

**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.631/Bang/2016 : Asst.Year 2011-2012

The Deputy Commissioner of Income-tax, Circle 3(1)(2) Bangalore.	v.	M/s.Harman Connected Services Corporation India Private Limited (Formerly Symphony Telca Corporation India Pvt. Ltd.) No.3 & 3A, EOIZ Industrial Area, Survey No.85 & 86, Sadarmangala Village, K.R.Puram, Hobli Bangalore – 560 066 PAN : AABCG5658E.
(Appellant)		(Respondent)

Appellant by : Smt.Tanmayee Rajkumar, Advocate
Respondent by : Sri.K.Sankar Ganesh, JCIT-DR

Date of Hearing : 15.12.2022	Date of Pronouncement : 16.12.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the Revenue is directed against final assessment order dated 29.01.2016 passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act. The relevant assessment year is 2011-2012.

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

The assessee is a company incorporated under the Companies Act, 1956. The assessee is engaged in providing software development services to its group companies as well as third parties. For the assessment year 2011-2012, the return of income was filed on 30.11.2011 declaring gross total

income of Rs.3,84,96,686. The assessment was selected for scrutiny and notice u/s 143(2) of the I.T.Act was issued on 10.09.2012. During the course of scrutiny assessment, the A.O. referred the matter to the Transfer Pricing Officer (TPO) to determine Arm's Length Price (ALP) of the international transactions undertaken by the assessee with its Associated Enterprises (AEs). The TPO vide order dated 30.01.2015 passed u/s 92CA of the I.T.Act, proposed the TP adjustment of Rs.18,10,43,171. Pursuant to the TPO's order, the draft assessment order was passed, incorporating the above TP adjustment as well as certain corporate tax additions.

3. Aggrieved, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide its directions dated 16.12.2015, disposed of the objections of the assessee. Pursuant to the directions of the DRP, the TPO gave effect to the same and consequently the TP adjustment was revised to 'Nil' as against Rs.18,10,43,171 proposed by the TPO. The impugned final assessment order was passed on 29.01.2016 after considering DRP's directions. The A.O. in the final assessment order, arrived at the total assessed income at Rs.12,47,64,644. The computation of total income by the A.O. in the final assessment order, reads as follows:-

			(Amount in Rs.)
A.	Income from Business		53,55,44,033
Add :	Following disallowances as discussed in the order.		
(1)	Disallowance of Heading Loss	5,22,43,701	

(2)	Restriction of depreciation on servers, routers etc.	17,31,256	
(3)	Disallowance u/s 40(a)(ia)	25,63,441	
	(i) Non TDS on Legal & Professional fees		
	(ii) Non TDS on Software	4,13,93,093	9,79,31,491
Business income in respect of all the units before deduction u/s 10A			63,34,75,524
Less :	Deduction u/s 10A		51,93,99,709
Business income before TP adjustment as worked out above (c/o)			11,40,75,815
Add:	Transfer Pricing adjustment as per order u/s 92CA dated 20.01.2016 by DCIT (TP)-2(2), Bangalore		Nil
Taxable Business Income			11,40,75,815
Add :	Interest income as returned		1,06,88,829
Total Assessed Income			12,47,64,644

4. Aggrieved by the final assessment order, the Revenue has filed the present appeal before the Tribunal. The grounds raised by the Revenue reads as follows:-

I. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.

II. The ld.Hon'ble DRP erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable and accordingly erred in excluding the comparables in software development segment.

III. The Ld.DRP erred in excluding uncontrolled comparables having turnover more than Rs.2000 crores in the absence of turnover criterion prescribed in Rule 10B of the Income Tax Rules and also there being no correlation between turnover and profit margin.

IV. For these and other grounds that may be urged at the time of hearing, it is prayed that the directions of the Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.

V. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”

5. The learned Departmental Representative relied on the grounds and submitted that the multiple of 10 times of the turnover should be adopted while adopting the turnover filter.

6. The learned AR, on the other hand, relied on the directions of the DRP and also the order of the Tribunal in the case of Northern Operating Services Pvt. Ltd. in IT(TP)A No.101/Bang/2016 (order dated 15.02.2019). It was further submitted by the learned AR as regards the international transactions with AEs based in USA, the issues were settled under MAP and the communication of resolution of dispute under MAP with USA was dated 16.10.2020. It was further stated that the MAP resolution was implemented pursuant to the Hon'ble High Court's judgment in WP No.8114/2021 (judgment dated 22.04.2022).

7. We have heard rival submissions and perused the material on record. As per the Dun & Bradstreet Classification of Software Industry, the companies could be classified under three major heads depending on the turnover of the company, viz.,

- (a) Less than Rs.200 crores categorized as small size companies.
- (b) Rs.200 crores to Rs.2000 crores categorized as medium size companies;
- (c) More than Rs.2000 crores categorized as large size companies.

8. The turnover of the assessee for the relevant assessment year is 332 crore (wrongly mentioned as 290.45 crore in the DRP's directions at para 3.1). The turnover of the assessee being Rs.332 crore, it would fall within the category of medium size company. Therefore, the companies not falling within the range, i.e., Rs.200 crore to Rs.2000 crore deserves to be excluded. The issue of turnover filter has been examined by the Bangalore Bench of the Tribunal in the cases of Genisys Integrating Systems (India)(P) Ltd. v. DCIT reported in (2012) 15 ITR (Trib.) 475 (Bangalore-Trib.), Kodiak Networks (India) (P.) Ltd. v. ACIT reported in (2012) 15 ITR (Trib.) 610 (Bangalore-Trib.) and Trilogy E-Business Software India (P) Ltd. v. DCIT reported in (2013) 23 ITR (Trib.) 464 (Bangalore – Trib.). The DRP after taking note of the above orders of the Tribunal had given directions that turnover filter is to be applied and only those companies having turnover of more than Rs.200 crore to Rs.2000 crore are to be taken as a comparable for the purpose of making the transfer pricing study. The relevant directions of the DRP reads as follows:-

“3.1 This issue has been examined by the Bangalore Bench of the Hon’ble ITAT in Genisys Integrating Systems v. DCIT (15 ITR (Trib) 475), Kodiak Networks v. ACIT (15 ITR (Trib) 610) and Trilogy e-Business Software India Vs. DCIT (23 ITR (trib) 464), which has consistently held that only companies with in the turnover range of Rs.1 Crore to Rs.200 Crores should be taken into consideration for the T.P. study in the case of small size companies and turnover range of 200 Crore to 2000 Crore should be taken for the medium size company. In Genisys Integrating Systems Vs. DCIT (15 ITR (Trib) 475), the Bench observed that the application of the turnover filter by the TPO has no rational basis. The turnover range of Rs.1 Crore to infinite was not a reasonable classification as turnover base. The Transfer Pricing Officer himself having

rejected loss making companies as comparable , there should also be an upper limit. A big company would be in a position to bargain the price and attract more customers. It would also have a broad base of skilled employees able to give better output. A small company may not have these benefits and therefore, the turnover would also come down reducing the profit margin. Thus, for the purpose of classification of companies on the basis of net sales or turnover, a reasonable classification has to be made. The turnover filter is important and the assessee being in that range having turnover of Rs.290.45 Crores companies having a turnover of Rs.200 Crore to Rs.2000 Crores are to be taken into consideration for the purpose of making transfer pricing study. The turnover reflected by the assessee company is Rs.290.45 crore (sic Rs.332 crore). On this basis, the TPO is directed to exclude comparable companies having turnover of more than Rs.2000 Crores.”

9. Further, the learned DR’s plea that the multiple of 10 times of the turnover should be adopted while adopting the turnover filter, has been specifically rejected by the Bangalore Bench of the Tribunal in the case of Northern Operating Services Pvt. Ltd. in IT(TP)A No.101/Bang/2016 (order dated 15.02.2019). The relevant finding of the Tribunal reads as follows:-

“15. The ld. DR submitted that the Hon’ble High Court of Karnataka in the case of M/s. Acusis Software (I) P. Ltd. V. ITO in ITA No.223/2017, judgment dated 14.08.2018, has taken the view that if the turnover of a comparable company is less or more than 10 times the turnover of the assessee, then it cannot be considered as a comparable company. The ld. DR drew our attention to the turnover of 10 comparable companies which is as follows:-

Sl. No.	Name of the case	Operating Income	Operating cost	OP./OC
1	Accentia Technologies Ltd.	1,069,026,524	82,93,91,898	28.89%
2	Acropetal Technologies	494,399,332	389706574	26.86%
3.	Cosmic Global Ltd.	62,496,615	5,69,15,360	9.81%
4.	e4e Healthcare (capitaline)	613,160,587	54,56,25,872	12.38%
5.	ICRA Online Ltd. (seg.)	156,691,000	11,67,49,267	34.21%
6.	Jeevan scientific Technology Ltd.	1,721,400,000	1,00,86,52,592	70.66%
7	Infosys B PO Ltd.	11,291,147,909	9,57,73,24,546	17.89%
8.	Jindal Intellicom	390,358,799	35,12,69,641	11.13%

	(capitaline)			
9.	Mindtree Ltd. (seg.)	5,653,000,000	5,10,39,05,999	10.76%
10	iGate Global Solutions Ltd.	11,845,540,000	9,47,11,65,000	25.07%

He submitted that if such criterion is applied, then that would be the proper basis for excluding companies for the purpose of comparability based on turnover.

16. The ld. Counsel for the assessee, on the other hand, submitted that the Hon'ble High Court of Karnataka in the case of Acusis Software (I) P. Ltd. (supra) merely dismissed the appeal of assessee on the ground that no substantial question of law arises for consideration. In particular, he drew our attention to the following paragraphs of the judgment of Hon'ble High Court:-

"14. The findings of the learned Tribunal as regards the comparable namely, Mercury Outsourcing Management Ltd., which too have been excluded by the Tribunal are quoted below for ready reference:-

"(ii) Mercury Outsourcing Management Ltd.

13.1 The learned Authorised Representative has submitted that the TPO has rejected this company on the similar reasoning of diminishing revenue and abnormal cost.

13.2 On the other hand, the learned DR has submitted that this company is incurring persistent losses and further the turnover of this company is less than Rs.1 Crore and therefore it does not satisfy the filter of turnover applied by the TPO.

13.3 We have considered the rival submissions as well as the relevant material on record. At the outset, we note that turnover of this company in the ITES segment is only Rs.45.33 lakhs which in any case does not satisfy any filter of turnover in comparison to the assessee's turnover more than Rs.27 Crores. Even if we apply the tolerance range of turnover of 10 times on both sides of the assessee's turnover then the company which is having less than Rs. 2.7 Crores of turnover will be outside the said range of 10 times. Accordingly, we are of the view that this company which is having only Rs. 45.33 lakhs turnover cannot be considered as a good comparable to the assessee".

15. From the aforesaid findings of the learned Tribunal, we are satisfied that the reasons assigned by the learned Tribunal in excluding the aforesaid company as comparable is also reasonable and the same deserves to be accepted by us. It is analysed by the learned Tribunal in extenso which arrived at a decision that the company which is having only Rs.45.33 lakhs turnover cannot be considered as comparable to the Assessee-company whose turnover is more than Rs.27 Crores.

16. The decision of the learned Tribunal in the other cases referred to by the learned counsel for the Appellant-Assessee would not render the

findings of the learned Tribunal in the present case nugatory or perverse for the reason that analyzing of the comparables may be in a different context and the same need not be blindly or generally adopted in all cases, irrespective of the context or the circumstances calling upon for the inclusion/exclusion of the comparables which absolutely is a decision to be taken by the learned Tribunal as last fact finding authority. This view is supported by our judgment dated 25.08.2018 on Softbrands case (supra), which we find it appropriate to quote hereunder to its relevant extent:-”

17. He submitted that the question of law which the assessee sought to raise before the Hon'ble High Court was justification for excluding Mercury Outsourcing Management Ltd. as a comparable company. It is in that context that the aforesaid decision was rendered by the Hon'ble High Court. He pointed out that the Tribunal in excluding Mercury Outsourcing Management Ltd., had taken a view that its turnover was small compared to the assessee's turnover and therefore not comparable, even if the tolerance range of turnover of 10 times on both the sides of assessee's turnover is applied. There is no positive finding by the Tribunal that the company can be excluded for the purpose of comparability on the basis of turnover, only if the turnover is 10 times on both the sides of assessee's turnover. On the conclusions of the Tribunal, the Hon'ble High Court only held that it is reasonable and deserves to be accepted. In para 16, the Hon'ble High Court has clearly observed that the decisions rendered in other cases referred to by the ld. Counsel for the assessee would not render the findings of the Tribunal in the case before the High Court as negatory or perverse for the reason that analysing of the comparables may be in a different context. The same need not be blindly or generally adopted in all the cases, irrespective of the context or circumstances calling for exclusion/inclusion of the comparables. The finding in each case is therefore a finding of fact. He pointed out that the Tribunal in the case of Autodesk (I) P. Ltd. v. DCIT [2018] 96 taxmann.com 263 [Bang. Trib.] after analysing the entire cases on the point, came to the conclusion that the decision rendered by the Tribunal in the case of Genesis Integrated Systems (I) P. Ltd. [2012] 53 SOT 159 lays down the correct law on the application of turnover filter and that decision has to be followed. He pointed out that the DRP in the present case has followed the ruling in the case of Genesis Integrated Systems (I) P. Ltd. (supra) and therefore the order of DRP has to be upheld.

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 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 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).”

19. In the given facts and circumstances of the case, we find no grounds to interfere with the order of DRP on this issue. Consequently, ground Nos.4 & 5 raised by the revenue are dismissed as without any merit.

20. In the result, the appeal by the revenue is dismissed.”

10. In view of the aforesaid reasoning and the orders of the Tribunal, cited supra, we hold that the DRP was justified in its directions to include only those companies having turnover of Rs.200 crore to Rs.2000 crore as a comparable for making the TP study in the assessee's case. It is ordered accordingly.

11. Further, we make it clear that our order will have impact only on non-US AE's transactions, since the international transaction of the assessee with its US based AE had already been settled under the MAP Resolution. It is ordered accordingly.

12. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 16th day of December, 2022.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 16th December, 2022.
Devadas G*

Copy to :

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

Asst.Registrar/ITAT, Bangalore