

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

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

IT(TP)A No.78/Bang/2017
(Assessment Year: 2012-13)

M/s. Zeomega Infotech Private Limited,
20-21, Rajalakshmi Plaza, Southend Road,
Basavanagudi, Bangalore-560 004
PAN AAACZ 1233F

....Appellant

Vs.

Assistant Commissioner of Income Tax,
Circle 7(2)(1), Bangalore.

.....Respondent.

Assessee By:	Shri Narendra Kumar Jain, Advocate.
Revenue By:	Shri Muzaffar Hussain, CIT (D.R)

Date of Hearing :	28.07.2020.
Date of Pronouncement :	07.08.2020.

ORDER

PER SHRI PAVAN KUMAR GADALE, JM :

The assessee has filed an appeal against the order passed under Section 143(3) r.w.s. 144C(13) in pursuance to the directions of the Dispute Resolution Panel (DRP) under Section 144C(5) of the Income Tax Act, 1961 dt.19.09.2016.

2. . At the time of hearing, the learned Authorized Representative submitted that he is pressing only Ground of appeal Nos.4(d) & 6 and sent email on the same day.

Accordingly, the other grounds of appeal are treated as not pressed and dismissed.

The effective grounds of appeal are as under:

“ 4(d) - Rejecting additional comparables proposed by the appellant without giving any cogent reasons and on unjustifiable grounds.

6. Granting TDS Credit of Rs.78,994 as against Rs.82,440 claimed by the appellant in the Return of Income.”

3. The Brief facts of the case are that, the assessee company is engaged in Software Development Services (SDS) and provides software design, coding, testing, maintenance services, innovative web based management software and management solutions to its parent company Zee Omega INC. The assessee company has filed the Return of Income for the Assessment Year 2012-13 on 11.12.2013 with total income of Rs.2,95,65,600/-. Subsequently, Notice u/sec143 (2) and U/sec142(1) of the Act along with questionnaire were issued. In compliance, the LdAr appeared from time to time and the details were furnished. The Assessing Officer on perusal of financial statements, find that the assessee has international transactions with its Associate Enterprises, exceeding the prescribed limits, and was referred to Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP). Whereas the assessee company has submitted financials details of the Software Development Services segment with PLI(OP/OC) referred at page 2 Para 1.2 of the TPO order as under :

1.2 FINANCIAL RESULTS FOR THE F Y 2011-12 AS PER THE P & L A/C

2.

Zeomega Infotech P. Ltd	A.Y. 2012-13	
Particulars	Amount in	Amount in
Total Operating Income ®	177197023	
Less: Other Income	1809711	
Operating Income		175387312
Total Operating Cost (OC)	152431405	
Less: Finance cost	-249698	
Less: Loss on Disposal of fixed assets	-8000	
Operating Cost (OR)		152689103
Operating Profit (OP)		22698209
OP/OC		14.87%
OP/OR		12.94%

4. The assessee has international transactions referred at Page 3 Para 3 of the TPO order as under:

3. INTERNATIONAL TRANSACTIONS (AS MENTIONED IN THE 92 CE REPORT)

	Amount Paid	Amount Received
Computer Software Development Services	17,53,87,312/-	TNMM
Reimbursement of Broadband Charges and other Expenses	41,01,363/-	
Total	17,94,88,675/-	

The assessee company has applied TNMM method as Most Appropriate Method (MAM) and calculated PLI(OP/OC).The TPO has issued letter calling for documents required under Section 92D along with financials, annual report and copies of agreement. The assessee company has submitted the details. The TPO on perusal of the TP document found that the assessee has selected 7 comparables in software development services segment and applied the filters. Whereas, the TPO has rejected the TP Study and has selected the comparables and tested the filters.

The final set of comparables selected by the TPO after analysis as per page 11 Para 8.3 of TPO order as under :

After considering the objections of the taxpayer to the comparables proposed in the show-cause notice, perusal of relevant annual reports and examination of additional comparables suggested by the taxpayer on the touchstones of filters and functionality, the final set of comparables are arrived as per the discussions in the forgoing paragraphs.

Sl. No.	Name of the taxpayer	OP/OC
1.	Datamatics Global Services Ltd.	14.57%
2.	Genesys International Corpn. Ltd.	30.09%
3.	I C R A 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%

The TPO after granting the Working Capital Adjustment has determined the PLI of assessee, OP/OC at 14.87% and on the selected the comparables at 22.63%. Further has computed the ALP at page 15 Para 12.4 of the order as under :

12.4 Computation of Arm's Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. Please see Annexure B for details of computation of PLI of the comparables. Based on this, the arm's length price of the services rendered by the taxpayer to its AE(s) is computed as under:

SOFTWARE DEVELOPMENT SERVICES

Arm's Length Mean Margin on cost	22.63%
Less: Working Capital Adjustment	1.69%
(As per Annex. C)	
Adjusted margin	20.94%
Operating Cost	15,26,89,103
Arm's Length Price(ALP)	18,46,62,201
(120.94% of Operating Cost)	
Price Received	17,53,87,312
Shortfall being adjustment u/s 92CA:	92,74,889
5% of price received	87,69,366
Since the shortfall is exceeding 5% of the International Transaction, adjustment is made	

Further, the TPO has passed the order under Section 92CA of the Act dt.27.1.2016. The Draft assessment order was passed under Section 143(3) r.w.s. 144C(1) of the act on 1.3.2016 with Transfer Pricing Adjustment and other disallowances. Whereas, the assessee has filed objections in Form 35A with the DRP against the Draft assessment order. The DRP issued directions and passed the order under Section 143(3) r.w.s. 144C (5) of the Act dt19.09.2016. In compliance to the directions of DRP, the final assessment order under Section 143(3) r.w.s. 144C(13) of the Act was passed on 30.11.2016 determining the total income of Rs.4,34,28,753/-. Aggrieved by the final assessment order, the assessee has filed an appeal with the Tribunal.

5. At the time of hearing, the learned Authorized Representative restricted his arguments to the extent of ground of appeal No. 4(d) and 6, and filed chart, Paper

Book to support the arguments. Further The LdAr made submissions on exclusion of three comparables and grant of TDS credit. Contra the learned Departmental Representative supported the orders of lower authorities.

6. We heard the rival submissions and perused the material on record. The learned Authorized Representative submitted that three comparables considered in determining the ALP are to be excluded and supported his arguments with the judicial decisions.

i) M/s. Infosys Limited – The company has a turnover of Rs.31,254 Crores and is a global brand and also has intangible assets. Further it is functionally different and operates on full fledged risk model with wide range of functions in comparison with operating profile of the assessee. The Id. AR submitted that the said comparable was excluded by the co-ordinate Bench of tribunal in the case of M/s CGI Information Systems and Management Consultants Pvt. Ltd. Vs. ACIT (TS-320-ITAT-2018 (Bang)-TP) .

(ii) Larsen & Toubro InfoTech Limited - The company has a turnover of Rs.2,959 Crores and has substantial onsite revenues. Further the operations are functionally different and derived benefit of L & T brand. This company was excluded in the coordinate bench decision of M/s CGI Information Systems and Management Consultants Pvt. Ltd. Vs. ACIT (supra).

iii) Persistent Systems Limited – This Company has a turnover of Rs.810 Crores and has substantial Related Party Transactions. Further has high R&D expenses and is functionally different and no segmental data is available. This company was

also excluded in the coordinate bench decision of CGI Information Systems and Management Consultants Pvt. Ltd. Vs. Acit(Supra) .

7. We found the above three comparable companies were excluded from the list of final comparables in the case of CGI Information Systems and Management Consultants Pvt. Ltd. Vs. ACIT (supra) referred at page 15 Para 28 to 30 which are read as under :

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. Vs. 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 Vs. 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) Larsent & Tourbro 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. Vs. 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 Pvt.Ltd. Vs. ITO ITA No.64/Del/2015 order dated 23.9.2015 and the decision of Hon'ble Delhi High Court in the case of Saxo India 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.

We respectfully follow the Hon'ble tribunal decision where the above three comparable companies are excluded by the co-ordinate Bench of this Tribunal for the same assessment year from the final list. Accordingly, we direct the TPO to exclude (i) Infosys Ltd (2) Larsen & Toubro Infotech Ltd and (iii) Persistent Systems from the final list of comparables for determination of ALP.

8. The learned Authorized Representative argued that the Assessing Officer has granted the Tds credit to the extent of Rs.78,994 as against Rs.82,440 claimed. We, upon hearing the submissions, direct the Assessing Officer to examine and verify the correctness of claim and allow the credit.

9. In the result, appeal of the assessee is partly allowed.

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

Sd/-

(B.R. BASKARAN)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Dated: 07.08.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore