

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI A K GARODIA, ACCOUNTANT MEMBER

IT(TP)A No.704/Bang/2016
Assessment year: 2011-12

LSI India Research & Development India Private Limited, [Erstwhile Broadcom Communications Technologies Private Ltd. since merged], S1, Wipro Electronic City, Special Economic Zone, Doddathogur Village, Begur Hobli, Electronics City, Bangalore – 560 100. PAN: AAECM 1677N	Vs.	The Deputy Commissioner of Income Tax, Circle 4(1)(1) [formerly Circle 1(2)(2)], Bangalore – 560 095.
APPELLANT		RESPONDENT

Appellant by	:	Shri Sharath Rao, CA
Respondent by	:	Shri Bijay Kumar Panda, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.10.2020
Date of Pronouncement	:	16.10.2020

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the assessee is directed against the order dated 29.01.2016 of DCIT, Circle 1(1)(2), Bangalore (hereinafter referred to as the “Assessing Officer” / “AO” in short) passed u/s.143(3) r.w.s. 144C(13) of Income-tax Act, 1961 [the Act] in relation to AY 2011-12.

2. The Assessee is engaged in the business of provision of Software Development Services (SWD services) to its wholly owned holding company. In terms of the provisions of Sec.92A of the Act, the Assessee and its wholly owned holding company were Associated Enterprises ("AEs"). In terms of Sec.92B(1) of the Act, the transaction of providing SWD Services and MSS were "international transaction" i.e., a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises. In terms of Sec.92(1) of the Act, the Any income arising from an international transaction shall be computed having regard to the arm's length price. In this appeal by the Assessee, the dispute is with regard to determination of Arms' Length Price (ALP) in respect of the aforesaid international transaction of rendering SWD services to the AE.

3. As far as the provision of SWD services are concerned, the Assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The Assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison. The OP/OC of the Assessee was arrived at 14.63% in its TP study. The operating income was Rs.27,86,04,151 and the Operating Cost was Rs.24,30,47,814. The Operating profit (Operating income – Operating cost

was Rs.3,55,56,537. Thus the OP/TC was arrived at 14.63%. The Assessee chose companies engaged in providing similar services such as the Assessee. It identified 8 companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the Assessee. The Assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/TC. He also selected comparable companies from database. The TPO accepted 3 companies chosen by the Assessee as comparable companies viz., R S Software (india) Ltd., Sasken Communication Technologies Ltd. and Tata Elxsi Ltd. The TPO on his own identified 10 other companies as comparable with the Assessee company and worked out the average arithmetic mean of their profit margins as follows:-

Sl. No	Name	Sales	Cost	PLI
1	Acropetal Technologies Ltd. (Seg)	814,016,893	616,754,876	31.98%
2	e zest solutions (from Capitaline)	112866098	93255341	21.03%
3	E-infochips Ltd	260384251	166447527	56.44%
4	Evoke (from Capitaline)	144869912	133996568	8.11%
5	I C R A Techno Analytics Ltd. (in 000)	158401000	126894000	24.83%
6	Infosys Ltd	253850000000	177,030,000,00	43.39%
7	Larsen & Toubro Info tech Ltd.	23318122096	19,764,861,289	19.83%
8	Mindtree Ltd.(seg)	8,783,000,000	7,937,143,242	10.66%
9	Persistent Systems & Solutions Ltd.	189,490,457	155,172,089	22.12%
10	Persistent Systems Ltd.	6,101,270,000	4,971,860,000	22.84%
11	R S Software (India) Ltd.	1,882,638,471	1,617,804,170	16.37%
12	Sasken Communication Technologies Ltd.	3,941,962,000	3,175,616,000	24.13%
13	Tata Elxsi Ltd (seg)	3,581,985,000	2,962,533,352	20.91%
	AVERAGE MARGIN			24.82%

5. The TPO computed the Addition to total income on account of adjustment to ALP as follows:-

Arm's Length Mean Margin on cost	24.82%
Less: Working Capital Adjustment (As per Annex. C)	1.27%
Adjusted margin	23.55%
Operating Cost	243,07,814
Arms Length Price(ALP) (123.55% of Operating Cost)	300,285,574
Price Received	278,604,151
Shortfall being adjustment u/s 92CA:	21,681,423

Thus a sum of Rs.21,681,423 was added to the total income of the Assessee on account of determination of ALP for provision of SWD services by the Assessee to its AE.

