

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.38/Bang/2015
Assessment Year : 2010-11

M/s Analog Devices India Pvt. Ltd., Salarpuria Nova, No.1, Varthur Road, Nagavarapalya, Old Madras Road, Bengaluru-560 093.	Vs.	The Dy. Commissioner of Income-Tax, Circle -1(1)(1), Bangalore.
PAN - AABCA 1873 F		
APPELLANT		RESPONDENT

IT(TP)A No.58/Bang/2015
Assessment Year : 2010-11

The Dy. Commissioner of Income-Tax, Circle -1(1)(1), Bangalore.	Vs.	M/s Analog Devices India Pvt. Ltd., Salarpuria Nova, No.1, Varthur Road, Nagavarapalya, Old Madras Road, Bengaluru-560 093.
		PAN - AABCA 1873 F
APPELLANT		RESPONDENT

Assessee by	:	Shri Darpan Kirpalani, Advocate
Revenue by	:	Shri Kannan Narayanan, JCIT

Date of Hearing	:	08-03-2021
Date of Pronouncement	:	14-06-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals have been filed by assessee as well as revenue against order dated 13/11/2014 passed by Ld.CIT(A)-4, Bangalore for assessment year 2010-11.

2. At the outset, it is submitted that, the tax effect involved appeal filed by revenue is low and therefore not maintainable.

We have perused the submissions advanced by both sides in light of records placed before us.

3. Admittedly the tax effect is less than Rs.50 Lacs in the appeal filed by revenue and therefore person to circular No. 17/2019 dated 8/8/2019 issued by CBDT, present appeal is not maintainable.

Accordingly we dismiss the appeal filed by revenue en route tax effect.

Assessee's Appeal:

4. Assessee has filed following revised grounds of appeal in respect of ITA No. 38/B/2015:

"Based on the facts and circumstances of the case and in law, Analog Devices India Private Limited, (hereinafter referred to as "ADI PL" or the Company" or the "Appellant"), respectfully

craves leave to prefer an appeal against the appeal order passed by the learned Commissioner of Income-Tax (Appeals) - IV [hereinafter referred to as the "learned C IT(A)"] under section 250 of the Income-tax Act, 1961 ('Act') on the following grounds:

On the facts and circumstances of the case and in law:

1. The learned CIT(A) has erred in law and facts, by upholding the addition of Rs. 52,712,412 made by the learned Assessing Officer ("AO")/Transfer Pricing Officer ("TPO") on account of adjustment to the arm's length price of the payments received by the Appellant from its Associated Enterprise ('AE') towards software development services and marketing and sales support services;

a) The learned CIT(A) has erred in law and facts by not accepting the Appellant's plea in entirety and confirming with the learned Assessing Officer ("AO")/Transfer Pricing Officer ("TPO") on not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 ("Rules"), and conducting a fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction and holding that the Appellant's international transaction is not at arm's length;

b) The learned CIT(A) has erred in law and facts by upholding the action of AO/ TPO in determination of the arm's length margin/ price using only single year data i.e. for FY 2009-10 and not allowing the use of multiple year data as applied by the Appellant in the transfer pricing documentation;

Ground relating to software development services transaction;

c) The learned CIT(A) has erred in law and facts by upholding the action of AO/TPO in rejecting certain comparables considered by the Appellant in the comparability analysis by applying different quantitative and qualitative filters:

i. The learned CIT(A) has erred, in law and in facts, by not accepting the Appellant's plea that companies having different accounting year (i.e. companies having accounting year other than March 31 or companies whose financial statements were for a period other than 12 months) should not be rejected.

ii. The learned CIT(A) has erred, in law and in facts, by not accepting the Appellant's plea that companies should not be rejected using employee cost greater than 25% of the total revenues as a comparability criterion.

ii. The learned CIT(A) has erred, in law and in facts, by not accepting the Appellant's plea that rejecting companies using export sales less than 75% of the operating revenues as a comparability criterion in respect of the software development services transaction, is not appropriate.

Sal Digitally signed

d) The learned CIT(A) has erred, in law and in facts, by upholding the action of AOITPO in accepting certain comparable companies based on unreasonable comparability criteria.

ICRA Techno Analytics Ltd. (JjJL ei')

11 Kals Information Systems Ltd.

liT Persistent Systems & Solutions Ltd.

And rejecting certain comparable companies based on unreasonable comparability criteria.

I. Akshay Software Technologies Ltd.

II. Helios & Matheson Information Technology Ltd.

III. LGS Global Ltd.

IV. Quintegra Solutions Ltd.

e) The learned CIT(A) has erred, in law and facts, by upholding the action of the AOITPO in restricting the benefit on an adhoc basis to the average cost of capital computed at 1.98 percent in the case of comparable companies.

f) The learned CIT(A) has erred in law and in facts, by not considering foreign exchange gain/loss as operating in nature while computing the operating margin of the Appellant and comparable companies.

g) The learned CIT(A) has erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Appellant vis-à-vis the comparables and concluding that once the working capital adjustment is granted, there is no necessity of providing any further adjustments.;

Grounds relating to marketing and sales support services transaction

h) The learned CIT(A) has erred in law and facts by upholding the action of AOITPO in rejecting the filters applied by the Appellant in the transfer pricing study for the comparable analysis

l) The learned CIT(A) has erred, in law and in facts, by upholding the action of AO/TPO in accepting certain comparable companies based on unreasonable comparability criteria.

I. Asian Business Exhibition & Conferences Ltd.

II. HCCA Business Services Pvt. Ltd.

III. Hindustan Housing Co. Ltd.

IV. Killick Agencies & Mktg Ltd.

j) The learned CIT(A) has erred, in law and in facts, by upholding the action of AO/TPO in rejecting certain comparable companies based on unreasonable comparability criteria.

I. Concept Communication Ltd.

II. Interads Ltd.

III. New Age Entertainment Ltd.

IV. India & Infoline Media & Research Ltd.

V. India Infoline Marketing Services Ltd.

VI. Marketing Consultants & Agencies Ltd.

General grounds

2. The learned CIT(A) has erred, in law and facts, in computing the ALP without giving benefit of +/-5 percent under the proviso to section 92C(2) of the Act;

3. The learned CIT(A) has erred, in law and facts, in confirming the imposition of interest under Sections 234B and 234D of the Act by the learned AO

4. The learned CIT(A) has erred, in law and facts, in upholding initiation of penalty proceedings under section 271(1)(c) of the Act by the learned AO.

The Appellant submits that each of the above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

Brief facts of the case are as under:

2. The assessee is an wholly owned subsidiary of Analog Devices Holding BV, Netherlands. It is engaged in the business of providing software development services and marketing support services to its AE group. It filed its return of income for year under consideration on 04/11/2011 declaring total income of Rs.4,85,18,975/-. The Ld.AO was observed that, assessee claimed deduction under section 80G of the Act. The return was processed under section 143 (1) of the act and the case was selected for scrutiny. Notice under

section 143 (2) was issued to assessee in response to which, representative of assessee appeared before the Ld.AO. During the assessment proceedings, the Ld.AO observed that, assessee had international transactions with its associated enterprises exceeding Rs.15 crores. Ld.AO accordingly, referred the issue to Ld.TPO for computing arm's length price of the transactions.

3. On receipt of reference, Ld.TPO called upon assessee to file economic details of the international transaction in Form 3CEB.

4. The Ld.TPO observed that assessee had following international transactions with its associated enterprise:

Descriptions	Received	Paid
Provision of Software Services	468,071,011	-
Market Support Service	53,588,650	-
Recovery of Expenses	5,754,543	-
Reimbursement of Expenses	-	879,132
Total International Trnsactions	528,293,336	

5. The Ld.TPO observed that, assessee was in receipt of sum of Rs.46.80 crores on account of software development service (hereinafter referred to as SWD) and Rs.2,56,61,598/- on account of Marketing and Sales support services (hereinafter referred to as MSS). Assessee used TNMM as most appropriate method to compute the ALP of the transactions and OP/OC as the PLI. Assessee thus computed its margin at 10% under both SWD and MSS segments.

6. The Ld.TPO observed that assessee used 12 comparables for SWD service segment with an average margin of 27.71 % and 6 comparables under MSS service segment with an average margin of 24.48%.

7. The Ld.TPO dissatisfied with the analysis carried out by assessee applied following comparables and shortlisted a set of 11 comparables under SWD service segment and 9 comparables for MSS Services, by using following filters:

- companies with less than 1 crore service income were excluded
- companies with current year data were only considered
- employee cost less than 25% of sales
- companies with different financial year ending were rejected
- companies with peculiar economic circumstances were rate rejected
- companies with export revenue greater than 75% of sales were rejected

SWD service segment

----This space is left vacant intentionally ----

SL.N o	Name	PLI
1	I C R A Techno Analytics Ltd.(Seg)	24.94 %
2	Infosys Ltd	44.98 %
3	Kals Information Systems Ltd.(seg)	34.41%
4	Larsen & Toubro Infotech Ltd.	19.33%
5	Mindtree Ltd.(seg)	14.83%
6	Persistent Systems & Solutions Ltd.	15.38%
7	Persistent Systems Ltd.	30.35%
8	R S Software (India) Ltd.	10.29%
9	Sasken Communication Technologies	17.36%
10	Tata Elxsi(seg)	20.93%
11	Thinksoft Global Services Ltd.	17.05%
	AVERAGE MARGIN	22.71%

MSS service segment

Sl. No.	Name of the company	OP/Cost (%)
1	Asian Business Exhibition & Conferences Ltd.	58.64
2	Cyber Media Research Ltd.	19.52
3	H C C A Business Services Pvt. Ltd.	19.11
4	Hindustan Housing Co. Ltd.	19.59
5	I C C International Agencies Ltd.	13.27
6	Killick Agencies & Mktg. Ltd.	16.77
	Average	24.48%

. The Ld.TPO thus proposed the adjustment as under:

Software Development Services	45,658,198
Marketing & Sales Support	7,054,214
Total	52,712,412

8. On receipt of the Transfer Pricing order, Ld. AO forwarded the draft assessment order seeking for any objections. The assessee vide letter dated 21/03/2014 informed that assessee will be filing appeal before the Ld.CIT(A). Accordingly the Ld.AO passed the final assessment order under section 143 (3) read with section 144C of the Act on 11/04/2014 by making following additions in the hands of assessee:

9. Adjustment as per order under section 92CA: Rs.5,27,12,412/-; Disallowance under section 14 A read with Rule 8D: Rs.2,082/-

10. Aggrieved by the additions made, assessee preferred appeal before the Ld.CIT (A)

11. The Ld.CIT(A) considered objections raised by assessee in respect of the comparables that was sought for exclusion based on the submissions and decisions relied. The Ld.CIT(A) excluded Infosys Ltd., Larsen and Toubro Infotech Ltd., Mind Tree Ltd., Persistent Systems Ltd., Sasken Communications Technologies Ltd., Tata Elxsi Ltd. in the SWD service segment by applying turnover filter of Rs.1 crore to Rs.200 crore.

12. The Ld. CIT (A) however rejected the comparables that were sought for inclusion by assessee under MSS service segment, upheld the comparables considered by the Ld. AO/TPO.

13. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before us now.

14. At the outset, Ld.AR submitted that, assessee wish to argue following comparables for exclusion/inclusion:

15. Ground No.1(d): under SWD segment assessee seeks exclusion of: ICRA Techno Analytics Ltd. and Kals Information Systems Ltd.

16. The Ld.AR submitted that in the event the 2 comparables sought for exclusion are upheld, assessee shall not press for inclusion of: Akshay Software Technologies Ltd., Halio& Matheson Information Technology Ltd., LGS Global Ltd., Quintegra Solutions Ltd.

17. Ground No.1(i): Under MSS segment, assessee seeks exclusion of: Asian Business Exhibition and Conferences Ltd., HCCA business services Ltd., Killick Agencies and Marketing Ltd., Hindustan Housing Company Ltd.

18. Assessee seeks inclusion of: Concept Communications Ltd., Interads Ltd., New age Entertainment Ltd., India Infoline Marketing Services Ltd., India and Infoline Media and Research Ltd., Marketing Consultants and Agencies Ltd.

19. It is submitted that, except for the above grounds, other grounds are not pressed by assessee.

20. Before we undertake the comparability analysis it is *sine qua non* to understand the functions performed, assets owned and risks assumed by assessee under both the segments.

21. The Ld.TPO in the Transfer Pricing order observed as under:

“2. FUNCTIONAL ANALYSIS:

THE FUNCTIONS OF THE TAXPAYER AS PER TP DOCUMENT:

7.2 Software Development Services

7.2.1 Functions Analysis

ADIPL has entered into an agreement with ADBV and with effect from 1st May 2001, ADIPL assumes the following responsibilities:

- Perform technical services for the development of software application to be designed on custom microelectronics circuits.*
- Evaluation of Prototypes.*
- Provide all requisite services to facilitate logistics for software development services.*
- Provide such other ancillary or related services as may be reasonably be required and requested by ADBV.*
- To ensure that it has the requisite expertise, infrastructure and personnel to provide the Service and to perform its obligations.*
- ADIPL to keep in strict confidence all confidential information including intellectual property acquired during the course of the projects.*

Intellectual Property

- ADIPL shall assign all rights, title and interest in any/al inventions (all proprietary rights with respect to inventions), intellectual property rights in the work product, software developed or services provided to ADBV.*

7.3 Project managements services

ADIPL provides software development services to its associated enterprise. In addition, ADIPL also provides project management services to Analog Devices Inc (Aol) on behalf of ADBV which includes providing programming language training, validation of software developed and co-ordination between AD! and independent Indian software companies with whom AD! enters into agreements for software development. The functions performed and risks assumed by the ISO unit in the provision of project management services are similar to, tiiepiTQY±SQrLQfJeChntcaJ s_ervicesJy the !PLXdivision.

7. 4 Market-Support Services

ADIPL provides marketing support functions to ADBV

7.4.1 Summary of Functions.

The primary Market support functions performed by ADIPL and the Associated are summarized below :

Customer

- information to customers*
- Price information to customer*

Human Resource

- Recruitment and training of support staff*

Infrastructure

- Maintenance of office facilities in India”*

22. From the above it is clear that assessee is a captive service provider without undertaking any risks associated with the activities carried out under both the segments.

Ground No.1(d):

23. At the outset Ld.AR submitted that in a similar situation of a captive service provider, this *Tribunal* in case of *VMware Software India Pvt.Ltd vs DCIT in ITA No. 322/B/2018 and ITA No. 417/B/2018 by order dated 23/12/2020* considered most of the comparables alleged for inclusion/exclusion by assessee under SWD segment as under:

“ICRA Techno Analytics Ltd.

“7. ICRA Techno Analytics Ltd: We find that this company was excluded by the CIT(A) for the reason that it is functionally dissimilar to that of the Assessee (pages 17-18 of the CIT(A)'s order). It has been held that this company is engaged in a diverse range of IT Solution Services. The company is not a full-fledged software development company and provides such services among its other wide array of IT solution services like Business Analytics, IT Engineering and Business Process Outsourcing. Thus, functionally, the company is different from the Assessee. The learned Counsel for Assessee has placed reliance on the decision of this Hon'ble Tribunal in DCIT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang - Trib.)], ACIT v. Broadcom India Research (P.) Ltd [2016] 72 taxmann.com 77 (Bangalore - Trib.) and ITO v. Interwoven Software Services (India) (P.) Ltd. [2016] 74 taxmann.com 103 (Bangalore - Trib.) wherein this company was directed to be excluded as a comparable in the case of assessee similar to the Assessee herein. Therefore, this company, in our view, was rightly excluded”

Kals Information Systems Ltd:

9. Kals Information Systems Ltd.: This company was excluded by the CIT(A) for reason that it was functionally dissimilar to the Assessee, by placing reliance of the decision of this Hon'ble Tribunal in Assessee's own case for the Assessment year 2009-10. The company is engaged in the development of software products and providing related services. It also provides implementation and maintenance of software products. It has developed a range of products such as Shine ERP software, Docuflo, Dac4Cast, CMSS, La Vision, Virtual Insure and Aldon. The annual report also confirms that the company is engaged in development of software and software products. The company holds significant inventories

which account for 27% of the total current assets which demonstrates that it is a product development company as against a pure software service provider like the assessee. The functions carried out by the two companies being substantially different, this company ought to stand rejected as a comparable. The company is being consistently excluded from the list of comparables in similar cases. Since the circumstances leading to it being excluded as being functionally dissimilar in the previous assessment continue to remain same, the company ought to remain excluded in the current assessment year. This Tribunal in DOT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang - Trib.)], ACIT v. Broadcom India Research (P.) Ltd [2016] 72 taxmann.com 77 (Bangalore - Trib.) and ITO v. Interwoven Software Services (India) (P.) Ltd,[2016] 74 taxmann.com 103 (Bangalore - Trib.), directed this company to be excluded in the case of assesseees similar to the Assessee herein. We, therefore, find no ground to interfere with the order of CIT(A).”

24. We note that similar has been the submission by assessee before authorities below in respect of this comparable for being excluded from the finalist.

25. We note that this comparable has been consistently excluded by various decisions of this *Tribunal* considered herein above and that the case of those assessee's are similar to the assessee before us. Further nothing contrary to the what has been observed by Coordinate Bench of this Tribunal has been placed before us by the Revenue.

Therefore Respectfully following the same in our view this comparable deserves to be excluded.

26. We have upheld above two comparables alleged by assessee for exclusion at the beginning it was submitted by Ld.AR in the event these 2 comparables are excluded assessee does not wish to argue the comparables sought for in this ground.

Accordingly the remaining comparable companies are not considered as not pressed.

Accordingly ground No. 1(d) stands allowed partly.

Ground No. 1 (j):

27. At the outset Ld.AR submitted that in a similar situation of a captive service provider, this Tribunal in case of *VMware Software India Pvt.Ltd vs DCIT in ITA No. 322/B/2018 and ITA No. 417/B/2018 by order dated 23/12/2020* considered most of the comparables alleged for exclusion by assessee under MSS segment as under:

“Asian Business exhibition and Conferences Ltd.

“20. Asian Business Exhibition & Conferences Ltd: The CIT(A) excluded Asian Business Exhibition & Conferences Ltd., for the reason that it is functionally dissimilar to the Assessee. This company is an event management company engaged in organizing exhibitions and events. Revenue is derived from sale of stall spaces, through sponsors by displaying names of exhibitors in signages, hoardings and banners, income from entry charges and income from delegates attending conferences! events. This is in no way comparable to the Assessee's MSS services segment under which it assists its AEs in marketing and sales of their products in India. This Tribunal in DCIT v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang - Trib.)I and ITO v. Interwoven Software Services (India) (P.) [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein. We find no grounds to interfere with the findings of the CIT(A).”

HCCA business services Ltd.

21. *CCA Business Services P. Ltd: This company was excluded by the CIT(A) for e reason that it is functionally dissimilar to the Assessee. This company is a service provider and provides services in the gamut of HR operations and administration. It provides HR operations and administration services, offering payroll processing and compensation restructuring, management of labour and legal compliances, employee reimbursement processing and accounting services. It is thus clear that the activities of HCCA are not similar to marketing support services provided by the Assessee. This Tribunal in DCII v. Electronics for Imaging India P. Ltd [(2016) 70 taxmann.com 299 (Bang - Trib.)] and ITO v. Interwoven Software Services (India) (P.) [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein. Therefore, this company ought to remain excluded from the final list of comparables for the MSS segment.*

Killick Agencies and Marketing Ltd.,

22. *Killick Agencies & Mktg. Ltd.:* This company was excluded by the CIT(A) for reason that it is functionally dissimilar to the Assessee, and therefore does not warrant any interference by this Hon'ble Tribunal. This Tribunal in *DCIT v. Electronics for Imaging India P. Ltd* [(2016) 70 taxmann.com 299 (Bang - Trib.)] and *ITO v. Interwoven Software Services (India) (P.)* [2016] 74 taxmann.com 103 (Bangalore - Trib.) directed this company to be excluded as a comparable in the case of assesseees similar to the Assessee herein.”

28. We note that similar has been the submission by assessee before authorities below in respect of this comparable for being excluded from the finalist.

29. We note that this comparable has been consistently excluded by various decisions of this *Tribunal* considered herein above and that the case of those assessee's are similar to the assessee herein.

Respectfully following the same in our view this comparable deserves to be excluded.

Hindustan Housing Co Ltd.

30. The Ld.AR submitted that this company was included by the Ld. TPO as it provides support services in respect of sales and marketing. The Ld. TPO has wrongly observed that this comparable helps to retained the market in view of the fact that after sales support determined is the sales. Referring to the annual reports placed at page 202 of paper book, the Ld. ar submitted that this company is into provision of administrative and allied services which includes air conditioning service charges, lift services etc it has been submitted by him that these services rendered by this comparable is not akin to to the marketing services provided by assessee to its AE.

31. On the contrary Ld.CIT DR relied on orders passed by the Ld. CIT (A).

32. We have perused submissions advanced by both sides in light of records placed before us.

33. We note that entire revenue of this comparable has been recorded under one segment. Though the bifurcations of the various revenues generated from the services provided as per available in schedule 7, these are not similar to the back-office support services rendered by assessee. We note that assessee basically provides information to customers, recruitment and training of support staff, maintenance of office facilities in India for its AE's etc which is not the kind of services rendered by this comparable.

34. Under such circumstances we do not find it fit to be included in the list.

Accordingly we direct the Ld. AO/TPO to exclude this comparable from the final list.

35. Assessee has also alleged inclusion of Concept Communications Ltd., Interads Ltd., New Age Entertainment Ltd., India Infoline Marketing Services Ltd., India and Infoline Media and Research Ltd., Marketing Consultants and Agencies Ltd.

36. We note that, these comparables have not been considered/analysed by Ld.AO/TPO. As we have excluded the comparables already considered by the Ld.TPO these comparables needs to be analysed for inclusion by Ld.TPO depending upon the FAR.

Accordingly these comparables are remanded to Ld.AO/TPO for reconsideration in accordance with law.

Accordingly this ground raised by assessee stands allowed as indicated hereinabove.

37. The Ld.AR submitted that ground No. 1 (h) is general in nature and therefore do not require adjudication.

In the result, appeal filed by assessee stands allowed and appeal filed by revenue stands dismissed as indicated hereinabove.

Order pronounced in open court on 14th June, 2021.

Sd/-

(CHANDRA POOJARI)
Accountant Member
Bangalore,
Dated, the 14th June, 2021.
/Vms/

Sd/-

(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, ITAT, Bangalore