologies Ltd.*
- Helios & Matheson Information Technology Ltd.*
- Maveric Systems Ltd.*
- Silverline Technologies Ltd.*
- Cherrytec Intcllisolve Pvt. Ltd.*
- Technosoft Engineering Projects Ltd.*
- KALS Information Systems Ltd.*
- Evoke Technologies Pvt. Ltd.*

13. The learned AO/learned TPO/Hon'ble DRP has erred in making the following errors in the computation of working capital adjustment:

a. by not providing the basis of computation of margin of the Appellant

b. in considering the wrong SBI PLR while computing the working capital adjustment

14. The Hon'ble DRP erred in directing the learned AO to consider forex gain or loss as operating in nature while computing the margin of the Appellant.

15. The learned AO/learned TPO/Hon'ble DRP erred in not allowing appropriate adjustment towards to the risk differential existing between the Appellant vis-à-vis independent comparable companies.

16. The learned AO/learned TPO/Hon'ble DRP has erred in levying interest under section 234B of the Act.

17. The learned AO/learned TPO/Hon'ble DRP has erred in levying interest under section 234C of the Act.

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

Brief facts of the case are as under:

2. Assessee is a company, engaged in the business of rendering software development services. It filed its return of income for year under consideration on 28/11/2012 declaring total income of Rs.9,12,52,550/-. The case was selected scrutiny and notice under section 143(2) was issued to assessee in response to which representative of assessee appeared before Ld.AO and filed requisite details as called for.

3. Ld.AO observed that, assessee had international transaction exceeding Rs.15crore, and therefore, the issue was referred to transfer pricing officer for determining arms length price of the international transaction.

4. On receipt of reference under section 9CA, Ld.TPO issued notice to assessee calling upon to file the economic analysis of international transaction entered into by assessee with its associated enterprises in Form 3 CEB.

Ld.TPO observed that, assessee has entered into following international transaction:

International Transaction	Value (INR)
Income from software development services	632,318,992
Payment for Administrative support services	8,803,314
Payment for Management support services	8,556,425
Reimbursement of expenses	10,625,194
Recovery of expenses	14,678,478
Receivables	95,221,314
Payables	4,180,132

5. Ld.TPO noted that, assessee earned margin of 13.38% by using OP/OC as PLI and TNMM as most appropriate method. It was noted that in TP documentation, assessee used 9 comparables with average arithmetic mean of 11.22% and thereby held transaction to be at arms length.

6. Ld.TPO disagreed with comparables adopted by assessee and shortlisted set of following 10 comparables having average margin of 22.63%.

Sl. No.	Company Name	Unadjusted Margins FY 2011-12
1	Datamatics Global Services Ltd.	14.57%
2	Genesys International Corpn. Ltd.	30.09%
3	ICRA Techno Analytics Ltd.	17.24%
4	Infosys Ltd.	43.10%
5	Larsen & Toubro Infotech Ltd.	25.47%
6	Mindtree Ltd.	15.01%
7	Persistent Systems Ltd.	27.20%
8	R S Software (India) Ltd.	15.34%
9	Sasken Communication Technologies Ltd.	12.15%
10	Spry Resources India Pvt Ltd.	26.18%
	AVERAGE	22.63%

7. Ld.TPO thus computed shortfall being, adjustment under section 92CA amounting to Rs.3,55,53,274/-.

8. Aggrieved by proposed adjustment, assessee raised objections before DRP. DRP in para 2.9, 2.10, 2.11, 2.12, 2.15, 2.16 directed Ld.AO to exclude Datamatics Global Services Ltd, Genesis international Corporation Ltd, ICRA Techno analytics Ltd, Infosys Ltd, Sasken Communications Technologies Ltd, Spry Resources India Ltd., from final list of

comparables. However, in the conclusion DRP ultimately held that a larger set of comparable takes care of the differences between the comparables as compared to be smaller set selected based on strict comparability and accordingly held the comparables selected by Ld.TPO to be appropriate.

9. Ld.AO on receipt of DRP directions passed final assessment order making transfer pricing addition in hands of assessee at Rs.3,55,53,274/-.

Aggrieved by order of Ld.AO, assessee is in appeal before us now.

10. At the outset, Ld.AR submitted that, assessee wishes to restrict its argument in respect of following 5 comparables raised in ground 10 and ground 11 for exclusion:

Genesis international services Ltd

ICRA Techno Analytics Ltd

Infosys Ltd

Larsen and Toubro Infotech Ltd

Persistent Systems Ltd.

11. He submitted that, in the event these comparables are excluded assessee is well within the margin of +/- 5% and no adjustment would required to be made in the hands of assessee.

12. Accordingly, all other comparables mentioned in these grounds, along with other grounds, stands dismissed as not argued. Assessee is however granted liberty to contest these grounds/comparables in appropriate years.

Ld.AR submitted that, these comparables deserves to be excluded for being functionally different and/or having high turnover.

13. Before we undertake comparability analysis of these Ltd comparables with assessee, it is *sine qua non* to understand functions performed by assessee under this segment.

Functions:

14. Ld.TPO has observed that assessee has entered into an agreement with its AE for provision of software development services on a cost plus basis it is also been recorded by Ld.TPO that, as per agreement assessee is supposed to provide to its AE's with services in the nature of customised server software development and testing services as requested by the AE group. Ld.TPO noted that, assessee operates in capacity of captive service provider. In TP study at page 694, it is noted that, assessee undertakes coding according to specifications provided by AE's and is responsible for initial unit test of modules developed by it to ensure that the activity undertaken meet the specifications requirements agreed. Further, it is also recorded that, AE is responsible for the final testing and quality control of final software module or solutions deliverable to the customer.

Assets:

14.1. Assets owned by assessee are only computer equipments and accessories, furniture fixtures office equipments another leasehold improvements. It is also been

noted that all intangible and non-routine assets are owned by the AE.

Risks:

14.2. It has been noted in TP study that all major risks are undertaken by a except for the foreign exchange fluctuation risk since assessee earns its revenue in foreign exchange rates.

TP documentation, thus characterises assessee is a captive service provider that assumes minimal risk associated with the business of providing software development services. This position has not been disputed by Ld.TPO

15. Based on above FAR analysis, we shall now analyse comparables alleged for exclusion and argued before us.

Ld.AR submitted that 5 comparables alleged by assessee for exclusion have been considered by Coordinate bench of this Tribunal in case of *AMD India Pvt. Ltd vs ITO* reported in (2020) 114 taxmann.com 703. He submitted that, assessee therein, has also been characterised to be rendering contract software development services to its AE. It has also been stated that, functional profile of assessee present appeal and that in decision cited by Ld.AR are same, and following is relevant observations therein:

“8. The learned counsel for the brought to our notice a decision of the ITAT Bangalore Bench in the case of CGI Information Systems & Management Consultants (P.) Ltd. v. Asstt. CIT [2018] 94 taxmann.com 97 wherein 4 out of the aforesaid five comparable companies viz., (a) Genesys International Corpn. Ltd. (b) Infosys Ltd., (c) Larsen and Toubro Infotech Ltd. and (d) Persistent Systems Ltd. were excluded by the ITAT. The functional profile of the Assessee in this appeal and that of the Assessee in the decision cited by the learned counsel for the Assessee is the

same. The following were the relevant observations of the Tribunal:—

"28. The learned counsel for the Assessee submitted before us that the comparability of the 3 companies out of the aforesaid 4 companies which the Assessee seeks to exclude from the list of comparable companies chosen by the TPO viz., Infosys Ltd., Larsen & Toubro Infotech Ltd. and Persistent Systems Ltd., were considered by the ITAT Delhi Bench in the case of Agilis Information Technologies India (P) Ltd. v. ACIT (2018) 89 taxmann.com 440 (Delhi-Trib.) for the same AY 2012-13. In this regard it was submitted that the functional profile of the Assessee is same as that of the Assessee in the case of Agilis Information Technologies India (P) Ltd., is identical in as much as the said company was also involved in providing SWD services to its AE and the TPO had chosen 16 comparable companies out of which 6 companies chosen by the TPO in the case of the Assessee for the purpose of comparability were the same. His submission was that the decision rendered by the Tribunal in the case of Agilis Information Technologies India (P) Ltd., (supra) would be equally applicable to the Assessee in the present case also. The learned DR submitted that the DRP in its directions has merely accepted with the reasoning of the TPO and therefore the issue of exclusion of these companies should be directed to be examined afresh by the DRP.

29. We have considered the rival submissions. In the case of Agilis Information Technologies India(P) Ltd., (supra), this Tribunal considered the comparability of the 3 companies which the Assessee seeks to exclude from the final list of comparable companies chosen by the TPO. The functional profile of the Assessee and that of the Assessee in the case of Agilis Technologies India (P) Ltd., is identical in as much as the said company was also involved in providing SWD services to its AE and the TPO had chosen some comparable companies which were also chosen by the TPO in the case of the Assessee for the purpose of comparability. In the aforesaid decision the Tribunal held on the comparability of the 3 companies which the Assessee seeks to exclude as follows:

(a) Infosys Ltd., was excluded from the list of comparable companies by following the decision of the Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies (2013) 36 taxmann.com 289 (Delhi). The discussion is contained in paragraphs 4.5 to 4.7 of the Tribunal's order. The

Tribunal accepted that Infosys Ltd. is a giant risk taking company and engaged in development and sale of software products and also owns intangible assets and therefore not comparable with a software development service provider such as the Assessee in that case.

(b) Larsen & Toubro Infotech Ltd., was excluded from the list of comparable companies by relying on the decision of the Delhi Bench of ITAT in the case of Saxo India (P) Ltd. v. ACIT (2016) 67 taxmann.com 155 (Del-Tri). The discussion is contained in paragraphs 4.8 to 4.10 of the Tribunal's order. The Tribunal held that L & T Infotech Ltd., was a software product company and segmental information on SWD services was not available. The Tribunal also noticed that the appeal filed by the revenue against the tribunal's order was dismissed by the Hon'ble Delhi High Court in ITA No.682/2016.

(c) Persistent Systems Ltd., was excluded from the list of comparable companies on the ground that this company was a software product company and segmental information on SWD services was not available. The Tribunal in coming to the above conclusion referred to the decision rendered by ITAT Delhi Bench in the case of Cash Edge India (P.) Ltd. v. ITO ITA No.64/Del/2015 order dated 23.9.2015 and the decision of Hon'ble Delhi High Court in the case of SaxoIndia Pvt. Ltd. (supra). The findings in this regard are contained in Paragraphs 4.14 to 4.16 of its order.

30. Respectfully following the decision of the Tribunal we hold that the aforesaid 3 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic mean of comparable companies for the purpose of comparison with the profit margins. In this regard we are also of the view that the plea of the learned DR for a remand of the issue to the DRP on the ground that the DRP has not given any reasons in its directions cannot be accepted. The DRP has endorsed the view of the TPO in its directions and therefore the reasons given by the TPO should be regarded as the conclusions of the DRP.

31. The learned DR next submitted that Genesys International Corporation Ltd., should be excluded from the list of comparable companies. The comparability of this company with the Assessee has been discussed by the TPO in page-11 of his order. The Assessee objected to inclusion of this company in the list of comparable companies for the reason that this company is functionally different and owns intangible assets which are peculiar only when the

Assessee owns software products. The objections of the Assessee are contained in its letter dated 22.12.2015 addressed to the TPO and in annexure-B to the said letter. The relevant portion of the objection is at page 711-713 of the Assessee's paper book. According to the Assessee this company is engaged in providing Geographical Information Services comprising of Photogrammetry, Remote Sensing, Cartography, Data Conversion, state of the art terrestrial and 3D geocontent including location based and other computer based related services. Page-38 of the Annual report 2012 containing the above description was brought to the notice of the TPO. Attention of the TPO was invited to the directors report to the shareholders at page ii of the annual report 2012, wherein the Directors have informed the shareholders that the company continued in its journey to be innovators and leaders in the fields of location base services related geo platforms and advanced survey techniques. There is no segmental reporting because it is stated in the annual report that this company is only in one segment viz., GIS based services and therefore there is no requirement of segmental reporting. It was also submitted that this company owns substantial intangibles equivalent to 10.42% of its total turnover.

32. The TPO however has regarded this company as a comparable company by observing that this company develops software for mapping and geospatial services and operates a few development centres in India. The company is predominantly into software development services. The intangibles in the possession of the company are only the GIS database which is only depreciation. It does not add significant value to the company.

33. The objections as put forth before the TPO were reiterated before the DRP. The DRP in paragraph 6.2.2 & 6.2.3 of its directions dealt with this issue as follows:

"6.2.2 The functions of the Assessee company have been examined in detail. A financial product on which the settlement system of bank runs is a real time system. It is very complex. Any bug or problem in it can crash the entire banking system of several nations. The Assessee's claim of providing only basis software services is rejected.

6.2.3 The Panel holds that the software for financial product is much more complex than a geospatial software. Therefore, the panel holds that the Genesys is a valid comparable."

34. *The learned counsel for the Assessee submitted that the DRP has completely proceeded on wrong facts which does not either emanate from the order of the TPO or the submissions of the Assessee. He reiterated submissions made before the TPO and DRP. The learned DR relied on the order of the DRP/TPO.*

35. *We have given a careful consideration to the rival submissions. It is clear from the material brought to the notice of the TPO by the Assessee that this company renders mapping and geospatial services. In rendering such services it develops software. But that does not mean that this company is in the business of software development. The business profile of this company as per the annual report does not show that this company is into software development service. The only line of business that this company carries on is rendering GIS based services and this is clear from the annual report which specifies that since the company carries on only one line of business viz., GIS based services there is no need to give any segmental results. In the circumstances, we are of the view that there is no basis for the TPO to conclude that this company is predominantly into software development services. The presence of intangible assets is indicative of the fact that this company is not in software development services business. The TPO has overlooked this aspect and proceeded on the basis that the presence of intangible assets would not be significant. Rule 10B(2) of the Income Tax Rules, 1962 (Rules) specifically provides that for the purposes of sub-rule (1) of Rule 10B, the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:—*

(a) the specific characteristics of the property transferred or services provided in either transaction;

(b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;

In the given facts and circumstances, we are of the view that Genesys International Corporation Ltd., cannot be considered as a comparable company and the said company should be excluded from the final list of comparable companies. We hold accordingly."

9. *Respectfully following the decision of the Tribunal we hold that the aforesaid 4 companies be excluded from the final list of comparable companies for the purpose of arriving at the arithmetic*

mean of comparable companies for the purpose of comparison with the profit margins.

10. As far as the comparable company ICRA Techno Analytics Ltd., is concerned the said company was excluded by the DRP on the ground of functional comparability. Besides the above, the related party transaction in the case of the aforesaid company was more than 25% as is evident from page 1129 & 1130 of Assessee's paper book containing the financial statement of this company from capitaline database, which details are extracted at page 863 of Assessee's paper book which is objections filed by the Assessee before the DRP. In the circumstances, this company has to be excluded from the list of comparable companies. We hold accordingly."

20. Respectfully following decision of this *Tribunal*, we hold that, aforesaid 5 comparables are to be excluded from finalist.

Accordingly, these grounds raised by assessee stands partly allowed.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 4th September, 2020.

Sd/-
(B. R. BASKARAN)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 4th September, 2020.
/Vms/*

Copy to:

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

By order

Assistant Registrar,
Income-Tax Appellate Tribunal.
Bangalore.

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-09-2020		Sr.PS
3.	Draft proposed & placed before the second member	-09-2020		JM/AM
4.	Draft discussed/approved by Second Member.	-09-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-09-2020		Sr.PS/PS
6.	Kept for pronouncement on	-09-2020		Sr.PS
7.	Date of uploading the order on Website	-09-2020		Sr.PS
8.	If not uploaded, furnish the reason	-09-2020		Sr.PS
9.	File sent to the Bench Clerk	-09-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS