

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Ms. Annapurna Gupta, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 77/Ahd/2019
Assessment Year 2008-09**

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| Weatherford Drilling & Production Services (India) Pvt. Ltd., Block No. 74, Mukutnagar, Sokhada Road, Manjusar, Ta Savli, Baroda-391775 PAN: AAACW4068M (Appellant) | Vs | The ACIT, Circle-2(1)(2), Vadodara (Respondent) |
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**Assessee by: Shri Dhanesh Bafna, A.R. &
Ms. Chandni Shah, A.R.
Revenue by: Shri Atul Pandey, Sr. D.R.**

Date of hearing : 23-08-2022
Date of pronouncement : 21-11-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id.
Assistant Commissioner of Income Tax, Circle-2(1)(2), Vadodara, u/s.

143(3) r.w.s. 92CA r.w.s. 144C(13) of the Act vide order dated 17/10/2018 passed for the assessment year 2008-09.

2. At the outset, the counsel for the assessee submitted that there is a delay of 33 days in filing of the present appeal and filed an application along with affidavit for condonation of such delay. The reason cited in the affidavit produced before us is that the assessee company had two directors, one of whom was a non-resident and was based outside of India. In the case of the other director, who was a resident of India, due to medical emergency in the family, she was unable to attend to any administrative activities. With respect to the other Director of the assessee company, since he was based outside India during the period under consideration, he was not available to authorise the filing of appeal before ITAT and hence there was a delay in filing of the present appeal. Looking into the fact that there is delay of a period of only 33 days in filing of the present appeal and the reasons for the same cited by the assessee, in the interests of justice, we are hereby condoning the delay of 33 days in filing of the appeal. Accordingly, delay in filing of appeal by the assessee is hereby condoned.

3. On merits, the brief facts of the case are that the assessee filed return of income for assessment year 2008-09 and the case of the assessee was referred to TPO under section 92CA(1) of the Act. Draft order under section 92CA(3) was passed after making upward adjustment of ₹ 80,83,421/- to the returned income. In appeal before DRP, Ahmedabad rejected the objections raised by the assessee and finalised the order under section 143(3) r.w.s. 144C of the Act, determining the total income at ₹ 2,50,34,561/- after

making addition of ₹ 80,83,421/- on account of transfer pricing adjustment (as made in the draft order by the TPO). In appeal, ITAT set aside the matter of the transfer pricing adjustment of ₹ 80,83,421/- to the file of TPO. The TP additions were again confirmed by TPO and DRP and the assessee is in appeal before us against the above order.

4. The brief facts in relation to the instant appeal are that the assessee, Weatherford Drilling and Production Services (India) Private Limited operates two divisions (i) Manufacturing Division: this division is engaged in manufacturing of gas lift walls and packers (ii) Weatherford Engineered Systems Support Division (WESS): this division supports the maintenance and development of software developed by Weatherford Group. The contention of the assessee is that the TPO erred in law and on facts in not excluding CTIL as comparable company though the same is functionally dissimilar to the WESS segment of the assessee company. Further, the TPO erred in law and on facts and ignoring the fact that due to extraordinary events which had taken place with CTIL during the year under consideration, for such company comparability adjustment cannot be made. Before DRP, the assessee submitted various contentions for exclusion of CTIL from the set of comparable companies, which can be summed up as under:

- (i) During the year under consideration, CTIL was engaged in IT education and training business and the company earned revenue from varied sources viz. sale of software products of IT education, brand licensing in software development support. Also, CTIL does not

maintain separate business segments for its business operations. Accordingly, CTIL is functionally dissimilar.

- (ii) CTIL earned abnormal margin/super profits (more than 30 times compared to the previous year) during the financial year 2007-08 coupled with the fact that it had losses in earlier 7-8 years
- (iii) Where comparability adjustments in view of rule 10B(3) cannot be made, the comparables should be rejected
- (iv) During February 2008, there has been significant change in the management of the company pursuant to which assessee CTIL entered into software and e-governance space
- (v) there is a mismatch in recognising the revenue vis-à-vis its corresponding expenditure

4.1 Considering the above, the assessee submitted that CTIL is not functionally comparable to WESS segment of the assessee and accordingly CTIL should be excluded from the comparable set.

4.2 However, DRP rejected the assessee's contention on the following grounds:

- (i) CTIL is engaged primarily in software development activity and the IT education and training business is only complementary to the core business of software development activity of the company. Accordingly, CTIL cannot be excluded on account of functional dissimilarity.
- (ii) Regarding the extraordinary event with respect to CTIL entering into software and e-governance space is concerned, the same admittedly

took place in February 2008 i.e. at the end of the financial year and hence had no impact on the financials the company, so far as comparability is concerned

- (iii) As to the claim that the company CTIL had earned abnormal margin/supernormal profits during the year under consideration, there is no provision under Rule 10B(2) to reject comparables on the basis of profit margins. Under the TP provisions of what is tested under the margin-based methods is the margin itself and thus, the margins cannot be used as a criterion for selecting or rejecting the comparable. In the comparability analysis, a higher profit or loss is not a determining factor unless there are any peculiar economic circumstances in such a case. Just like loss-making companies, “super” normal profit-making companies are also part of the industry and hence cannot be rejected merely because they have all such profits, unless peculiar economic circumstances of such companies are pointed out. The DRP relied upon several judicial precedents in support of the above contention.

5. The assessee is in appeal before us against the aforesaid findings by DRP/AO. Before us, the counsel for the assessee submitted that the ITAT on appreciation of facts had directed to remove one of the comparable company and it was in respect to second comparable company i.e. CTIL that the ITAT had set aside the matter to the file of TPO for de novo consideration. The counsel for the assessee drew our attention to page 231 the paper book and submitted that profit and loss account of CTIL shows that during the year under consideration it had incurred software development expenses to the tune of ₹ 1,97,77,882/- and the said company had outsourced 67% of its cost

to third company. Accordingly, the business model of CTIL was totally different from that of the assessee company. The counsel for the assessee further drew our attention to page 215 of the paper book and submitted that during the period under consideration, profit of CTIL had increased by 30 times from the previous year and the same clearly constituted exceptional events occurring during the year under consideration and hence CTIL could not have been used as a comparable in the instant set of facts. The counsel for the assessee submitted that even if it were to be accepted that CTIL was into software development, but since substantial part of the software development was outsourced to 3rd party, the modus operandi or the business model of CTIL was not comparable to the assessee. In response, the Ld. DR relied upon the observations made by DRP/AO in the Order.

6. We have heard the rival contentions and perused the material on record. The primary arguments put forward by the counsel for the assessee in support of his contention that the CTIL should be excluded as a comparable company, is that during the year under consideration CTIL has subcontracted majority of its software development work to 3rd party vendors and has made significant payments to these vendors to the extent of 53-72% of total cost/27.85% of software development income. The counsel for the assessee relied upon several case-laws in support of its contention.

6.1 We observe that in the case of **Ramp green Solutions v CIT [2015] 60 taxmann.com 355 (Delhi)**, the Delhi High Court held that a company outsourcing most of its work to other service providers cannot be compared to company where services are rendered by employing own employees. In the

case of **Principal Global Services (P.) Ltd.[2018] 95 taxmann.com 315 (Bombay)**, the High Court held that business model of comparable being of outsourcing its service being different from in-house business model of providing services, said company was not was a comparable. In the case of **Aptara Technology (P.) Ltd.[2018] 92 taxmann.com 240 (Bombay)**, the High Court held that a company which outsourced its work to sub-vendors as against assessee carrying out its activities in-house, could not be selected as comparable. In the case of **Mercer Consulting (India) (P.) Ltd.[2016] 76 taxmann.com 153 (Punjab & Haryana)**, the High Court held that since assessee conducted its business activities itself without outsourcing any part of it, a company which outsourced substantial portion of its work, could not be accepted as comparable. In the case of **New River Software Services (P.) Ltd[2017] 85 taxmann.com 302 (Delhi)**, the High Court held that where assessee-company was rendering knowledge process outsourcing services to its AE, a company which had outsourced major portion of its work and thereby following different business model, could not be accepted as comparable.

6.2 In our considered view, in light of the above rulings, it is well established principle that the company which does most of these activities through its own employees is not functionally comparable to a company which outsources majority of its work to third party vendors. In view of the above, we are of the considered view that CTIL should be excluded from the list of comparables, since CTIL is functionally different from that of the assessee company.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 21-11-2022

Sd/-

**(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

Ahmedabad : Dated 21 /11/2022

Sd/-

**(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER**

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद