

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.507/Bang/2015
Assessment Year: 2010-11

Deputy Commissioner of Income-tax Circle-2(1)(2) Bangalore	Vs.	M/s. EIT Services India Pvt. Ltd. (Formerly known as M/s. Hewlett Packard Global Soft Pvt. Ltd.) No.39/40, Electronic City Hosur Road Bengaluru 560 100 PAN NO : AAACD4078L
APPELLANT		RESPONDENT

Appellant by	:	Shri Sumer Singh Meena, D.R.
Respondent by	:	Shri Padamchand Khincha, A.R.

Date of Hearing	:	11.11.2021
Date of Pronouncement	:	15.11.2021

ORDER

PERB.R. BASKARAN, ACCOUNTANT MEMBER:

The revenue has filed this appeal challenging the directions given by the Ld. Dispute Resolution Panel (DRP) for assessment year 2010-11. The grounds of appeal urged by the revenue read as under:

- 1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.*
- 2. On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing the TPO/AO to exclude the comparables M/s Infosys Ltd.; M/s Persistent System Ltd; Sasken*

Communication Technologies Pvt. Ltd, mainly on basis of other cases for other FYs, without considering the facts discussed by the TPO for selection of the comparables in the case of assessee, without appreciating the fact that these are qualifying the qualitative and quantitative filters applied by the TPO.

3. *On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing the TPO/AO to apply new filters i.e. 25% Export Filter, 75% Export Filter & Onsite Filter in ITES Segment without appreciating the fact that the direction actually amounts to setting aside of the draft order, which is beyond the mandate given to DRP vide provisions by Section 144C(8).*
4. *On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing the TPO/AO to exclude M/s Mindtree Ltd, M/s LGS Global, by applying new filter i.e. Onsite Filter in Software Segment without appreciating the fact that the direction actually amounts to setting aside of the draft order, which is beyond the mandate given to DRP vide provisions by Section 144C(8).*
5. *On the facts and in the circumstances of the case, as per the directions of the Dispute Resolution Panel, whether working capital adjustment can be made on the basis of advance received from AEs in absence of debtors and inventory in the case of assessee for calculating the cost of working capital built in the profit margin.*
6. *On the facts and in the circumstances of the case the Dispute Resolution Panel is not justified in directing the TPO to adjust the profit margin of the assessee for the entire amount of advances received from AE on the ground that there is time value for money.*
7. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in directing the AO to exclude reimbursement of specific expenditure both from the export turnover as well as from total turnover for the purpose of computation of deduction u/s 10A, without appreciating the fact that the statute allows exclusion of such expenditure only from export turnover by way of specific definition of export turnover as envisaged by Sub-clause (4) of Explanation 2 below Sub-section (8) of Section 10A and the total turnover has not been defined in this Section.*
8. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd.,*

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which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.

9. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in directing the AO to not exclude expenses related to technical services from export turnover for computation of deduction u/s 10A without appreciating the 'elaborate-reasons and facts brought on record by the AO in the draft assessment order.*
10. *On the facts and in the circumstances of the case the Dispute Resolution Panel erred in law in directing the AO to verify the claim of deduction u/s I OA for the revenue earned through DTM/Onsite Revenue without Segment without appreciating the fact that the direction actually amounts to setting aside of the draft order, which is beyond the mandate given to DRP vide provisions by Section 144C(8).*
11. *For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds ma; be reversed.*
12. *The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.*

We may summarise the grounds urged by the revenue issue-wise as under:-

- (a) Ground No.1, 11 and 12 are general in nature.
- (b) Ground Nos. 2, 4, 5 and 6 are related to T.P adjustment made in respect of software segment.
- (c) Ground No.3 is related to T.P adjustment made in respect of ITES segment.
- (d) Ground Nos. 7 & 8 are related to computation of deduction u/s 10A by excluding expenses from both export turnover and total turnover.
- (e) Ground Nos. 9 & 10 are related to computation of deduction u/s 10A by not excluding expenses related to technical services from export turnover.

2. The assessee company is earlier known as Hewlett Packard Global Soft Pvt. Ltd. It is engaged in software development and information enabled services. It also provides technical call centre services. For the purpose of TP study, the activities of the assessee have been classified into two segments, viz., Software development services and IT enabled services. The assessee has reported turnover of Rs.1182.56 crores in software development services and Rs.320.14 crores in ITES. The assessee followed TNMM method and adopted OP/OC as profit level indicator. The TPO did not accept the TP study of the assessee. He selected 13 comparables in software development services whose average margin was 21.51%. After giving working capital adjustment of 1.23%, the TPO arrived adjusted margin at 20.28%. Accordingly, he made transfer pricing adjustment of Rs.62.02 Crores in respect of software development services.

3. Under ITES segment, the TPO selected 9 comparables whose average margin was 25.69%. After giving working capital adjustment of 0.58%, the TPO arrived at the adjusted margin of 25.11% in ITES segment. Accordingly, he made transfer pricing adjustment of Rs.35.96 crores in ITES segment.

4. The Ld. DRP gave partial relief to the assessee in respect of software development segment by excluding following comparable companies:-

- a) Infosys Limited
- b) Mindtree (SEZ)
- c) Persistent Systems Ltd.
- d) Sasken Communications Ltd.
- e) LGS Global Limited.

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After exclusion of above said comparables, the margin declared by the assessee was within +/- 5% bandwidth. Accordingly, the SWD segment was considered to be at arm's length and the T.P adjustment made in SWD segment came to be deleted.

5. In respect of ITES segment, Ld. DRP directed exclusion of ICRA Online Ltd and Sundaram Business Services Ltd. This resulted in transfer pricing adjustment of Rs.36.50 crores in ITES segment. The Ld DRP also granted relief with regard to computation of deduction u/s 10A of the Act.

6. The revenue has filed this appeal challenging the relief granted by Ld. DRP with regard to T.P adjustment of SWD segment and ITES segment and also on computation of deduction u/s 10A of the Act.

7. The Ld A.R submitted that the assessee has settled T.P adjustment made in ITES segment in respect of USA transactions under MAP proceedings. He submitted that the assessee has settled the issues relating to T.P adjustment in respect of non-USA transactions in ITES segment and also corporate issues, i.e., relating to deduction u/s 10A of the Act certain other issues under Vivad Se Vishwas Act. Accordingly he submitted the issue relating to T.P adjustment made in respect of SWD segment alone would survive for consideration of the bench.

8. The Ld. A.R. proceeded to explain as to how the grounds relating to T.P adjustment in ITES segment and deduction u/s 10A would not survive. He submitted that the total turnover of the assessee in ITES segment consisted of both USA transactions and

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non-USA transactions. The TP adjustment of Rs.36.50 crores made in respect of ITES segment could be classified as under:

US transaction	-	Rs.30.94 crores
Non-US transaction	-	Rs. 5.56 crores

The Ld. A.R. submitted that the assessee has settled the TP adjustment in respect of USA transactions through MAP proceeding, wherein the PLI (OP/OC) was determined at 16.22%. He further submitted that in respect of non-USA transaction, the assessee has settled the same under Vivad Se Vishwas Act, 2020. He further submitted that form No.5 has already been received.

9. The Ld. A.R. further submitted that the revenue has raised grounds in respect of following corporate issues:-

- a) Reduction in relief u/s 10A (ET/TT issue)- Rs. 62,48,155/-
- b) Reduction in relief u/s 10A(DTM)
Onsite and shifting - Rs.21,35,57,566/-

The Ld. A.R. submitted that the above said corporate issues have also been settled under VSVS Act. Accordingly, the Ld. A.R. submitted that the grounds urged by the revenue in respect of T.P adjustment in ITES segment and deduction u/s 10A would not survive.

10. With regard to TP adjustment made in respect of SWD segment, the Ld. A.R. submitted that the DRP has excluded M/s Infosys Ltd., M/s. Persistent Systems Ltd. and M/s. Sasken Communication Technologies Pvt. Ltd. The exclusion of above said 3 companies is being questioned by the revenue in ground No.2. The Ld. A.R. submitted that all the above said 3 companies have been held to be not good comparable companies for the very same assessment year under consideration by the co-ordinate bench in the case of Electronics for Imaging India Pvt. Ltd. in ITA

No.212/Bang/2015 dated 24.2.2016. He submitted that the Ld. DRP has also excluded M/s. Mindtree & M/s. LGS Global. In respect of these two companies, the revenue is questioning the decision of Ld. DRP only on the ground that the Ld. DRP has excluded above said 2 companies by applying new filter namely Onsite filter in software segment and such application of new filter would amount to setting aside the matter to A.O., which is beyond the power of Ld. DRP. The Ld. A.R. submitted that the application of new filter would not amount to setting aside the matter to AO/TPO as contended by the revenue.

11. The Ld. D.R. on the contrary submitted that the submissions of the assessee with regard to settlement of disputes relating to ITES segment and deduction u/s 10A of the Act under MAP proceeding/VSVS Act would require examination at the end of the A.O. The Ld. D.R. submitted that USA transaction in ITES segment has been settled under MAP proceedings at 16.22%. In case the A.O. finds that the TP adjustment made in respect of non-USA transactions in ITES segment was not settled under VSVS Act, then the above said rate of 16.22% may be directed to be applied to non-USA transactions in ITES segment.

12. With regard to TP adjustment made in respect of SWD segment, the Ld. D.R. placed his reliance on the order passed by TPO.

13. We heard the rival contentions and perused the record. It is the submission of the Ld. A.R. that TP adjustment made in respect of USA transactions in ITES segment would not survive, since USA transactions have been settled under MAP proceedings. It is also the submission of the Ld. A.R. that non-USA transactions and

deduction u/s 10A of the Act have been settled under VSVS Act. Accordingly, it was submitted that the grounds relating to TP adjustment made in respect of ITES segment and deduction u/s 10A of the Act will not survive. However, as rightly pointed out by Ld. D.R., these submissions of the assessee require verification at the end of AO. Accordingly, we restore the above said issues to the file of A.O. to examine the above said submissions of the assessee. In case the A.O. finds that the TP adjustment made in respect of non-USA transactions in ITES segment was not settled under VSVS Act, then the rate of 16.22% determined under MAP proceedings for USA transactions should be applied to non-USA transactions in ITES segment. In respect of other issues, if the AO was not convinced with the claim of the assessee, he may take appropriate decision in accordance with law. The assessee should be provided with adequate opportunity of being heard. In case, the AO

14. With regard to SWD segment, it is the submission of the Ld. A.R. that the comparable companies namely M/s. Infosys Ltd., M/s. Persistent Systems Ltd. and M/s. Sasken Communication Technologies Pvt. Ltd. have been held to be not good comparable companies in the case of Electronics for Imaging India Pvt. Ltd. (supra). For the sake of convenience, we extract below the decision rendered by the coordinate bench in respect of the above said 3 companies in the above said case.

“(2) Infosys Ltd.

17. *The assessee objected against the selection of this company on the ground that this company has a big name and brand value and therefore it has a bargaining power. It also contended that the turnover of this company is Rs.21,140 crores, which is 442 times higher than the assessee.*

18. *The DRP accepted the objections of the assessee and by following the decision of the Delhi Benches of the Tribunal in the case of Agnity India Pvt. Ltd. v. ITO (2015) 58 taxmann.com 167*

(Delhi – Trib) directed the TPO to exclude this company from the list of comparables.

19. *We have heard the Ld. DR as well as Ld. AR and considered the relevant material on record. We note that in the case of Agnity India Pvt. Ltd. (supra), the Delhi Bench of the Tribunal has considered the comparability of this company and the findings of the Delhi Bench of the Tribunal has been confirmed by the Hon'ble Delhi High Court. The Hon'ble Delhi High Court has observed that this company having brand value as well as intangible assets cannot be compared with an ordinary entity provide captive service. We further note that this company provides end to end business solutions that leverage cutting edge technology thereby enabling clients to enhance business performance. This company also provides solutions that span the entire software lifecycle encompassing technical consulting, design, development, re-engineering, maintenance, systems integration, package evaluation and implementation, testing and infrastructure management service. In addition, the company offers software product for banking industry. Thus, this company is engaged in diversified services including design as well as technical consultancy, consulting, re-engineering, maintenance, systems integration as well as products for banking industry.*

20. *In view of the above facts that Infosys Ltd having huge brand value and intangibles as well as having bargaining power, the same cannot be compared with the assessee who is providing services to its AE.*

.....

(4) Persistent Systems Ltd.

24. *We have heard the LD. D.R. as well as Ld. AR and considered the relevant material on record. The assessee raised objections against selection of this company on the ground that this company is functionally not comparable as engaged in the product development. The segmental information for services and product is not available. Further, the assessee has also pointed out that there was an acquisition and restructuring during the year under consideration.*

25. *The DRP has noted the fact that this company has reported the entire receipt from sales and software services and product. Therefore, no segmental information was found to be available for sale of software services and product. Further, the DRP has noted that as per Note 1 of Schedule 15, this company is predominantly engaged in outsource software development service. Apart from the revenue from software services, it also earns income from*

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license of products, royalty on sale of products, income from maintenance contract, etc. These facts recorded by the DRP has not been disputed before us.

26. *Therefore, when this company is engaged in diversified activities and earning revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, etc. the same cannot be considered as functionally comparable with the assessee. Further, this company also earns income from outsource product development. In the absence of any segmental data of this company, we do not find any error or illegality in the findings of the DRP that this company cannot be compared with the assessee and the same is directed to be excluded from the set of comparables.*

(5) Sasken communication Technologies Ltd.

27. *The assessee raised objection that this company has revenue from software services, software products and other services. The DRP has come to the conclusion that this company earned revenue from 3 segments. However, no segmental information is available. Accordingly, the DRP directed AO to exclude this company from the comparables.*

28. *We have heard the Ld. DR as well as Ld. AR and considered the relevant material on record. The DRP has reproduced the break-up of revenue in the impugned order as under:-*

Amount in Rs.

	<i>Year ended March, 31, 2010</i>	<i>Year ended March 31, 2019</i>
<i>Software services</i>	<i>37,736.22</i>	<i>40,531.20</i>
<i>Software products</i>	<i>2,041.00</i>	<i>6,146.43</i>
<i>Other services</i>	<i>372.77</i>	<i>1,297.05</i>
<i>Total revenues</i>	<i>40,150.89</i>	<i>47,974.68</i>

29. *Thus, there is no dispute that this company earns revenue from 3 segments. However, the segmental operating margins are not available. Therefore, in the absence of segmental relevant data and particularly operating margins, this composite data cannot be considered as comparable with the assessee for software development services segment. Accordingly, we do not find any error or illegality in the findings of the DRP.”*

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15. Following the above said order of coordinate bench, we affirm the order passed by Ld. DRP in respect of the above said 3 companies.

16. With regard to the remaining 2 companies namely, M/s. Mindtree Ltd. and M/s. LGS Global, we agree with the Ld. A.R. that the application of a filter would not amount to setting aside the matter to the file of AO, since the Ld DRP itself has excluded them. Accordingly, we reject this ground.

17. In the result, the appeal filed by the revenue is dismissed.
Order pronounced in the open court on 15th Nov, 2021

Sd/-
(George George K.)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 15th Nov, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.