

IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI MANISH BORAD (ACCOUNTANT MEMBER)

I.T.A. No. 7347/Mum/2017
(Assessment year 2013-14)

NortonLifeLock Software Solutions Private Ltd. (Formerly known as Symantec Software Solutions Pvt Ltd) Regus Business Center, 9 th Floor, Platina G Block, Plot C59, Bandra Kurla Complex, Bandra East, Mumbai-400 051 PAN : AABCV2624B	vs	Asst. Commissioner of Income-tax, Cir.14(3)(2), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri M.P. Lohia (AR)
Respondent by	Shri Manpreet S Duggal (DR)

Date of hearing	12-08-2021
Date of pronouncement	27-09-2021

ORDER

Per : Saktijit Dey (JM):

This is an appeal by the assessee against final assessment order dated 31-10-2017 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2013-14, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. At the outset, learned counsel for the assessee, on instruction, did not press grounds 1, 4 and 6. Accordingly, these grounds are dismissed as not pressed.

3. In grounds 2 and 3, assessee has challenged rejection/selection of certain comparables.

4. Briefly the facts are, the assessee is a resident company and is a part of Symantec group. As per the functional profile, assessee is engaged in providing software development services to the overseas Symantec group entities. Of course, the assessee also provides various other services to the group entities, such as, marketing support services, general and administrative services, etc. However, presently, we are concerned with provision of software development services. In the financial year relevant to the assessment year under dispute, assessee had provided software development services to its overseas associated enterprises (AEs) and earned revenue of Rs.28,26,79,000/-. In the TP study report, the assessee had benchmarked the transaction with the AEs by applying transactional net margin method (TNMM) as the most appropriate method with operating profit/operating cost (OP/OC) as the profit level indicator (PLI). Undertaking search process in the database, the assessee had selected fifteen companies as comparables with average margin of 9.51%. Since, the assessee had shown operating margin at 12.31%, the transaction with AEs was claimed to be at arm's length. The Transfer Pricing Officer (TPO), however, did not find the assessee's benchmarking acceptable. After verifying the details and materials available on record, he observed that three comparables selected by the assessee, viz. CAT Technologies Ltd, Lucid Software Ltd and Silverline Technologies Ltd are having wide variations in operating margin over the last years. He was of

the view that the fluctuating margin suggests the unstable nature of the comparable's business and revenue. Thus, he concluded that the aforesaid three companies cannot be treated as comparables. Further, he held that Calibre Point Business Solutions Ltd cannot be treated as comparable as it only provides software support services and not any software development. Thus, he excluded these companies from being treated as comparables.

5. Having done so, he observed that on analyzing the accept/reject matrix of the comparables considered by the assessee, he found that four companies, viz. Aspire Instruments (India) Ltd, Infobean Technologies Ltd, Thirdware Solutions Ltd and Cyber Infrastructure Pvt Ltd are otherwise comparable to the assessee. Thus, finally the TPO shortlisted following ten companies as comparables with arithmetic mean of 21.32%:-

S.No.	Name of the Company	F.Y. 2012-13
1	Akshay Software Technologies Limited	8.15%
2	Aspire Systems (I) Pvt. Ltd.	34.94%
3	OG-VAK Software & Exports Limited	14.58%
4	Cigniti Technologies Ltd	8.70%
5	Cyber Infrastructure Pvt. Ltd	41.70%
6	Evoke Technologies Limited	3.08%
7	Infobeans Technologies Ltd.	30.04%
8	Maveric Systems Limited	-
9	Priya Softweb Solutions Pvt. Ltd.	19.79%
10	Thirdware Solutions Ltd	30.92%
	Arithmetic Mean	21.32%

6. Applying the arithmetic mean of the comparables, the assessing officer determined the ALP of the transaction at Rs.32,33,16,587/-. The resultant shortfall of Rs.4,06,37,587/- was proposed as adjustment to the ALP. Challenging

the aforesaid adjustment to the ALP, assessee raised objection before learned DRP; however, without any success.

7. Before us, the learned authorized representative submitted, the assessee does not want to dispute the rejection of Calibre Point Business Solutions Ltd and Maveric Systems Ltd as comparables. Further, he submitted, assessee does not dispute inclusion of Aspire Systems (I) Pvt Ltd as a comparable. Proceeding further, he submitted, CAT Technologies Ltd, Lucid Software Ltd and Silverline Technologies Ltd have been rejected as comparables only for the reason that there is wide variation in their operating margin over the years. He submitted, once the companies are accepted to be functional similar to the assessee, they cannot be rejected merely because of variation in their margin. He submitted, CAT Technologies has been accepted by the TPO himself in assessee's own case in assessment years 2011-12, 2012-13 and 2015-16. Thus he submitted, there is no justifiable reason to exclude the company as a comparable. He submitted, Lucid Software Ltd also was not rejected due to any functional difference. Drawing our attention to the annual reports of the company, he submitted, both the companies are functionally similar to the assessee. As regards, Silverline Technologies Ltd, he submitted, it has made loss in the current year and in the preceding assessment year. Whereas, it has made profit in assessment year 2011-12. Therefore, it cannot be treated as a consistent loss making company. Thus, he submitted that these three companies have to be treated as comparables. In support of his contention, learned counsel relied upon the following decisions:-

1. PCIT vs Honeywell Turbo (I) Pvt Ltd –ITA 877 of 2016 dt. 04.02.2019 (Bombay High Court)
2. Chryscapital Investment Advisors vs DCIT – ITA 417/2014 dt 27.04.2015 (Delhi High Court)

3. M/s NXP India Pvt Ltd vs DCIT – IT (TP) A No.692/Bang/2017 dt. 27.04.2020

8. Proceeding further, he submitted, Infobean Technologies Ltd cannot be considered as comparable due to functional dissimilarity. Drawing our attention to the annual report of the company at page 656 of the paper book, he submitted, while the assessee provides software development services, this company sells software product. Therefore, it cannot be treated as comparable. Further, he submitted, Thirdware Solutions Ltd cannot be considered as comparable as it also sells product and segmental information regarding revenue earned and expenditure incurred in different segments are not available. As regards Cyber Infrastructure Pvt Ltd, learned counsel drawing our attention to the annual report of the company submitted that though the company has earned revenue from software development as well as BPO services; however, segmental details are not available. Thus, he submitted, these three companies cannot be treated as comparables. In support, he relied upon the following decisions:-

1. M/s Emerson Electric Company (India) Pvt Ltd vs ACIT – ITA No.6098/Mum/2018 & ITA No.531/Mum/2018 dt. 145.06.2019
2. M/s Philips India Ltd vs ACIT – 2489/Kol/2017 dt.04.04.2018
3. Skillnet Solutions India Pvt Ltd vs DCIT – ITA No.6570/Mum/2017 dt 24.02.2021

9. The learned departmental representative submitted, Silverline Technologies Ltd cannot be treated as comparable due to wide fluctuation in its margin. He submitted, though in assessment year 2011-12 it has shown profit of 14.25%, in subsequent two assessment years it has shown huge loss. He submitted, the reason for such wide variation in the profit margin has not been reasonably explained by the assessee. Thus, he submitted, Silverline Technologies Ltd cannot

be treated as comparables. As regards CAT Technologies Ltd and Lucid Software Ltd, he relied upon the observations of the TPO and learned DRP.

10. As regards assessee's contentions regarding exclusion of certain companies selected by the TPO, the learned departmental representative submitted, while undertaking comparative analysis under TNMM, only broad comparability has to be seen. If functions of the comparables are broadly similar to the assessee, they can be treated as comparables. He submitted, though a number of companies came out in assessee's search process, as would be evident from the TP study report; however, the assessee did not consider them as comparables due to their relatively high margin. Thus, he submitted, the assessee has resorted to cherry-picking. In this context, he specifically referred to Thirdware Solutions Ltd. The learned departmental representative submitted, software development service also includes development of software product. Therefore, a company cannot be rejected simply for the reason that it has developed a software product. As regards the decisions relied upon by the learned counsel for the assessee, the learned departmental representative submitted, unless it is demonstrated that the assessees, in relation to whom the decisions have been rendered, are functionally similar to the present assessee, the decisions cannot be made applicable.

11. We have considered rival submissions and perused materials on record. Undisputedly, CAT Technologies Ltd, Lucid Software Ltd and Silverline Technologies Ltd are assessee's comparables. The TPO has rejected these comparables only on the reasoning that they have wide variation in operating margin. On a perusal of facts on record, it is observed that CAT Technologies Ltd has earned profit margin of 4.71% and 5.11% in assessment years 2011-12 and

2012-13, respectively. Whereas, it has a negative margin of 13.00% in the impugned assessment year. Therefore, it cannot be said that there is wide variation in the margin. Moreover, neither the TPO nor learned DRP have disputed the fact that the company is functionally similar to the assessee. Similar is the case with Lucid Software Ltd. Though, in the preceding two assessment years it has reported a positive profit margin, in the impugned assessment year it has reported a negative margin. However, nothing has been brought on record to demonstrate that the company is not functionally similar to the assessee. Merely because the aforesaid two companies have reported negative margin in the impugned assessment year, they cannot be considered as incomparable. In fact, in assessee's own case in subsequent assessment years CAT Technologies Ltd. Has been accepted as a comparable. Further, in the case of NXP (I) Pvt Ltd vs DCIT (supra), the co-ordinate bench has accepted CAT Technologies Ltd and Lucid Software Ltd as comparable to a software development service provider. Since, the aforesaid decisions of the co-ordinate bench is for the very same assessment year, we follow the same and direct the assessing officer to include CAT Technologies Ltd and Lucid Software Ltd as comparables.

12. As regards Silverline Technologies Ltd, though, going by the legal principles, it cannot be considered as a consistent loss making company; however, we have observed abnormal variation in its profit margin in the immediately two preceding assessment years as well as in the current year. In assessment year 2011-12, it has reported profit margin of 14.25%. Whereas, in assessment year 2012-13 it has reported negative margin of (-) 50.61%. In the impugned assessment year, the company has reported negative margin of (-) 39.97%. Thus, there is wide variation in the margin of the company. Further, in assessment year 2012-13 and the

impugned assessment year it has reported abnormally high negative margin. Whereas, the assessee has reported a profit margin of 12.31% in the impugned assessment year. As per generally accepted legal principle, in many cases comparables having super normal profit are not considered as comparables. Reverse is the situation in case of Silverline Technologies Ltd. Compared to assessee's margin, this comparable has shown abnormally high negative margin in two consecutive assessment years. Therefore, in our considered opinion, it will not be safe to include this company as a comparable. Therefore, we agree with the decision of the departmental authorities insofar as Silverline Technologies Ltd is concerned.

13. As regards Infobean Technologies Ltd and Thirdware Solutions Ltd and Cyber Infrastructure Ltd are concerned, undoubtedly, these comparables were selected by the TPO. After taking note of the rival contentions and perusing materials on record, we find that as per the information available from the annual report of Infobean Technologies Ltd it is involved in sale of software products, whereas, the transaction of the assessee with its AE being considered for comparability analysis is relating to software development services. It is further evident from the annual report of the company, it is into diversified activities including developing customized software, whereas, segmental details relating to various segments are not available in the annual report. Considering the aforesaid aspect, the co-ordinate bench in case of Skillnet Solutions Pvt Ltd vs DCIT (supra) has rejected this company from being treated as a comparable to a software development service provider. Same view has been expressed by the co-ordinate bench in case of M/s Emerson Electric Co Pvt Ltd vs ACIT (supra). Pertinently, the aforesaid decisions of the co-ordinate bench are for the very same assessment

year. In view of the aforesaid, we hold that Infobean Technologies Ltd cannot be considered as a comparable.

14. As far as Thirdware Solutions Ltd is concerned, it is observed from the annual report of the company that it has reported sales of software license. Further, even if there may be revenue earned from software development services; however, segmental information is not available. Considering this aspect, the co-ordinate bench in a case of M/s Emerson Electric Co Pvt Ltd vs ACIT (supra) has held that this company cannot be considered as a comparable to a software development service provider. Similar view has been expressed by the co-ordinate bench in case of M/s Philips India Ltd vs ACIT (supra). Since the aforesaid decisions of the co-ordinate bench are for the very same assessment year, respectfully following them, we direct the assessing officer to exclude Thirdware Solutions Ltd from the list of comparables.

15. As regards Cyber Infrastructure Pvt. Ltd, on perusal of the annual report of the company placed in the paper book, we find that it has reported revenue from software development services as well as business process outsourcing (BPO) services. However, segmental details relating to the revenue earned are not discernible from the annual report. It is further observed, the TPO, apart from relying upon the data available in public domain while including the company has not made any effort to independently ascertain the functional similarity or even the segment wise details by issuing notice under section 133(6) of the Act. Thus, in absence of substantial details/data relating to various segments of the comparables, they cannot be included in the list of comparables. Pertinently, in case of Emerson Electric Co. India Pvt vs ACIT, Cyber Infrastructure Pvt. Ltd was

excluded for the very same reason. In view of the aforesaid, we direct exclusion of Cyber Infrastructure Pvt. Ltd as well.

16. In nutshell, the assessing officer is directed to include CAT Technologies Ltd and Lucid Software Ltd in the list of comparables. Further, he directed to exclude Infobean Technologies Ltd, Thirdware Solutions Ltd. and Cyber Infrastructure Pvt. Ltd from the list of comparables.

17. In grounds 5 and 7 assessee has challenged the denial of working capital adjustment and risk adjustment.

18. We have considered rival submissions and perused materials on record. Before us, the learned counsel for the assessee submitted that though in the TP study report, the assessee has not provided detailed working of the working capital adjustment and risk adjustment, since, the transaction with AE was found to be at arm's length; however, the assessee has reserved its right to claim such adjustment at a later stage. He submitted, before the TPO, the assessee had furnished detailed working of working capital adjustment and risk adjustment. However, neither the TPO nor DRP have considered them properly.

19. Per contra, the learned departmental representative strongly relied upon the observations of the TPO and learned DRP.

20. Having considered rival submissions, we find that the claim of working capital adjustment has been rejected by the TPO alleging that the assessee neither claimed such adjustment in the TP study report nor furnished the detailed working justifying the adjustment. Whereas, learned DRP rejected assessee's claim relying upon their decision in assessment year 2012-13. It is observed, in written submissions filed before the assessing officer, assessee had furnished working of working capital adjustment. As it appears, the TPO has not properly

looked into the working furnished by the assessee. Though, in assessment year 2012-13, the DRP had rejected assessee's claim of working capital adjustment; however, the ground raised by the assessee before the Tribunal on the issue became academic as the assessee otherwise got the desired relief. Pertinently, while deciding allowability of working capital adjustment in assessee's own case in assessment year 2005-06, the Tribunal has held that such adjustment is allowable. In view of the aforesaid, we restore the issue to the AO for re-examining the working of working capital adjustment furnished by the assessee and decide the issue accordingly. Insofar as risk adjustment is concerned, both the TPO and learned DRP have rejected assessee's claim alleging that no working of such adjustment has been furnished. However, it is the case of the assessee that such working was furnished both, before the TPO and learned DRP. In view of the aforesaid, we direct the assessing officer to examine the working of risk adjustment furnished by the assessee and decide the issue as per law. Grounds 5 and 7 are allowed for statistical purpose.

21. Ground 8 challenging the initiation of penalty proceedings under section 271(1)(c) of the Act being premature at this stage is dismissed.

22. Ground 9 challenging levy of interest under section 234A, 234B, 234C and 234D being consequential, does not require adjudication.

23. In the result, appeal is partly allowed.

Order pronounced on 27/09/2021.

Sd/-

sd/-

(MANISH BORAD)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 27/09/2021

Pavanan

Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

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By Order

Asstt. Registrar, ITAT, Mumbai