

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.3188/Bang/2018
Assessment Year : 2005-06

M/s. Infor (Bangalore) Private Limited, <i>(Previously Softbrands India Private Ltd., and now merged with Infor India Private Ltd.,)</i> , 302, 3 rd Floor, Prestige Sigma, #3, Vittal Mallya Road, Bengaluru – 560 001. PAN : AAFCS 9041 K	Vs.	DCIT, Circle – 3(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Srinivas K P, CA
Revenue by	:	Shri. Priyadarshi Mishra, Addl. CIT(DR)(ITAT), Bengaluru

Date of hearing	:	11.01.2022
Date of Pronouncement	:	11.01.2022

ORDER

Per N V Vasudevan, Vice President :

This appeal by the Assessee is directed against the order dated 3.10.2018 of the CIT(A)-3, Bangalore, in relation to AY 2005-06.

2. The Assessee is engaged in the business of provision of Software Development Services (SWD services), to its Associated Enterprise (AE) and therefore was an international transaction as defined in the Act. In terms of Sec.92(1) of the Act, the Any income arising from an international transaction (transaction with an Associated Enterprise) shall be computed having regard to the arm's length price. In this appeal by the Assessee, the dispute is with regard

to determination of Arms' Length Price (ALP) in respect of the aforesaid international transaction of rendering SWD services to the AE.

3. As far as the provision of Software Development services are concerned, the Assessee filed a Transfer Pricing Study (TP Study) to justify the price paid in the international Transaction as at ALP by adopting the Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM) of determining ALP. The Assessee selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) for the purpose of comparison. The Assessee chose companies who are engaged in providing similar services such as the Assessee. The Assessee identified companies whose average arithmetic mean of profit margin was comparable with the Operating margin of the Assessee. The Assessee therefore claimed that the price it charged in the international transaction should be considered as at Arm's Length.

4. The Transfer Pricing Officer (TPO) to whom the determination of ALP was referred to by the AO, accepted TNMM as the MAM and also used the same PLI for comparison i.e., OP/TC. He also selected comparable companies from database. The TPO identified 17 companies as comparable with the Assessee company and worked out the average arithmetic mean of their profit margins as follows:

Comparables selected by the TPO and their arithmetic mean:

SI. No.	Comparables Selected by TPO	NCP Margins as per TPO Order (%) (WC- Unadj)	NCP Margins as per TPO Order (%) (WC -
1	Bodhtree Consulting Ltd.	24.85	-
2	Lanco Global Systems Ltd.	13.65	10.16
3	Exensys Software Solutions Ltd.	70.68	64.14
4	Sankhya Infotech Ltd.	27.39	21.94
5	Sasken Network Systems Ltd.	16.64	14.73
6	Four Soft Ltd.	22.98	22.15

7	Thirdware Solution Ltd.	66.09	65.28
8	R S Software (India) Ltd.	8.07	7.40
9	Geometric Software Solutions	20.34	18.49
10	Tata Elxsi Ltd.	24.35	23.59
11	Visualsoft Technologies Ltd.	23.52	20.88
12	Sasken Communication	14.42	13.94
13	iGate Global Solutions Ltd.	4.32	2.45
14	Flextronics Software Systems Ltd.	32.19	30.32
15	L&T Infotech Ltd.	10.33	9.19
16	Satyam Computer Services Ltd.	29.44	27.81
17	Infosys Technologies Ltd.	42.83	41.99
Arithmetical Mean		26.59	24.57

5. The TPO computed the addition to be made to the total income on account of determination of ALP at Rs. 79,53,501/- as follows:

19.6 Computation of Arms Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arms length margin (Please see Annexure-B for details of computation of PLI of the comparables). Based on this, the arms length price of the software services rendered by you is computed as under:

Arithmetic mean PLI .	26.59%
Less: Working capital adj. as per Annexure-C	<u>2.96%</u>
Adj. Arithmetic mean PLI	23.94%

Arm's Length Price:

Operating Cost	Rs. 6,02,89,055/-
Arm's Length Margin	23.94% of the Operating Cost
Arm's Length Price @23.94% of operating cost	Rs. 7,47,22,254/-

19.7 Price Received vis-a-vis the Arms Length Price:

The price charged by the taxpayer to its Associated Enterprises is compared to the Arms Length price as under:

<i>Arm's Length Price at 123.77% of operating cost</i>	<i>Rs. 7,47,22,254/-</i>
<i>Price received</i>	<i>Rs. 6,67,68,753/-</i>
<i>Shortfall being adjustment u/s 92CA</i>	<i>Rs. 79,53,501/-</i>

6. Thus a sum of Rs.73,53,501/- was added to the total income of the Assessee on account of determination of ALP for provision of SWD services by the Assessee to its AE.

7. The Assessee did not file objections before the Disputes Resolution Panel (DRP) against the draft assessment order passed by the AO wherein the addition suggested by the TPO as adjustment to ALP was added to the total income of the Assessee by the AO. The Assessee preferred appeal against the final order of assessment of the AO before CIT(A). The CIT(A) excluded one out of the 17 comparable companies chosen by the TPO. To the extent the Assessee did not get relief from the CIT(A), the Assessee filed the present appeal before the Tribunal.

8. The prayer of the learned counsel for the Assessee before the Tribunal was to exclude the following 8 companies from the list of comparable companies, viz., Sankhya Limited, Exensys Software Solutions Ltd, Bhodtree Consulting Ltd., Thirdware Solutions Ltd., Infosys Ltd., Flextronics Ltd., Geometric Software Solutions Co. Ltd. and Four Soft Ltd. The learned counsel for the Assessee relied on the decision of ITAT Bangalore Bench in the case of ACIT Vs. McAfee Software India Pvt.Ltd. (2016) 68 taxmann.com 293 (Bangalore-Trib.), wherein in the case of a SWD service provider such as the Assessee wherein the very same 17 companies were chosen as comparable companies by the TPO, for the very same AY 2005-06, this tribunal held that the aforesaid 8 companies are not comparable

companies. The learned DR however placed reliance on the order of the CIT(A) wherein the CIT(A) has not accepted the correctness of similar decision rendered by the ITAT.

9. We have considered the rival submissions and the material on record. We shall deal with each of the comparable companies listed in the earlier paragraph. In the case of Mc.Afee Software India Pvt.Ltd., the Tribunal has dealt with the issue of comparability of the aforesaid 7 companies as follows:

(i) **Infosys Technologies Ltd., Exensys Software Solutions Ltd:** Vide Paragraph 10.2 of the aforesaid order, the aforesaid two companies were excluded for the reasons that these two companies were functional dissimilar and having extraordinary event during the relevant previous year. Exensys was having extraordinary profits by way of amalgamation of companies during the year. Infosys was excluded having different functionality of products, having high turnover and brand name. Following the decision of Agnity Technologies Vs. ITO of ITAT as approved by the Hon'ble Delhi High Court, Infosys was held to be not comparable. The same view taken by the Co-ordinate Bench in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. IT(TP)A Nos. 04/Bang/2012 & 1388/Bang/2011 1302/Bang/2011 dt. 11-06-2015 (supra) were followed.

(ii) **Bodhtree Consulting Ltd.:** Vide Paragraph 10.3 of the aforesaid decision, this company was excluded from the list of comparable company because of application of Related party transactions filter: As per schedule 4 of the balance sheet, the company has investments in Perigon, LIC, USA and as per the response u/s 133(6); the company has export sales to Perigon LIC, USA of Rs. 133.90 lakhs, being 34.68% of the total turnover. For being functionally different. The company in its response to notice u/s 133(6) has stated that it provides e-paper solutions, data cleansing software, website development and other customized software and also state that the e-paper solutions and data cleansing services would come under the category of IT enabled services. Considering the above, we direct that the above company has to be excluded on the reason of RPT of more than 25% and functionality.

(iii) **Sankhya Infotech Ltd., Thirdware Solution Ltd., & Four Soft Ltd.** Vide Paragraph 10.6 & 10.7, the aforesaid three companies were excluded from the list of comparable companies. As far as "Sankhya Infotech Limited ('Sankhya') the Tribunal found that that Sankhya is engaged in the

business of development of software products & services and training. The company focuses on the development of niche products for the transport and aviation industry. However, segmental information in relation to the above mentioned activities is not available in public domain. Therefore, as Sankhya engages itself in products and services as well as software training, it cannot be considered as a comparable in the context of a software development company. As far as FOURSOFT LIMITED is concerned, vide Para 10.7 of the aforesaid order, it was held that this company is involved in product development and owns products namely 4S eTrans and 4S eLog. These products are used in Sun Microsystems Inc, in an Application Verification Kit Certified for Enterprises and Assessee have been investing continuously on product developments. Since Assessee is in the product development, having I.P. rights, the same was not regarded as comparable. As far as THIRDDWARE SOFTWARE SOLUTIONS LIMITED is concerned, this company was not regarded as comparable as it is engaged in sale of software licence and related services and not a service provider. Referring to the annual report, it was submitted that this comparable was rejected by the ITAT, Pune in the case of Egain Communications Ltd. This company having revenue from product license and earning extraordinary profit due to intangible it owns.

(iv) Flextronics Software Systems Ltd.,: This company was excluded vide Paragraph 10.10 of the aforesaid order wherein it was held that this company was functionally dissimilar to a SWD service provider by following the decision of co-ordinate bench rendered in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) as under:

"26. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional dissimilarity between the Assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the Assessee company to bring them on par with the Assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables". Respectfully following, we exclude the same.

(v) Geometric Software Solutions Company Ltd.: Vide Paragraph 10.8 of the aforesaid order this company was excluded as not comparable with a SWD service provider such as the Assessee, with the following observations:

“10.8. Even though this company was accepted as comparable in ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) and Cordys Software India P. Ltd., in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (supra) and was not objected to, we find that the Co-ordinate Bench at Banalore in the case of DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 has considered that this is in product development. We have perused the TPO's order. In page 85 and 86 of the order, this comparable was analysed. TPO records that there are product sales to the extent of 18%. Segmental profits are not available. On assumptions, this company was retained. We are of the opinion that being a product based company, the same is not strictly comparable to a service company like Assessee. In the absence of segmental profit of service income, we have to exclude the same. Following the decision in the case of DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 (supra), this company is accordingly excluded.”

10. The learned counsel for the Assessee made a prayer for inclusion of one company by name i-Gate Global Solutions Ltd. This company was accepted by the TPO as a comparable company. The CIT(A) however on his own excluded this company from the list of comparable companies, for the reason that this company was into multiple businesses and segmental information is not available. The learned counsel for the Assessee submitted that as per information given in response to notice under Sec 133(6), the revenue earned from Software development services is Rs.40,61,408 thousands out of the total revenue from operations of Rs.43,16,463 thousands. Thus, it is very clear that the primary business segment of the Company is Software development services which constitutes 94.09% of the total revenue from operations. Hence, this Company was rightly selected as a comparable by the TPO and wrongly rejected by the CIT(A) on wrong understanding of the facts about the nature of business of iGate. It was submitted that the CIT(A) has relied heavily on TPO's order in

case of other companies where information was not available in public domain but was sought under section 133(6) by the TPO and used for arriving at the final set of comparable companies. The CIT(A) has made an exception only in the case of this company which is not a high margin earning company without giving any credible reason for rejecting the selection process of TPO which has resulted in an upward adjustment for the Assessee. Thus, the CIT(A) has followed a very biased approach in retaining high margin companies based on information sought by TPO under Sec 133(6) and deleting low margin making companies by not accepting information sought by TPO under sec 133(6). The CIT(A) has turned a blind eye to the fact that this company had passed the 75% software development services filter applied by the TPO. The CIT(A) had used this contention to retain all the other high margin earning companies selected by the TPO but has overlooked this basic fact in case of this company. Based on the above facts, it was prayed that this Company be retained as a comparable since the Company was primarily engaged in the business of Software Development and there are no other business segments.

11. After considering the submissions, we are of the view that the submissions made by the learned counsel for the Assessee are acceptable and hence, this company is directed to be included in the list of comparable companies.

12. No other grounds in the appeal were pressed for adjudication. The TPO/AO is directed to give effect to this order after affording Assessee opportunity of being heard.

13. In the result, the appeal is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(CHANDRA POOJARI)
Accountant Member

Sd/-

(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 11.01.2022.

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.