

**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. 2565/Bang/2017
Assessment Year : 2013-14

M/s. Galax E Solutions India Pvt. Ltd., Unit No. 4, 8 th Floor, Innovator Block, ITPL Whitefield Road, Bangalore – 560 066. PAN: AABCG9007F	Vs.	The Assistant Commissioner of Income Tax, Circle – 3(1)(2), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri C.J. Brito, CA
Revenue by	:	Shri Rajendra Kumar Mishra, CIT (DR)

Date of Hearing	:	24-08-2021
Date of Pronouncement	:	11-10-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against final assessment order dated 25/09/2017 passed under section 143(3) read with section 144 C of the Act by the Ld.ACIT Transfer Pricing officer, Circle 3(1)(2), Bangalore on following grounds of appeal:

“1. The Learned Transfer Pricing Officer [TPO], Assessing Officer [AO] and Honorable Dispute Resolution Panel [DRP] have erred in law as well as on facts in passing the order which is bad in law and disregarding principle of natural justice.

2. *The Ld. TPO, AO as well as DRP have erred in law as well as on facts by considering companies which are functionally not comparable to the functions performed, assets employed and risk assumed by the assessee company viz., (i) Larsen & Toubro Infotech Ltd, and (ii) Persistent Systems Ltd*

3. *The Ld. TPO, AO as well as DRP have erred in law as well as on facts by excluding five companies which have passed through all filters and are functionally comparable to the functions performed, assets employed and risk assumed by the assessee company viz., (i) Akshay Software Technologies Ltd (ii) Batchmaster Software Pvt Ltd (iii) Cigniti Tech and (iv) E-Zest Solutions Limited .*

4. *The Learned Transfer Pricing Officer [TPO], Assessing Officer [AO] and Honorable Dispute Resolution Panel [DRP] have erred in law as well as on facts by rejecting the assessee's filters and adopting inappropriate filters like one sided turnover filter ignoring the upper turnover filter applied by the assessee at 10 times of the turnover of the assessee company and thereby erred in considering comparable companies having turnovers greater than 10 times the turnover of Rs. 95 Crores reported by the assessee company.*

5. *The Ld. TPO, AO as well as DRP have erred in law by excluding communication charges amounting to Rs.17,22,189/- and traveling and conveyance expenses of Rs. 10,35,631/, from the export turnover in the process of Computation of deduction u/s 10AA without reducing the same from the total turnover ignoring the decision of the Hon'ble Karnataka High Court in the case of CFI Vs. M/s Tata Elxsi Ltd. & Others [(2012) 247 CTR (Kar.) 334 by stating that the issue is pending before the Hon'ble Supreme Court.*

6. *For these and other grounds that may be urged at the time of hearing with the permission of the bench. The respondent craves leave to add, alter, amend and / or delete any of the grounds mentioned above. It is prayed that the total addition of Rs. 4,38,97,053/- may please be deleted."*

Brief facts of the case are as under:

2. Assessee is a software development service provider and filed its return of income for year under consideration on 13/11/2013 declaring income of ₹ 8,67,56,210/-. The case was selected for scrutiny and notice under section 143 (2) of the Act was issued to assessee, in response to which representative of assessee

appeared before the Ld.AO and filed requisite details as called for. The Ld.AO observed that associate had international transaction exceeding ₹ 15crores, and accordingly reference was made to the transfer pricing officer.

3. On receipt of reference under section 92 CA, the Ld.TPO called for the economic details of international transaction in Form 3 CEB. The Ld.TPO observed that assessee had following international transaction with its associated enterprise:

International Transaction	Amount (in Rs.)
Provision of Software development services	945017785
Reimbursement of expenses	13401128
Issue of equity shares	14394842

4. The Ld.TPO observed that assessee computed its margin at 15% by using OP/OC as PLI it used to TNMM as the most appropriate method to determine arm's-length price of its transaction. Assessee used following 9 comparable companies with average margin of 8.28% and thereby held its transaction to be at arm's-length:

Sl.No	Name of the Company (M/s.)	Wt. Avg (%)
1	Akshay Software Technologies Ltd.	7.20%
2	Take Solutions	17.24%
3	FCS software	-4.73%
4	Synfosis Business Solutions.	5.69%
5	Batchmaster software ltd.	1.08%
6	Cigniti Tech	8.72%
7	Infomile Tech	10.19%
8	E - zest solutions	9.73%
9	CG VAK software	19.37%
Arithmetic mean		8.28%

5. The Ld.TPO rejected the filters applied by assessee. He chose following 7 comparable is based on new set of filters with an average margin of 19.95%:

SI No	Name of the Company	Margins - PLI
1	CG VAK Software & Exports Ltd	20.54%
2	ICRA Techno Analytics Ltd	17.10%
3	Larsen & Toubro Infotech Ltd	26.06%
4	Mindtree (Seg)	18.19%
5	Persistent Systems Ltd (Seg)	28.27%
6	R S Software India Ltd	17.41%
7	Tech Mahindra Ltd (Seg)	18.72%
Arithmetic Mean before Working Capital Adjustment Less: Working capital Adjustment considered by the TPO		20.90% 0.95%
Adjusted Margin for comparable companies		19.95%
Operating margin of the Assessee Company		15%

The Ld.TPO proposed adjustment of Rs.4,09,19,899/- being the shortfall to the arm's-length price.

6. On receipt of the transfer pricing order, the Ld.AO passed draft assessment order by re-computing the deduction under section 10 AA of the Act at Rs.4,44,11,444/- as against Rs.4,49,14,165/- claimed by assessee. He disallowed communication expenses and foreign travel expenses from the export turnover for the purpose of computing deduction under section 10AA of the act.

The Ld.AO passed the draft assessment order by proposing addition of Rs.4,14,22,650/- (including the adjustment proposed by Ld.TPO).

Aggrieved by the order of Ld.AO, assessee filed objections before the DRP.

7. DRP while considering assessee's objections, excluded Tech Mahindra from the list of comparables. Rest of the objections raised by assessee were rejected. On receipt of the DRP directions, the Ld.AO passed final assessment order by making addition of ₹ 4,38,97,083/- to the hands of assessee.

Aggrieved by the order of loan deal, assessee is in appeal before us.

8. At the outset the Ld.AR submitted that, assessee wish to argue only Ground No.4 and 5.

Accordingly Ground No.1, 2 and 3 are dismissed as not pressed.

9. In **Ground No.4**, assessee is seeking exclusion of following comparables as they fail the turnover filter:

Larsen and Toubro Infotech Ltd

Mindtree Ltd. (SEG.)

Persistent Systems Ltd

Before we undertake the compatibility analysis, it is *sine qua non* to understand the functions performed, assets owned and risk assumed by assessee.

9.1 Functions:

In TP study assessee is held to be a software development service provider. It is submitted that assessee carries out low-level design functions, software development coding, quality assurance/testing and maintenance of both. It is also submitted that assessee performed general managerial functions like

corporate strategy finance accounting treasury and legal functions and human resource functions.

9.2 Assets employed:

It is submitted that assessee owns tangible assets like furniture and fixtures, office equipment, computers, leasehold improvements.

9.3 Risks assumed:

It is submitted in the TP study that assessee has human resource risk as the key to the success depends on trained employees. It undertakes foreign exchange risk as remuneration is received by assessee in foreign exchange.

Assessee has been characterised as to be a captive service providers to the associated enterprises and therefore the risk assumed is less than minimal.

Based on the above we shall analyse the compatibility of alleged comparable is sought for exclusion by assessee.

9.4 The Ld.AR submitted that the turnover of the assessee company during the year was Rs. 94.5 crores and hence it falls under the category of companies having turnover in the range of One crore to 200 crores. However the turnover of the companies sought for exclusion is more than 200 crores. It is thus submitted by the Ld.AR that these comparables cannot be considered as good comparable companies. In support, the Ld.AR placed his reliance on the decision of by co-ordinate bench of this *Tribunal* in case of *Autodesk India Pvt.Ltd vs.DCIT* reported in (2018) 96 *taxman.com* 263.

On the contrary, the Ld.CIT.DR relied on orders passed by authorities below.

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

9.5 We note that coordinate bench of this Tribunal for assessment year 2013-14 in case of *Evolving Systems Network (I) Pvt.Ltd Vs.ACIT reported in (2021) 130 taxman.com212* held as under:

“9. As far as excluding the companies on the basis of turnover is concerned, the issue has been settled in several decisions of the Tribunal and has been elaborately discussed by this Tribunal in the case of AutodeskIndia (P.) Ltd. v. Dy. CIT [2018] 96 taxmann.com 263 (Bang. - Trib). The Tribunal in this decision after review of entire case laws on the subject, considered the question, whether companies having turnover more than 200 crores upto 500 crores has to be regarded as one category and those companies cannot be regarded as comparables with companies having turnover of less than 200 crores, the Tribunal held as follows:

"17.7. We have considered the rival submissions. The substantial question of law (Question No. 1 to 3) which was framed by the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) Pvt. Ltd., (supra) was as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or if CIT dear relied on orders passed I authority is below fluctuation profit margins, as compared to the Assessee in transfer pricing analysis. Therefore as rightly submitted by the learned counsel for the Assessee the observations of the Hon'ble High Court, in so far as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court, even though the said decision is of a non-jurisdictional High Court. We however find that the Hon'ble Bombay High Court in the case of CIT v. Pentair Water India Pvt. Ltd. Tax Appeal No. 18 of 2015 judgment dated 16-9-2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There is no decision of the jurisdictional High Court on this issue. In the circumstances, following the principle that where two views are available on an issue, the view favourable to the Assessee has to be adopted, we respectfully follow the view of the Hon'ble Bombay High Court on the issue. Respectfully following the aforesaid decision, we uphold the order of the DRP excluding 5 companies from the list of comparable companies chosen by the TPO on the basis that the 5 companies turnover was much higher compared to that the Assessee.

17.8. *In view of the above conclusion, there may not be any necessity to examine as to whether the decision rendered in the case of Genisys Integrating (supra) by the ITAT Bangalore Bench should continue to be followed. Since arguments were advanced on the correctness of the decisions rendered by the ITAT Mumbai and Bangalore Benches taking a view contrary to that taken in the case of Genisys Integrating (supra), we proceed to examine the said issue also. On this issue, the first aspect which we notice is that the decision rendered in the case of Genisys Integrating (supra) was the earliest decision rendered on the issue of comparability of companies on the basis of turnover in Transfer Pricing cases. The decision was rendered as early as 5-8-2011. The decisions rendered by the ITAT Mumbai Benches cited by the learned DR before us in the case of Willis Processing Services (supra) and Capegemini India Pvt. Ltd. (supra) are to be regarded as per incurium as these decisions ignore a binding co-ordinate bench decision. In this regard the decisions referred to by the learned counsel for the Assessee supports the plea of the learned counsel for the Assessee. The decisions rendered in the case of M/S.NTT Data (supra), Societe Generale Global Solutions (supra) and LSI Technologies (supra) were rendered later in point of time. Those decisions follow the ratio laid down in Willis Processing Services (supra) and have to be regarded as per incurium. These three decisions also place reliance on the decision of the Hon'ble Delhi High Court in the case of Chriscapital Investment (supra). We have already held that the decision rendered in the case of Chriscapital Investment (supra) is obiter dicta and that the ratio decidendi laid down by the Hon'ble Bombay High Court in the case of Pentair (supra) which is favourable to the Assessee has to be followed. Therefore, the decisions cited by the learned DR before us cannot be the basis to hold that high turnover is not relevant criteria for deciding on comparability of companies in determination of ALP under the Transfer Pricing regulations under the Act. For the reasons given above, we uphold the order of the CIT(A) on the issue of application of turnover filter and his action in excluding companies by following the ratio laid down in the case of Genisys Integrating (supra)."*

10. *Respectfully following the aforesaid decision, we hold that the aforesaid five companies should be excluded from the list of comparable companies. We hold and direct accordingly. The learned DR however pointed out that the Assessee did not raise this issue of turnover filter before AO and raised it before DRP in which the turnover limit of Rs. 1000 crores alone is mentioned. In our opinion, this will not be very material, as the turnover filter of Rs. 200 crores has been applied in several cases by this Tribunal. The Assessee cannot be denied the right to seek its exclusion before the Tribunal and in this regard the learned counsel for Assessee has rightly placed reliance on the decision of the*

Special Bench of the Hon'ble Tribunal in the case of Dy. CIT v. Quark Systems (P.) Ltd. [2010] 38 SOT 307 (CHD - Trib.) for the proposition that the Assessee cannot be precluded from seeking exclusion of a company selected by it in its TP study, when the company is otherwise not comparable to the Assessee. We therefore direct exclusion of the aforesaid 5 companies from the list of comparable companies.

We further know that *Hon'ble Karnataka High Court* in case of *Acusis Software India Pvt.Ltd vs. ITO* reported in (2018) 98 *taxman.com* 183, has also upheld application of tolerance range of turnover of 10 times on either side of an assessee's turnover by observing as under:

“14. *The findings of the learned Tribunal as regards the comparable namely, Mercury Outsourcing Management Ltd., which too have been excluded by the Tribunal are quoted below for ready reference:—*

" (ii) Mercury Outsourcing Management Ltd.

13.1 The learned Authorised Representative has submitted that the TPO has rejected this company on the similar reasoning of diminishing revenue and abnormal cost.

13.2 On the other hand, the learned DR has submitted that this company is incurring persistent losses and further the turnover of this company is less than Rs.1 Crore and therefore it does not satisfy the filter of turnover applied by the TPO.

13.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that turnover of this company in the ITES segment is only Rs.45.33 lakhs which in any case does not satisfy any filter of turnover in comparison to the assessee's turnover more than Rs.27 Crores. Even if we apply the tolerance range of turnover of 10 times on both sides of the assessee's turnover then the company which is having less than Rs. 2.7 Crores of turnover will be outside the said range of 10 times. Accordingly, we are of the view that this company which is having only Rs. 45.33 lakhs turnover cannot be considered as a good comparable to the assessee".

15. *From the aforesaid findings of the learned Tribunal, we are satisfied that the reasons assigned by the learned Tribunal in excluding the aforesaid company as comparable is also reasonable and the same deserves to be accepted by us. It is analysed by the learned Tribunal in extenso which arrived at a decision that the company which is having only Rs.45.33 lakhs turnover cannot be considered as comparable to the Assessee-company whose turnover is more than Rs.27 Crores.”*

Even going by the above observation, and considering 10 times to 1/10 of the turnover the alleged comparable is much more than the turnover of assessee.

9.6 We note that, assessee before *Hon'ble Karnataka High Court* as well as in the decision by coordinate bench of this *Tribunal* hereinabove, were captive service provider like assessee before us.

Respectfully following the same we direct the Ld.TPO to exclude the comparable's alleged hereinabove for exclusion.

Accordingly Ground No.4 raised assessee stands allowed.

Ground No.5

10. It is submitted by the Ld.AR that the Ld.AO while computing deduction under section 10AA of the Act, reduced communication expenses and travelling and conveyance expenses incurred from the export turnover. It is submitted that this issue is no longer *res integra* by virtue of ratio laid down by *Hon'ble Supreme Court* in case of *CIT vs HCL Technologies* reported in (2018) 93 *taxman.com* 83.

10.1 It is the submitted that to arrive at the profits from export business, expenses excluded from export turnover has to be excluded from total turnover also.

The Ld.CIT.DR though supported the orders passed whether it is below, could not controvert the observations by *Hon'ble Supreme Court*.

10.2 We therefore respectfully following the view taken by *Hon'ble Supreme Court* direct the Ld.AO to recompute deduction

under section 10AA of the Act in accordance with the principles laid down in case of *CIT vs HCL Technologies (supra)*.

Accordingly this ground reasonable assessee stands allowed.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 11th October, 2021

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 11th October, 2021.
/MS/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.