

**IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCHES "A", BANGALORE**

**Before Shri George George K, JM & Shri Laxmi Prasad Sahu, AM**

IT(TP)A No.106/Bang/2022 : Asst.Year 2017-2018

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| M/s.ACI Worldwide Solutions<br>Private Limited<br>No.9, Salarpuria Cambridge Mall<br>Bangalore – 560 008.<br><b>PAN : AAACV7566R.</b> | v. | The Assistant Commissioner<br>of Income-tax, Circle 1(1)(1)<br>Bangalore. |
| (Appellant)   |    | (Respondent)  |

Appellant by : Sri.Narendra Kumar Jain, Advocate  
Respondent by : Sri.Sumer Singh Meena, CIT-DR

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| <b>Date of Hearing : 12.05.2022</b> | <b>Date of<br/>Pronouncement : 13.05.2022</b> |
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**ORDER**

**Per George George K, JM :**

This appeal at the instance of the assessee is directed against final assessment order dated 31.01.2011 passed u/s 143(3) r.w.s. 144C(3) r.w.s. 144B of the Income-tax Act. The relevant assessment year is 2017-2018.

2. The brief facts of the case are as follows:

The assessee is engaged in the business of rendering software development services and sales and marketing support services to its Associated Enterprises (AEs). The services are provided on cost plus basis. The assessee is also engaged in software distribution activities. During the course of assessment proceedings, reference was made to the TPO to determine the Arm's Length Price (ALP) of international transactions undertaken by the assessee with its AEs. The

TPO vide order dated 26.01.2021 u/s 92CA of the I.T.Act, proposed the following TP adjustments:-

| Name of the Segment                | Average margin                       | TP adjustment   |
|------------------------------------|--------------------------------------|-----------------|
| Software development segment       | 20 comparables with median of 26.18% | Rs.6,92,14,199  |
| Marketing support services segment | 5 comparables with mean of 15.88%    | Rs.2,53,32,409  |
| Software Distribution segment      | 5 comparables with mean of 17.85%    | Rs.4,56,73,477  |
| Total                              |                                      | Rs.14,02,20,085 |

2.1 The AO passed the draft assessment order u/s 143(3) of the I.T.Act on 31.03.2021, incorporating the TP adjustment of Rs.14,02,20,085 as made by the TPO. Aggrieved by the draft assessment order, the assessee filed objections before the DRP on 21.04.2021. Pursuant to the directions of the DRP, an order giving effect to it was passed by the TPO dated 21.01.2022 making the following TP adjustments:

| Name of the Segment           | Average margin  | TP adjustment  |
|-------------------------------|---|----------------|
| Software development segment  | 20 comparables with median of 24.33%                              | Rs.6,15,49,522 |
| Marketing support services    | Determined the transaction at ALP and no adjustment made thereon. | Nil            |
| Software Distribution segment | Determined the transaction at ALP and no adjustment made thereon. | Nil            |

2.2 Post the above order, the AO passed the final assessment order u/s 143(3) r.w.s. 144C(3) r.w.s. 144B of the I.T.Act dated 31.01.2022. In the order, the AO has retained same TP adjustment at Rs.14,02,20,085 as in draft assessment order dated 31.03.2021 despite relief given in the transfer pricing order giving effect to DRP's directions.

Aggrieved by the final assessment order, the assessee filed the instant appeal before the ITAT.

2.3 The assessee has raised 14 grounds, however, during the course of hearing, the learned AR had only pressed grounds 5, 6(iii), 7 and 8 (in respect of Transfer Pricing Adjustment of software development segment), ground 11 (pertaining to the TP adjustment in marketing support segment), ground 12 (in respect of TP adjustment of software distribution segment). The grounds argued by the learned AR, we shall adjudicate as under:

**Grounds relating to TP adjustment in software development segment (Ground 5, 6(iii), 7 and 8).**

**Ground 5**

3. The above ground reads as follows:-

*“The learned AO has erred in making transfer pricing adjustment of Rs.6,92,14,199/- without considering OGE u/s 92CA(4) passed by the TPO pursuant directions of DRP, wherein the TPO had made revised TP adjustment to Rs.6,15,49,522/- for software development segment.”*

3.1 It is submitted by the learned AR that in the final assessment order, the A.O. has made TP adjustment of Rs.6,92,14,199 without considering the order giving effect to u/s 92CA(4) of the I.T.Act, passed by the TPO pursuant to the directions of the DRP, wherein the TPO had revised TP adjustment to Rs.6,15,49,522 in respect of software development segment. The learned AR had placed on record copy of the order giving effect to the DRP's directions (TPO's order dated 21.01.2022 – page 18 of 51). It was submitted by the learned AR that the assessee has filed a rectification

application before the A.O. on 04.02.2022, however, the same is still pending. In this regard, the learned AR requests the Tribunal to direct the A.O. to consider the TP adjustment as per the order giving effect to the DRP's directions.

3.2 We have heard rival submissions and perused the material on record. The TPO u/s 92CA(4) of the I.T.Act had passed an order dated 21.01.2022 giving effect to the directions of the DRP. In the said order, the adjustment has been made with reference to the software development segment at Rs.6,15,49,522 instead of Rs.6,92,14,199 determined by him in the order passed u/s 92CA(3) of the I.T.Act (order dated 26.01.2021). The AO is directed to examine the issue raised in ground 5, and accordingly, reduced the TP adjustment made pursuant to the DRP's directions. It is ordered accordingly.

3.3 In the result, ground 5 is allowed for statistical purposes.

**Ground 6(iii)**

4. By raising ground 6(iii), the assessee is seeking to exclude seven comparables on the grounds that the turnover of the said companies far exceeds Rs.200 crore, and therefore, the said companies cannot be compared with that of the assessee, where the turnover under the software development segment is only Rs.45.35 crore. In this context, the learned AR relied on the following judicial pronouncements:-

- (i) Autodesk India (P) Ltd. v. DCIT, Circle 11(1), Bangalore (2018) 96 taxmann.com 263 (Bangalore Trib.)

(ii) Cenduit (India) Services Pvt. Ltd. v. DCIT, Circle 2(1)(1), Bangalore (TS-19-ITAT-2022 Bang-TP).

(iii) M/s.Software Paradigms Infotech Pvt. Ltd. v. ACIT, Circle 1(1), Mysuru (TS-676-ITAT-2021 Bang-TP)

4.1 The learned Departmental Representative was duly heard.

4.2 We have heard rival submissions and perused the material on record. Admittedly, the assessee's turnover in the software development segment is Rs.45.35 crore. The turnover of for Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage Software Private Limited, are far exceeding Rs.200 crore for the relevant assessment year. The TPO/DRP has excluded the companies having turnover of less than Rs.1 crore, however, the TPO / DRP has not put upper limit of the turnover for exclusion of comparables having high turnover. The Bangalore Bench of the Tribunal in the case of Autodesk India (P) Ltd. v DCIT, Circle 11(1), Bangalore (supra) has 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 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 Vs. 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)."*

4.2.1 In view of the judicial pronouncements, cited supra, we direct the AO to exclude Larsen & Toubro Infotech Limited, Mindtree Limited, Persistent Systems Limited, Tata Elxsi Limited, Nihilent Limited, Infosys Limited and Cybage

Software Private Limited from the list of comparables, since the said companies are having turnover far exceeding Rs.200 crore for the relevant assessment year. It is ordered accordingly.

4.3 In the result, ground 6(iii) is partly allowed.

### **Ground 7**

5. The assessee is seeking to exclude M/s.R Systems International Limited as a comparable. It was submitted by the learned AR that the TPO has inadvertently included M/s.R Systems International Limited in the final list of comparables, despite the directions of the DRP to exclude it on the ground of different financial year (internal page 38 of the DRP's directions). The learned AR submits that M/s.R Systems International Limited prepared financials for the year ending December 2016. Thus, it is submitted that this company should be rejected following the directions of the DRP upholding different financial year filter. The learned AR placed on record the relevant extracts of the financial statement of M/s.R Systems International Limited.

5.1 The learned DR was duly heard.

5.2 We have heard rival submissions and perused the material on record. The issue is restored to the files of the AO / TPO. The AO / TPO shall comply with the directions of the DRP and exclude M/s.R Systems International Limited, if it is found that the said company has prepared financials for the year ending December 2016. It is ordered accordingly.

5.3 In the result, ground 7 is allowed for statistical purposes.

**Ground 8**

6. In the above ground, the assessee is seeking to rectify the margin of comparable M/s.Harbinger Systems Private Limited. It is submitted that the TPO has taken the margin at 11.16%, whereas, the correct margin of this company is 8.12%. It was stated that the variation in the margin is due to incorrect treatment by the TPO of certain items such as forex gain, bad debts, donation, etc.

6.1 We have heard rival submissions and perused the material on record. The DRP in its directions at page 31 had specifically directed the TPO to examine this aspect. However, the TPO has merely incorporated the margin at 11.16% and has not verified the claim of the assessee. Therefore, in the interest of justice and equity, we confirm the directions of the DRP and restore the matter to the AO / TPO to examine the issue afresh. It is ordered accordingly.

6.2 In the result, ground is allowed for statistical purposes.

**Ground relating to TP adjustment in Marketing Support Segment (Ground 11)**

7. It is submitted that the TPO had made TP adjustment under marketing support segment in the final assessment order of Rs.2,53,32,409. The learned AR has placed on record the TPO's order passed pursuant to the DRP's directions, wherein, the TP adjustment for the marketing support

segment was entirely deleted. The learned AR has also stated that the assessee had filed rectification application with the AO, however, the same is pending. Therefore, it was requested that the Tribunal may direct the AO to delete TP adjustment relating to marketing support segment.

7.1 We have heard rival submissions and perused the material on record. The TPO, while giving effect to the directions of the DRP, had deleted the TP adjustment in marketing support segment (refer page 18 of the TPO's order). The AO, in the final assessment order, has included TP adjustment of Rs.2,53,32,409 for marketing support segment. The matter is restored to the AO / TPO to examine the issue raised in ground 11 and take a decision in accordance with law.

7.2 In the result, ground 11 is allowed for statistical purposes.

**Ground 12 (TP adjustment in software distribution segment)**

8. It is submitted by the learned AR that in the final assessment order, the A.O. has retained the TP adjustment of Rs.4,56,73,477 for the software distribution segment. The learned AR has placed on record the TPO's order passed pursuant to the DRP's directions, wherein the entire TP adjustment in this segment was deleted (refer page 18 of the TPO's order giving effect to DRP's directions). The AO is directed to look into the issue raised in ground 12 and take a decision in accordance with law. It is ordered accordingly.

8.1 In the result, ground 12 is allowed for statistical purposes.

9. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 13<sup>th</sup> day of May, 2022.

**Sd/-**  
**(Laxmi Prasad Sahu)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(George George K)**  
**JUDICIAL MEMBER**

Bangalore; Dated : 13<sup>th</sup> May, 2022.  
Devadas G\*

Copy to :

1. The Appellant.
2. The Respondent.
3. The DRP-1, Bangalore.
4. The Pr.CIT-1), Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore