आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA No. 148/Hyd/2015**
(निर्धारण वर्ष / Assessment Year: 2010-11)

EPAM Systems India Private Limited, (Previously known as M/s.Alliance Global Services IT India Private Limited) Raidurg Village, Serilingampally Mandal [PAN No. AAACW2012R]	Vs.	Deputy Commissioner of Income Tax, Circle-1(1), Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by:	Shri Utpalsen, Shri Aliasgar Rampurwala & Shri Pratik Shah, ARs
राजस्व द्वारा/Revenue by:	Ms. D. Komali Krishna, CIT-DR

सुनवाई की तारीख/Date of hearing:	29/07/2022
घोषणा की तारीख/Pronouncement on:	07/09/2022

आदेश / **ORDER**

PER K. NARASIMHA CHARY, JM:

Aggrieved by the order dated 30/12/2014 passed under section 143(3) read with section 144C of the Income Tax Act, 1961 (for short "the Act") by the Deputy Commissioner of Income Tax, Circle-1(1), Hyderabad ("the learned Assessing Officer") pursuant to the directions dated 31/10/2014 by the Ld. Dispute Resolution Panel (DRP), Hyderabad ("Ld.

DRP") in the case of M/s. Alliance Global IT India Private Ltd. ("the assessee"), for the assessment year 2010-11, assessee preferred this appeal.

2. Brief facts of the case, as could be culled out from the record are that the assessee is a company engaged in the business of computer software development and related services. They have filed their return of income for the assessment year 2010-11 on 29/9/2010 declaring a total income of Rs. 5,37,14,560/-. It was noticed by the learned Assessing Officer that the assessee company had international transactions with its Associated Enterprises ("AEs") and therefore the determination of the arm's length price (ALP) was referred to the Learned Transfer Pricing Officer (TPO).

3. During the year, towards provision of software development services, the assessee received a sum of Rs. 41,72,29,259/- from its AE Alliance Global Services LLC and while adopting the transaction net margin method (TNMM) as the most appropriate method with OP/OC as PLI, the assessee analysed the international transaction to reach their margin at 12.03% whereas the average margin of the sixteen comparables selected by the assessee happens to be at 13.18%. Ld. TPO accepted four out of sixteen comparables selected by the assessee and rejected the balance 14 comparables further the Ld. TPO conducted search and found that other entities are also comparable with the assessee and by adding them he finalise the list of 18 comparables. The average margin of the 18 comparables came to 22.69% and therefore, basing on this, BPO suggested offered adjustment to the tune of Rs. 3,73,63,098/-.

4. Ld. TPO further found that the assessee had shown receivables of Rs. 14,41,63,268/- from its associated enterprise, namely, aliens consulting Inc and proposed to charge interest at 12% per annum, which the assessee objected stating that the impact of outstanding receivables on the profitability was taken care while calculating the working capital adjustment OP/OC. Ld. TPO recorded that on an arm's length situation any

independent party would like to receive its the funds within the credit period allowed and if not, would normally charge interest and, therefore, by placing reliance on the decision reported in Logix micro-systems Ltd 42 SOT 425 held that a reasonable period should be provided as interest free period and no interest should be calculated for such period beyond which the interest has to be charged. On this count, Ld. TPO proposed adjustment of Rs. 78,92,870/-. He, therefore, by order dated 24/9/2013 passed under section 92 CA (3) of the act proposed a total adjustment of Rs. 4,52,55,968/-.

5. Basing on the orders passed by the Ld. TPO the learned Assessing Officer issued draft assessment order dated 28/2/2014 proposing to determine the total income of the assessee at Rs. 9,10,77,658/-. Assessee filed objections before the Ld. DRP and the Ld. DRP by the directions dated 31/10/2014 directed the Ld. TPO to exclude Infosys and M/s Zylog systems Ltd from the final list of comparables and decline to interfere with the other comparables. In respect of the interest on receivables, learned DRP held that in view of the amendment to Section 92B of the Act by the Finance Act, 2012 with retrospective effect from 01/04/2002 to include such receivables or any other debt arising during the course of business as "international transaction" and directed the learned Assessing Officer to apply LIBOR+2% as notional interest to benchmark the international transaction of interest on receivables, as against 12% adopted by the learned TPO.

6. Pursuant to the directions given by the learned DRP and consequent learned TPO order dated 21/11/2014, learned Assessing Officer passed the final assessment order dated 30/12/2014 making an addition of Rs. 3,52,17,592/- towards ALP adjustment.

7. In this appeal, assessee challenged the inclusion of E-Infochips, Bangalore Ltd., Kals Information System Ltd. and Persistent Systems Ltd., in the software development service segment. In respect of E-Infochips, Bangalore Ltd., assessee submitted before the learned TPO that as per the

website of the company, this entity is engaged in the product development service, hardware engineering services, product re-engineering, design IP development and verification IP development, but though the company derives 13.5% of the total revenue from consultancy, no segmental information is available. Apart from that it was contended that the margins earned by the E-Infochips, Bangalore Ltd., is about 72.32%. He placed reliance on the decision of a Co-ordinate Bench of this Tribunal in the case of Intoto Software India Vs. ACIT (2014) 146 ITD 360 in support of his contention that when an entity is both a product company and a software development service provider, in the absence of the segmental information, it cannot be a good comparable.

8. Learned TPO, however, did not agree with the assessee stating that as per the director's report, this company is engaged in the development of software and since this entity passed the filter of 75% of revenue from software development service, it is a good comparable. Learned DRP observed that the TP study cannot be considered as an exact signs to verify and study each aspect of functionality of company and high profitability of one year cannot be a ground to exclude the entity from the list of comparables.

9. Before us, learned AR argued that it could be seen from Clause-5 of Schedule 11 of notes forming part of account under 'Significant Accounting Policies', it is shown that this entity is earning Rs. 5,90,78,374/- of the revenue from consultancy charges and since the segmental information is not available as per Clause-16 of Schedule 11, by following the decision in Intoto Software (supra) this entity has to be excluded.

10. We perused the annual report of E-Infochips, Bangalore Ltd., provided from page No. 664 of the paper book. In the Annexure to Directors' report at page No. 666, this company is engaged in development of software as per the specific requirements of clients. In the profit and loss account at page No. 671, this company is earning the revenues from software services only. Even under sales and other income it is stated that

revenue from software services is recognised. It is so stated at Clause-9 of Schedule 11 at page No. 678 that the company is engaged in the development and maintenance of computer software. At no place, it is stated that this company is engaged in the business of consultancy services also, except a stray mention at Clause-5 at page No. 678 and also at 679 of the paper book. Even at these two places also, it is stated that the company got Rs. 5,90,78,374/- from a related party under the head 'Consultancy Charges'. As per the profit and loss account, Schedule-7 explains the income from software services. In order to know whether this consultancy to the group companies is also a part of the software development process which is the main source of income to the company. But unfortunately, after Schedules 1 to 6 at page Nos. 673 to 675, on page No. 676, only Schedule-11 is furnished. Schedule-7 should have thrown some light on this aspect but it is conspicuously absent in the annual report at page Nos. 675 and 676. In the absence of any clinching evidence to show that the so called consultancy is not a part of software development service, but it forms part of a different segment, we find it difficult to hold that there is more than one segment for the purpose of comparison. Merely because E-Infochips earns a margin at 72.32% for a particular year, it is not possible to exclude the same because, it is not solely depending upon the margin for a particular year, the ALP adjustment will be made but it would be only one of the several entities the average of which is taken into consideration, and thereby ironing out the difference if any, from entity to entity. The view taken in Intoto Software (supra) has no application to the facts of the case. We, therefore, decline to interfere with the findings of the authorities below insofar as E-Infochips, Bangalore Ltd., is concerned.

11. In respect of Kals Information System Ltd., assessee submitted before the learned TPO that this entity is engaged in the business of development software products and also providing services apart from engaged in providing the implementation and maintenance of software products. Further, this entity holds inventories constituting 27% of the total current assets.

12. According to the learned TPO, in the preceding year, Kals Information System Ltd., was in the software development service and it uses its own library products and prepares customised software. Learned TPO further observed that the website information is often an invitation to the prospective customers by colourfully describing the activities in presenti as well as in future but what is relevant is only current activities. On this score, the annual report describes the current business as development of computer software and, therefore, it is functionally comparable to the assessee.

13. As stated above, learned DRP brushed aside the contentions of the assessee on similar grounds applied to E-infochips (supra) and confirmed the inclusion of this entity.

14. Before us, learned AR submitted that the company is deriving other income to the tune of Rs. 21,03,759/- as could be seen from the profit and loss account which constitutes about 10% of the total revenue. Even according to the segmental information, apart from the application software, this company is deriving income from domestic training, translation and interpretation. Learned AR further submitted that in the assessment year 2009-10, this company is excluded from the list of comparables on the ground that it has revenue from both software services as well as products, apart from engaged in providing training services.

15. We have gone through the extracts of the annual report of this company furnished at page Nos. 564 to 569. According to the profit and loss account at page No. 566, the break-up figures relating to the income from sales, services and training to the tune of Rs. 2,30,45,144/- are detailed in Schedule-10. But unfortunately, Schedule-10 is not to be found in these extracts. Insofar as segmental information is concerned, at para 9 of Schedule-14 given at page No. 568, the revenue from application software is Rs. 2,16,92,935/- and the revenue from training is Rs. 13,52,209/- which constitutes about 6% of the total revenue. Segmental

information is provided. Earnings from training segment constitute only 6% of the total revenue. There is no revenue from the products this year as could be seen from the annual report of this company for this year and, therefore, the view taken in the earlier years is not relevant. In these circumstances, we are of the considered opinion that merely because the Kals Information Systems derives 6% revenue from training, it cannot be said that it is not a good comparable.

16. Now coming to Persistent Systems Ltd., assessee pleaded before the learned TPO that this entity acquired assets in Paxonic, Inc. and that the learned TPO himself rejected certain companies that have peculiar economic circumstances. It was further pleaded that this entity is engaged in rendering outsourced product development services as against software development services, as could be gathered from the annual report. As per the assessee, Persistent Systems Ltd., is engaged in product development also and, therefore, not comparable to the assessee. Lastly it was contended that segmental information is not available. Learned TPO referred to page No. 74 of the annual report and observed that this company is a leading provider end to end software product development service from research to testing to professional services and customer support. He further observed that this company provides customised innovation, services and business models for each phase of the software product cycle, helping the customer to reduce the cost, avoid waste and create fully integrated product, which according to the learned TPO denotes the provision of software support services to the product developing companies.

17. Learned DRP's observations are similar to the ones in the case of other two companies. Before us, learned AR submitted that in assessee's own case for the assessment year 2013-14, this company is excluded from the list of comparables, on the ground that Persistent Systems Ltd., into both software products, services and technology innovation and segmental details are not available.

18. We have gone through the annual report of Persistent Systems Ltd., provided in paper book at page Nos. 570 to 586. Total revenues of this company are from software services and products. Schedule-15 of Notes to account at page No. 584 of the paper book shows that the Persistent Systems Ltd., is predominantly engaged in outsources software development services. At page No. 571 and 572 of the paper book, it is clearly stated that outsources software product development is different from IT services and at page No. 579 they have clearly stated that Persistent Systems Ltd., is one of the market leaders in outsources software product development.

19. When there is a difference between Outsourced Software Product Development and the IT services which means rendering software development service, and the assessee is in software development service, naturally the Persistent Systems Ltd., which is into Outsourced Software Product Development is not a comparable because of functional dissimilarity. Further on this very ground, it was excluded in assessee's own case for the assessment year 2013-14. Following the view taken in assessee's own case for the assessment year 2013-14, in the absence of any change in the business model, we hold that Persistent Systems Ltd., is not a good comparable hence the same is directed to be excluded from the list of list of comparables.

20. Now coming to interest on receivables, Learned TPO placed reliance on the decision in Logix Micro Systems Ltd., 42 SOT 525, wherein it was held that a reasonable period should be provided as interest free period and no interest should be calculated for that period. Learned TPO charged interest at 12% p.a.

21. It was argued before the learned DRP that the receivables are result of international transaction and is not a separate transaction by themselves, apart from the fact that they do not impact the taxable income of the assessee.

22. Learned DRP observed that delays in receiving the money has a cost attached to the assessee in its business requirements, because if the money was received in time as contemplated in the trade practice, the said amount would have been utilised by the assessee in its working capital requirements as well as reducing financial burden of borrowing money from financial institutions. Learned DRP further referred to the amendment to section 92B of the Act by way of Finance Act, 2012 with retrospective effect from 01/04/2002 to include such receivables or any other date arising during the course of business as international transaction.

23. Delhi Bench of the Tribunal in the case of Bechtel India Pvt. Ltd., (in ITA No. 6530/Del/2016, dated 16/05/2017) while referring to the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Patni Computer Systems (2013) 215 Taxmann 108 (Bom), wherein the amendment to Section 92B of the Act by Finance Act, 2012 with retrospective effect from 01/04/2002 was considered. While following the view taken by the Tribunal in the case of M/s. Logix Microsystems Ltd. Vs. ACIT in I.T.A No.423/Bang/2009, dated 07/10/2010, learned TPO thought it proper to consider the SBI short term deposit rate as appropriate Comparable Uncontrolled Price (CUP) to determine the ALP of the interest on outstanding receivables.

24. Learned DRP concluded that extending credit period beyond normal period of sixty days is in substance granting of loan to an AE so as to enjoy the funds, which the AE would otherwise have to repay without delay and, therefore, extending credit period beyond the normal credit or agreed credit period would constitute a separate international transaction. Learned DRP, however, granted relief to the assessee by directing the learned Assessing Officer/learned TPO to re-work the notional interest by charging LIBOR+2% as against the 12% adopted by them.

25. We have gone through the findings of the authorities in the light of the submissions made on either side. In view of the view taken by the Hon'ble Bombay High Court in Patni Computer Systems (supra), on the amendment to Section 92B of the Act by way of Finance Act, 2012 with retrospective effect from 01/04/2002, it is not open for the assessee to agitate the question as to whether or not the interest on outstanding receivables is an international transaction requiring separate benchmarking. Only issue remains to be considered is in respect of the rate of interest. This aspect is no longer res integra and dealt with by the Mumbai Bench of the Tribunal in the case of Tecnimont ICB House Vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.), and confirmed by the Hon'ble Bombay High Court in PCIT Vs. Tecnimont (P) Ltd., (2018) 96 taxmann.com 223.

26. Insofar as the interest on receivable is concerned, Mumbai Bench of the Tribunal, in the case of Tecnimont ICB House vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.) considered the view taken in Everst Kanto Cylinder Ltd. v. Asst. CIT (LTU) [2014] 52 taxmann.com 395 (Mum.); PMP Auto Components (P.) Ltd. v. [IT Appeal No. 1484 (Mum.) of 2014, dated 22-8-2014]; Hinduja Global Solutions Ltd. v. Addl. CIT [2013] 145 ITD 361/35 taxmann.com 348 (Mum.); Tata Autocomp Systems Ltd. v. Asst. CIT [2012] 52 SOT 48/21 taxmann.com 6 (Mum.); CIT v. Tata Autocomp Systems Ltd. [2015] 56 taxmann.com 206 (Bom.); Four Soft Ltd. v. Dy. CIT [2011] 142 TTJ 358 (Hyd.); and Everst Kanto Cylinder Ltd. v. Asst. CIT (LTU) [2015] 56 taxmann.com 361 (Mum.) wherein the Hon'ble Tribunals has upheld use of LIBOR for the purpose of benchmarking loan/advance given to foreign AE's, and held that the notional interest has to be worked out for so called amount receivable from AE, by applying LIBOR interest rate for the purpose of computation of transfer pricing adjustment, if any. This view is affirmed by the Hon'ble Bombay High Court [2018] 96 taxmann.com 223 (Bombay) observing that in cases where any business enterprise is required to pay interest on delayed payment, it would examine the cost of interest and if the same is

higher than the amount of interest payable on funds obtained locally, it would take a loan from local sources and pay the amounts payable for exports and expenses within time. Therefore, extending of credit beyond the normal period of sixty days is in substance a granting of loan to an AE so as to enjoy the funds, which the AE would otherwise have to repay within the period of sixty days. On this premise the Hon'ble High Court upheld the Tribunal computing interest at LIBOR rates as the rate prevailing in country where the loan is received/consumed by the AE by observing that the same cannot be faulted.

27. In the case of CIT Vs. CottonNaturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi) the Hon'ble Delhi High Court considered the question - whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, observed that such a question must be answered by adopting and applying a commonsensical and pragmatic reasoning and held that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid; that the interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. It is further observed that the interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters; that the interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable; that the currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. While referring to the Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115, the Hon'ble High Court held that the PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate and the PLR rates are not

applicable to loans to be re-paid in foreign currency. Hon'ble Court accordingly held that whatever the principle that is applicable to the case of outbound loans, would be equally applicable to inbound loans given to Indian subsidiaries of foreign AEs that the parameters cannot be different for outbound and inbound loans, and a similar reasoning applies to both inbound and outbound loans.

28. Respectfully following the judicial opinion stated supra, we are of the considered opinion that the ends of justice would be met by accepting the interest rate on similar foreign currency receivables/advances as LIBOR+200 points. We accordingly uphold the findings of the learned DRP on this aspect and direct the learned Assessing Officer / learned TPO to adopt the same.

29. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on this 7th day of September, 2022

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 07/09/2022

TNMM

Copy forwarded to:

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2. Deputy Commissioner of Income Tax, Circle-1(1), Hyderabad.
3. Dispute Resolution Panel (DRP), Hyderabad.
4. Director of Income Tax (IT & TP), Hyderabad.
5. Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
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