6. The Assessee filed objections before the Disputes Resolution Panel (DRP) against the draft assessment order passed by the AO wherein the addition suggested by the TPO as adjustment to ALP was added to the total income of the Assessee by the AO. The DRP gave excluded 10 out of 13 comparable companies chosen by the TPO. Three companies remain as comparable companies after the directions of the DRP viz., Persistent Systems and Solutions Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd. Based on the directions of the DRP, the AO passed the final order of assessment. To the extent the Assessee did not get relief from the DRP, the Assessee has preferred appeal before the Tribunal.

7. Though the assessee has raised several grounds of appeal, grounds 9 to 12 with regard to determination of ALP and consequent addition made to total income, at the time of hearing the Id. counsel for the assessee pressed for adjudication of exclusion of 3 comparable companies and inclusion of 3 comparables. The 3 companies sought to

be excluded are Persistent Systems and Solutions Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd. The 3 companies sought for inclusion as comparables are R S Software (India) Ltd., Mindtree Ltd. and Evoke Technologies Ltd.

8. First we shall take up for consideration the plea of assessee for inclusion of 3 and exclusion of 3 comparable companies that remain after the order of DRP. The ld. counsel for the assessee in this regard drew our attention to a decision of ITAT Bangalore Bench in the case of *LSI India Research Pvt. Ltd. [2017] 83 taxmann.com 357 [Bang. Trib.]* wherein in a case of assessee engaged in providing SWD services such as the assessee and in which case the very same 13 comparable companies chosen as in the present appeal were chosen as comparables, the Tribunal excluded the aforesaid 3 companies and also directed inclusion of 3 companies which the assessee seeks in this appeal. The following were the relevant observations of the Tribunal in the aforesaid order:-

“9. Now we decide about the remaining six comparables excluded by the DRP and other four comparables retained by the DRP for which the assessee is seeking exclusion. We find that out of these six comparables excluded by the DRP, one comparable i.e. ICRA Techno Analytics Ltd. is having RPT in excess of 15% and therefore, for this reason alone this company has to be excluded although, the DRP has excluded it for a different reason that it is having various activities and the segmental data are not available. We hold this exclusion on account of RPT filter. In fact, we find that para-8 & 9 of the Tribunal order rendered in the case *Commscope Networks (India) (P.) Ltd. (Supra)* is relevant in respect of inclusion/exclusion of nine companies directed to be excluded by DRP and also in respect of exclusion of four companies which were retained by DRP but it was the contention of the assessee for exclusion thereof. We therefore, re-produce para-8 & 9 of the Tribunal order for the sake of ready reference;

"8. We decide the issue of various exclusions and inclusions in these cross appeals. **Regarding inclusion of 3 comparables out of 9 comparables excluded by DRP, we find that when both sides are seeking inclusion of these 3 comparables being 1 (Evoke Technologies Pvt Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd. and their inclusion is proper as per the tribunal order rendered in the case of Applied materials India Pvt. Ltd. v. ACIT as reported in TS-815- ITAT - 2016, we reverse the order; of DRP; about exclusion of these 3 " comparables and 'direct the AO/TPO to include these three in final list of comparables.**

9. Now we decide about the remaining 6 comparables excluded by DRP and 4 comparables retained by DRP but for which the assessee is seeking exclusion. Out of these 6 comparables excluded by DRP, one comparable ICRA Techno Analytics Ltd. is having RPT in excess of 15% and therefore, for this reason alone, this comparable has to be excluded although DRP has excluded it for a different reason that it is having various activities and segmental data are not available. We uphold its exclusion on account of RPT filter. Exclusion of Acropetal Technologies Ltd. (Seg) is covered in favour of the assessee by the same tribunal order rendered in the case of Applied materials India Pvt. Ltd. v. ACIT (Supra). Respectfully following the same, we uphold its exclusion. Exclusion of 1) e - Zest Solutions Ltd., 2) Infosys Ltd., 3) Larsen & Toubro Infotech Ltd., 4) Persistent Systems & Solutions Ltd., 5) Persistent Systems Ltd., 6) Sasken Communication Technologies Ltd. and 7) Tata Elxsi Ltd. are also covered in favour of the assessee by the same tribunal order rendered in the case of Applied materials India Pvt. Ltd. v. ACIT (Supra). Respectfully following the same, we uphold the exclusion of these Seven comparables also. Exclusion of E - Infochips Ltd. is covered in favour of the assessee by the tribunal order rendered in the case of Saxo India Pvt. Ltd. v. ACIT in ITA No, 6148/Del/2015 dated 05.02.2016 Para 10.1 & 10.2 available at pages 221 to 223. Respectfully following the same, we uphold its exclusion. In this manner, we uphold the exclusion of six comparables excluded by DRP out of 9 comparables excluded by DRP and exclude 4 comparables retained by DRP and we have already held that out of 9 comparables

excluded by DRP, 3 have to come back being 1. Evoke Technologies Pvt, Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd. Now, we decide about LGS Global Ltd. As per the tribunal order rendered in the case of Applied materials India Pvt. Ltd. v. ACIT (Supra), this is a good comparable and therefore, we direct the A.O. and TPO to include this comparable. So, there should be 4 comparables in the final list of comparable and on the basis of that, the AO/TPO should work out the ALP".

10. As per the above two paras, reproduced from the order of the Tribunal rendered in the case Commscope Networks (India) (P.) Ltd. (Supra), we find that in that case, the Tribunal held that **out of 9 comparables excluded by DRP, 3 have to come back being 1) Evoke Technologies Pvt. Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd.** Out of remaining 10 comparable companies selected by TPO, the tribunal in that case excluded. 9 companies being 1) ICRA Techno Analytics Ltd., 2) Acropetal Technologies Ltd. (Seg), 3) e - Zest Solutions Ltd., 4) Infosys Ltd., 5) Larsen & Toubro Infotech Ltd., **6) Persistent Systems & Solutions Ltd., 7) Persistent Systems Ltd., 8) Sasken Communication Technologies Ltd.** and 9) Tata Elxsi Ltd. Hence, in that case, only four companies were left in the final list of comparables being J) 1) Evoke Technologies Pvt. Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd. and 4) Larsen & Toubro Infotech Ltd.”

9. The Id. DR, however, reiterated the stand of the revenue as reflected in the order of DRP. In this regard, we find that the 3 companies that were excluded by the DRP were accepted as comparables by the TPO and were excluded by the DRP *suo motu*. In these circumstances, we are of the view that when the TPO and assessee agree on certain comparables, it is not open to the DRP to *suo motu* exclude comparable companies. We are therefore of the view that the ratio laid down in the decision cited above, as far as inclusion of comparable companies are concerned, is equally applicable to the present case. As far as the grievance of the Assessee in the action of the DRP in excluding are concerned, viz., Persistent Systems and Solutions Ltd., Persistent Systems Ltd. and Sasken Communication

Technologies Ltd., we find that persistent systems and solutions Ltd., and Persistent Systems Ltd., were claimed by the Assessee to be engaged in software development, consultancy and systems integration and outsourced software product development and segmental details were not available. The DRP however gave a finding that except SWD services no other services were rendered and chose to rely on some observations in the annual report. However the Tribunal in the decisions cited accepted the argument of the Assessee and held these two companies to be not comparable. As far as Sasken Communication Technologies Ltd., is concerned, we find that the Assessee did not dispute the comparability of this company before the TPO and the DRP but seeks to now raise an issue regarding comparability of this company with the functional profile of the Assessee. A specific ground of appeal has been raised for exclusion of this company as a comparable company in Grd.No.11.6. The Special Bench of the *ITAT Chandigarh Bench in the case of DCIT v. Quark Systems Pvt. Ltd. 38 SOT 207(SB)(Chd.)* has taken the view that it is open to the parties in Transfer Pricing cases to take a stand contrary to their TP study, if they contend that the stand taken in the TP study is contrary to facts or was erroneous. Such a claim cannot be disregarded only on the basis that it is contrary to Assessee's own stand in the TP study. We are also of the view that in the case of companies providing software development services such as the assessee, inclusion of the aforesaid company as a comparable has always been an issue. The Assessee has now contended that this company is functionally different. Since the issue has been raised by the Assessee for the first time before ITAT, we deem it fit and proper to remand the question of comparability of this company to the AO/TPO afresh.

