

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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

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| IT(TP)A No.2779/Bang/2017 |
| Assessment year : 2013-14 |

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| Apigee Technologies (India) Pvt. Ltd., C/o. Goolge India Pvt. Ltd., Level 4, Tower E, RMZ Infinity, Old Madras Road, Bangalore – 560 016. PAN: AAICS 9117R | Vs. | The Deputy Commissioner of Income Tax, Circle 1(1)(2), Bangalore. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri K.R. Vasudevan, Advocate |
| Respondent by | : | Shri Devarathna Kumar, CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 03.11.2021 |
| Date of Pronouncement | : | 03.11.2021 |

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 25.9.2017 of the Assessing Officer passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] for the assessment year 2013-14.

2. The assessee has raised the following grounds:-

“The grounds mentioned hereinafter are without prejudice to one another.

1. The learned Assessing Officer ("learned AO"), learned Transfer Pricing Officer ("learned TPO") and the Honourable

Dispute Resolution Panel ("Hon'ble DRP") have grossly erred in determining an adjustment of INR. 70,27,460/- to the Arm's Length Price ("ALP") of the Appellant's international transactions with its Associated Enterprises ("AEs") u/s 92CA read with Section 144C (13) of the Income-tax Act, 1961.

2. The learned AO/learned TPO/Hon'ble DRP have erred in rejecting the transfer pricing documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act.
3. The learned AO/ learned TPO/ Hon'ble DRP have erred in rejecting comparability analysis carried in the transfer pricing documentation and in conducting a fresh comparability analysis by introducing various filters in determining the ALP.
4. The learned AO / learned TPO/ Hon'ble DRP have erred in not considering the previous two years financial data of the comparable companies while determining the ALP.
5. The learned AO/learned TPO/Hon'ble DRP have erred in using data available at the time of assessment proceedings, instead of data available at the time of preparing the transfer pricing documentation for comparable companies while determining ALP.
6. The learned AO/ learned TPO/ Hon'ble DRP have erred in not considering the provision for bad and doubtful debts as operating in nature in computing the results of companies considered as comparable.
7. The learned AO/learned TPO/Hon'ble DRP have erred in not considering foreign exchange gain/ loss as non-operating in nature.
8. The learned AO/ learned TPO/ Hon'ble DRP have erred in considering following companies as comparable without giving due cognizance to the contentions of the Appellant:
 - CG-VAK Software & Exports Ltd.
 - Larsen & Toubro Infotech Ltd.
 - Persistent Systems Ltd.

9. The learned AO/ learned TPO/ Hon'ble DRP have erred in rejecting following companies that ought to have been accepted as comparable:
- Sasken Communication Technologies Ltd.
 - R Systems International Ltd.
 - Akshay Software Technologies Ltd.
 - Spry Resources India Pvt. Ltd.
10. The learned AO/learned TPO/Hon'ble DRP have erred in using information obtained under section 133(6) of the Act in undertaking comparability analysis thereby relying on unaudited data as well as information not available in public domain in determining the ALP.
11. The learned AO/ learned TPO/ Hon'ble DRP have erred in not allowing appropriate adjustment towards the risk difference between the Appellant vis-à-vis the comparable companies.

The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”

3. The assessee has also raised the following additional ground:-

“12. The Learned AO/learned TPO/Hon'ble DRP has erred in not applying an upper limit on turnover while selecting comparable companies.”

4. The assessee has filed petition for admission of additional ground stating that when applying the arm's length principle, the conditions of a controlled transaction (i.e. a transaction between a taxpayer and an associated enterprise) are compared to the conditions of comparable uncontrolled transactions. In this context, to be comparable means that:

none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin). Such differences should be reckoned in order to achieve reliable comparability between the taxpayer and the third-party comparable companies. Hence, it is essential to apply upper limit on sales turnover to bridge the disparities between appellant and the comparable companies selected by the TPO. Therefore, it is necessary to apply upper limit on sales turnover filter while benchmarking the assessee company with comparable companies. In support of the same, the Petitioner highlights that it had also applied lower turnover filter in transfer pricing documentation, wherein comparable companies having turnover less than INR 1 Crore were rejected and the same was accepted by the TPO as well in course of assessment proceedings.

5. Further the jurisprudence with respect to application of upper turnover filter has evolved and now the Tribunals through various decisions have been allowing the application of upper limit on turnover filter. The Petitioner has inadvertently missed taking this ground before the lower authorities and hence raising the same through an additional ground before this Hon'ble Tribunal. Therefore, it is submitted that the additional ground to apply upper limit of turnover filter be admitted in the interest of justice and equity.

6. The Id. DR submitted that the assessee has not objected this issue before the AO as well as DRP and also comparables selected by the assessee is also having upper limit more than 200 crores, as such this additional ground need not be admitted.

7. We have heard both the parties and perused the material on record on this issue. Admittedly, this Tribunal in the case of *Northern Operating*

Services in IT(TP)A No.101/Bang/2016 dated 15.2.2019 has held as under:-

“18. We have given a careful consideration to the rival submissions and are of the view that as rightly submitted by the ld. Counsel for the assessee, the decision rendered by the Hon'ble High Court of Karnataka in the case of Acusis Software (I) P. Ltd. (supra) does not positively say that for a company to be excluded on the basis of high turnover, the tolerance range of turnover of 10 times on both the sides of assessee's turnover has IT(TP)A No.101/Bang/2016 & CO No.8/Bang/2017 to be seen. Even the Tribunal in the order against which the appeal was filed, did not proceed on application of turnover filter with any such condition. Therefore, it is not correct to say that for application of turnover filter, tolerance range of turnover of 10 times on both the sides of assessee's turnover has been laid down by the Hon'ble High Court. The Hon'ble High Court held that the order of Tribunal is correct and calls for no interference and further held that no question of law arose for consideration. The decision rendered in the case of Autodesk (I) P. Ltd. (supra) of the Tribunal after analysing every conflicting views has ultimately concluded that the law laid down in the case of Genesis Integrated Systems (I) P. Ltd. (supra) has to be followed. The following were the relevant observations of the Tribunal:-

"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 IT(TP)A No.101/Bang/2016 & CO No.8/Bang/2017 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).”

8. Being so, the assessee is not prevented from raising additional ground with regard to turnover filter before the Tribunal. Accordingly, by placing reliance on the Hon'ble Supreme Court judgment in the case of *M/s National Thermal Power Co. Ltd. Vs. CIT, 229 ITR 383 (SC)*, we admit the additional ground.

9. Coming to main grounds, ground Nos. 1 to 7 and 10 & 11 were not pressed at the time of hearing and accordingly they are dismissed as not pressed

10. Ground Nos.8 & 9 are with regard to consideration of comparables on the basis of turnover filter. Since this issue revolves on the additional ground No.12 raised by the assessee, it is appropriate to remit the entire

issue to the AO/TPO on the reason that when the turnover filter is applied, the comparables selected by the assessee as well as the TPO are to be excluded. Accordingly, the issue is remitted to the AO/TPO to decide the issue afresh after applying the turnover filter and computation of arm's length price (ALP) accordingly. The TPO is at liberty to conduct fresh TP study to determine the ALP transactions in this case.

11. In the result, the appeal by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on this 3rd day of November, 2021.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 3rd November, 2021.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.