

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE
BEFORE SHRI A.K GARODIA, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No.39/Bang/2016
Assessment Year : 2011-12

The Asst. Commissioner of Income-tax, Circle-1(1)(1), Bengaluru	Vs.	M/s Applied Materials India Pvt. Ltd., Unit-5, 3 rd Floor, Explorer Building, International Tech Park, Whitefiled Road, Bengaluru-560 066. PAN – AAECA 2635 C
APPELLANT		RESPONDENT

IT(TP)A No.17/Bang/2016
Assessment Year : 2011-12

M/s Applied Materials India Pvt. Ltd., Unit-5, 3 rd Floor, Explorer Building, International Tech Park, Whitefiled Road, Bengaluru-560 066. PAN – AAECA 2635 C	Vs.	The Asst. Commissioner of Income-tax, Circle-1(1)(1), Bengaluru
APPELLANT		RESPONDENT

Assessee by	:	Shri Pradeep Kumar, CIT
Revenue by	:	Shri T Suryanarayana, Advocate

Date of Hearing	:	23-09-2020
Date of Pronouncement	:	28-09-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of MP No.269/Bang/2017 filed by revenue in IT(TP)A No.39/Bang/2016.

2. On perusal of order dated 26/12/2017 passed in MP, we note that this *Tribunal* recalled its order dated 21/09/2016, for limited purposes of adjudicating Ground no.7 in IT(TP)A No.39/Bang/2016. Thus, in order dated 26/12/2017 passed in MP, this *Tribunal* observed as under:

“04. Having heard the parties, and order passed by the Tribunal, in our considered opinion the Tribunal has committed mistake apparent from the record as the Tribunal has not adjudicated the ground number 7, therefore we deem it appropriate to recall the decision for the limited purpose of adjudicating ground 7 of the Revenue’s appeal.”

3. Based on order passed in MP No.269/Bang/2017, Revenue Appeal and assessee are placed before this Bench. We note that no issues relating to assessee appeal in IT(TP)A No.17/Bang/2016 is a subject matter of issue in MP No.269/Bang/2017. Observations of this *Tribunal* in original order dated 21/09/2016 has been accepted by both sides and has attained finality. However, Assessee’s appeal has been placed before us along with Revenue appeal. In such circumstances, no interference is called for.

Accordingly, assessee’s appeal stands allowed as indicated in order dated 21/09/2016.

4. Vide order 26/12/2017 passed in MP No.269/Bang/2017, in Revenue Appeal Ground No.7 needs to be adjudicated that, reads as under:

7. The DRP erred in directing to exclude E-infochips Ltd., from the list of comparables holding that no segmental information is available and that it fails 75% service revenue filter, by not acknowledging the fact that the determination of ALP by carrying out comparability analysis of the comparable companies is an art and not exact science as no two companies are exactly same and also the DRP erred in applying the service revenue income filter by taking 'software service income' to turnover ratio rather than 'service income' to turnover ratio.

5. It has been alleged that, DRP excluded E-Infochips Ltd., on the ground of having service income less than 75% of sales, which is alleged to be contrary to observations of Ld.TPO.

6. Ld.CIT DR submitted in written submission that Ld.TPO while analysing comparables observed that, this company has revenue from software development up to 88%. He submitted that per contra, DRP observed that revenue earned by this company is less than 75%, and therefore cannot be included. He submitted that, basis of DRP to hold revenue is less than 75% has not been demonstrated and therefore needs to be reconsidered. Ld.CIT.DR placed reliance on decision of Ld.TPO.

7. Ld.AR placed reliance on decision of coordinate bench of this *Tribunal* in case of *Electronics for Imaging India Pvt.Ltd (supra)* wherein, E- Infochips Ltd is excluded for failing in service income filter. We have perused submissions advanced by both sides in light of records placed before us.

It is observed, that this *Tribunal* in case of *Autodesk India Pvt Ltd. vs ACIT (supra)* excluded E- Infochips Ltd., by following view taken by this *Tribunal* in case of *Comscop Network (India) Pvt. Ltd. vs ITO in IT (TP) A/Bang/2016* dated 22/02/17 wherein, this company was excluded for reason that, there is no segmental information regarding diverse functions performed by this company and that there was major fluctuation in its profits, which influenced turnover of this company. We also note that this *Tribunal* in case of *DCIT vs CGI Information Systems (supra)* had encountered identical situation for year under consideration. This *Tribunal* observed as under:

“24. As far as ground No. 4 raised by revenue is concerned, the said ground of appeal is weak and any event comparability of companies that were excluded by the DRP were on valid grounds contemplated by the relevant statutory provisions of the act and rules. As far as ground No. 5 in revenue’s appeal is concerned, the revenue seeks to challenge the exclusion of AE Infotech Ltd. On the ground that it failed direct software service income filter at 75%. At the outset, the assessee submits that E Infotech Ltd was excluded by the DRP on the ground that: (i) no segmental information is regarding its diverse functions is available; (ii) it failed the software service income filter and 75%; (iii) there were major fluctuations in profit and turnover every years which seems to be influenced by extraordinary/peculiar circumstances; and (iv) there is a presence of inventory (page 10 and 11 of the DRP’s directions). The revenue, in its appeal has challenged its exclusion only on the 2nd ground. In other words, the revenue has not challenged its exclusion on the other grounds stated hereinabove and thus its exclusion on these grounds have attained finality and cannot be disturbed by this Hon’ble Tribunal. Even otherwise, we are of the view that the DRP rightly arrived at the finding that companies software development service revenue for FY 2010-11 was less than 75% of its total operating revenue for the year. Thus the above action of the DRP in rejecting the above companies correct.”

8. From the above, it is observed by this *Tribunal* consistently in various decisions for A.Y: 2011-12 held that, this company does not satisfy service income filter being

75%. We therefore, do not see any reason to set aside this company to Ld.TPO.

9. Therefore, respectfully following view taken by coordinate bench of this *Tribunal* in *DCIT vs M/s CGI Information Systems and Management Consultations Pvt. Ltd., (supra)*, we direct Ld. TPO to exclude this company.

Accordingly this ground raised by revenue stands dismissed.

Order pronounced in the open court on Sept, 2020.

(A.K GARODIA)
Accountant Member

Bangalore,

Dated, the Sept, 2020.

/Vms/

(BEENA PILLAI)
Judicial Member

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	--		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