10. Therefore, 2 companies viz., Persistent Systems and Solutions Ltd., and Persistent Systems Ltd., are directed to be excluded and the

comparability of Sasken Communication Technologies Ltd., is remanded to the TPO/AO for fresh consideration. The 3 companies viz., R S Software (India) Ltd., Mindtree Ltd. and Evoke Technologies Ltd. are directed to be included in the final list of comparable companies. We hold and direct accordingly. The TPO is directed to compute the ALP in the light of directions given above, after affording opportunity of being heard to the assessee.

11. The other corporate tax issue which requires to be decided is the claim of assessee for deduction u/s. 43B of the Act towards employee related liability like gratuity, leave compensation and bonus. There was a merger of Reneses Mobile India Pvt. Ltd. [RMIPL] Broadcom Communications Technologies Pvt. Ltd. [BCTPL] effective from 1.4.2014. As per the provisions of section 43B of the Act, statutory liabilities which are not paid will not be allowed as deduction. Certain statutory dues have been paid by RMIPL before the due date for filing return of income for AY 2011-12 and assessee was eligible to claim deduction u/s. 43B of the Act. In the return of income the assessee has not claimed the same, however, a claim was made for deduction before the AO in terms of section 43B. The AO refused to entertain the claim of assessee as revised return had not been filed as required u/s. 139(5) of the Act. The DRP confirmed the order of AO by following the decision of Hon'ble High Court in the case of *Orissa Rural Housing Development Corporation Ltd.*, 343 ITR 316 (Ori) and the decision of Hon'ble Supreme Court in the case of *Goetze (India) Ltd.*, 284 ITR 323 (SC). According to the DRP, without filing a revised return, the assessee cannot make a claim for deduction. Aggrieved by the aforesaid order, the assessee has raised grounds 3 to 6 before the Tribunal.

12. We have heard the rival submissions. In our view, the decision of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd.* (*supra*) is applicable only when a claim is made before the AO and is not applicable

to the appellate authorities under the Act. Though the Hon'ble Orissa High Court in the decision cited by the Id. counsel for the assessee in the order of DRP has applied the said decision in the context of power of appellate authority, however several other High Courts have taken a contrary view. The Hon'ble Punjab & Haryana High Court in *CIT v. Ramco International, 221 CTR 491 (P&H)* and Hon'ble Delhi High Court in the case of *Jai Parabolic Springs Ltd., 306 ITR 42 (Del)* have taken the view that ratio laid down by the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. (supra)* is not applicable to the appellate authorities under the Act. In the light of the aforesaid decisions, we are of the view that the DRP ought to have examined the claim of assessee. We accordingly direct that the claim of assessee for deduction in terms of section 43B should be examined by the AO. We accordingly remit this issue to the AO for fresh consideration, after allowing the assessee opportunity of being heard.

13. The other corporate tax issues are ground No.7 with regard to non-grant of credit in respect of TDS . The AO is directed to examine the claim of assessee and give credit, if the stand of assessee that the credit appears in Form 26AS is correct. The AO is also directed to examine the claim of assessee in ground No.8 with regard to the period of levy of interest u/s. 234C of the Act in accordance with law.

14. In the result, the appeal is partly allowed.

Pronounced in the open court on this 16th day of October, 2020.

Sd/-

(A K GARODIA)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 16th October, 2020.

/Desai S Murthy/

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.