

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS KAVITHA RAJAGOPAL, JM**

**ITA No. 1291 & 7304/MUM/2017
(Assessment Year 2012-13, 2013-14)**

Lionbridge Technologies Private
Limited,
3rd Floor, Reliable Tech Park Off
Thane, Belapur RD,
Airoli- 400 708
(Appellant)

Vs. ACIT, 15(2)(1)
Room No. 357, 3rd Floor, Aayakar
Bhavan, M.K.Road, Mumbai- 400
020
(Respondent)

PAN No. AABCT3380Q

Assessee by : Mukesh Butani/ Karishma R.
Phatarphekar/ Harsh Shah/ Pratik
Poddar/ Paras Savla
Revenue by : Samruddhi Dhananjay Hande, SR AR

Date of hearing: 23.11.2022
Date of pronouncement : 20.02.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. The brief facts for the appeal number 1291/M/2017 for assessment year 2012 - 13 shows that it was originally filed by the assessee against the order dated 24/1/2017 passed by the assistant Commissioner of income tax - 15 (2) (1) Mumbai (the learned AO) in pursuance of the direction of the dispute resolution panel (DRP - 1, Mumbai (the learned DRP)). During the course of hearing, the assessee challenged the comparable cybermate Infotek limited having operating margin of 56.97% is to be excluded from the comparability study of the arm's-length price of the international transaction. However, the argument of the assessee was rejected with respect to the exclusion of the above comparable as per paragraph number six of the order of the ITAT in ITA number 1291/M/2017 dated 7/11/2017. Subsequently assessee filed

miscellaneous application (MA number 75/M/2018 in ITA number 1291/M/2017 which was decided on 15/6/2018 wherein it has been held that there is no mistake apparent from the record against the inclusion of the above comparable. However, as per paragraph number 14 the order was recalled for the limited purpose of adjudicating the other comparables adopted by the learned transfer pricing Officer and learned dispute resolution panel and other grounds of appeal filed by the appellant. Against this miscellaneous application, assessee approached the honourable Bombay High Court and order was passed on 13 December 2018 in writ petition number 2960 of 2018 wherein the honourable High Court allowed the petition of the assessee in part restoring to the tribunal limited to the extent of comparing the CIL with the assessee over and above the issues restored by the ITAT in its own order. Therefore, the issues along with the comparability of CIL with the assessee along with the other issues are now to be decided.

02. Before us also the assessee argued that if once CIL is excluded entire transfer pricing addition is deleted and all other TP issues becomes academic.
03. For exclusion of CIL, the argument of the assessee is that it is engaged in the product Development, segmental details between product development and software services are not available therefore in absence of segmental data it is not a good comparable, the honourable Bombay High Court in two different decisions as well as the ITAT in assessee's own case has categorically held that company involved in product development cannot be adopted as a comparable company. The assessee also relied upon the decision of ITAT in four different assessee's which were engaged in the provision of software development services where it was held that the above comparable company i.e. CIL is not a good comparable. To show that the comparable is engaged in product development, reference was made to page number 211, 215, 231 and 238 of the paper book. With respect to the segmental analysis not available in case of this comparable, reference was made to paper book page number 243. The assessee also referred to the decision of the coordinate bench in case of the assessee itself for assessment year 2009 - 10 and 2010 - 11 in 64 taxmann.com 461 dated November 18/2015 wherein in paragraph number 25 the coordinate bench has held that that the learned transfer pricing officer has not recorded any finding that assessee is a product manufacturing Co but it was found that assessee is in the business of calling



of localisation and software services. Further, for characterization of the assessee, the decision of the honourable Bombay High Court in ITA number 1815 of 2016 dated 3 May 2019 was also pressed into service submitting that assessee was characterized as a software service company and not a product manufacturing Co. Thus, it was submitted that the functional profile of the assessee has been held to be a software services company and it has not under gone any change.

04. To examine the functional profile of the assessee, attention was drawn to page number 27 of the paper book wherein it was shown that an international transaction of ₹ 908,141,789/- is with respect to receipt of fees towards low-end, routine, software development and localization services rendered by assessee to its group companies. For the function, attention was drawn to contract localization service agreement dated first day of April 2010 and it was shown that services means service are subcontracted software services related to a particular project. It was also shown that project means a particular assignment of statement of work for software services between a customer of financial entrepreneur and the entrepreneur. Thus, it was stated that assessee is engaged in software services and not in software development.
05. Coming to the comparability of CIL, the annual accounts placed at page number 203 onwards was referred wherein in the directors' report it is mentioned that this company is engaged in the business of providing custom-built software development, product development and IT services to customers in domestic and overseas locations. Attention was also drawn to the annexure to the director's report wherein the comparable company was carrying on continuous efforts in strengthening its research exposure in application and system development areas. Referring to the segmental reporting at page number 243 where it was stated that the entire operation of the comparable company relates only to one segment of computer segment. Thus, it was stated that it does not have the segmental information available. Reference was also made to balance sheet abstract and company's general business profile wherein generic name of the principal product or service of the company was stated to be computer software.



06. Stating that CIL was a product company and therefore it cannot be compared with the assessee, reliance was placed on the decision of honourable Bombay High Court in case of CIT versus PTC software private limited 75 taxmann.com 31 wherein at paragraph number 10 (a) it held that software product company cannot be compared with the company rendering software services.
07. It was also submitted that CIL was rejected as a comparable for assessment year 2012 - 13 in case of several other companies one of them is 91 taxmann.com 356 in paragraph number 10 wherein it has been held that CIL was engaged in providing both software development services and was a product company and in the absence of segmental details it cannot be compared as both the above segments were clubbed together under the head software segment. It was also held that that company is engaged in providing software development services as well as developing variety of software products in the field of hospital management, software Heal Soft and 38 other products. It was held that where the segmental details were not available of the concern, which was engaged in multiple activities i.e. in providing software development services as well as being a product company then margins of the said comparable company cannot be applied to benchmark the international transactions of the concern, which was engaged in providing software development services. Accordingly, it was submitted that Cybermate Infotek limited deserves to be excluded.
08. The learned departmental representative vehemently supported the order of the learned transfer-pricing officer. It was submitted that assessee himself has accepted the above comparable company and therefore now it cannot argue that it should be excluded and functionally not comparable.
09. We have carefully considered the rival contention and perused the orders of the lower authorities. As such the order under section 92CA (3) of the act passed on 21/1/2016 shows that transfer pricing methodology adopted by the assessee clearly shows in comparability analysis that at serial number 3 the assessee has included Cybermate Infotech limited as a good comparable. This is evident at paragraph number 5.2 of the order. When the assessee was asked to give the updated margins of the comparable companies using the single year data, once again the assessee included the above company as comparable this is evident as per paragraph number 5.2.2 of the order where

the assessee computed the margin of this comparable company at 56.97% (the weighted average margin based on three financial years was 64.32%). Therefore, the transfer-pricing officer in final set of comparables included this comparable at serial number two as per paragraph number 5.6 of his order taking the above margin. However, before the learned dispute resolution panel the assessee challenged the above comparable company as per paragraph number 5.4.2 (d) submitting that this company is engaged into high-end customizable software development and the company has its own research and development Centre and the company has no employees cost ratio as the said comparable needs to be rejected. Therefore, assessee raised objection before the learned dispute resolution panel. The learned DRP rejected the argument of the assessee about exclusion of this comparable comparable along with other nine comparables for exclusion/inclusion in a summary manner holding that it is only required to be checked if the companies broadly into software development business and whether the software development high-end or low end does not have any relevance. Also merely because the company has its own research and development Centre and low employee cost it does not mean that the company is not a service company. Thus challenging the same finding before us, the assessee has contended as per argument summarized above. The functional profile of the Assessee company has been crystallized by the honourable High Court in ITA number 1815 of 2016 dated 3 May 2019 that assessee was a software service company. Therefore, accepting the above profile, it needs to be seen that whether the comparable company i.e. CIL is comparable or not. The directors' report of that comparable company shows that it is engaged in the business of providing custom-built software development, product development and IT services to customers in domestic and overseas location. It is also apparent from the directors' report that that company is engaged in the hospital management software and 38 other products. It did not have the segmental analysis for software development activities and software services activities. Accordingly, it is apparent that in absence of segmental analysis, margin of the comparable company cannot be compared with the margin of the assessee company. For that reason, we direct the learned transfer pricing officer to exclude the above comparable from comparability analysis.

010. As it is the statement of the assessee that if CIL is excluded from the comparability analysis, other transfer pricing issue becomes academic. Therefore, no adjudication is made thereon.
011. In the result, appeal of the assessee is allowed.
012. Now we come to the appeal of the assessee for assessment year 2013 - 14 in ITA number 7304/M/2017, which was originally decided on 21 May 2018 partly allowing the appeal of the assessee. Thereafter assessee preferred a miscellaneous application in MA number 704/M 2018 which was decided on 27/05/2019 recalling the order originally passed with respect to adjudication on inclusion in comparability analysis of Acropetal technologies Ltd and aspire Systems India private limited. Relevant paragraph recalling the above order to that extent is placed at paragraph number 4 and 6 of the order of the coordinate bench dated 27/05/2019. Accordingly, now the issue is to be decided whether Acropetal Technologies Limited and aspire Systems India private limited is a good comparable or not.
013. The learned authorized representative submitted that with respect to Acropatel technologies Ltd submitted the ITAT by its order dated 21 May 2018 accepted the appellant's argument and followed the ITAT order for assessment year 2008- 2009. However, instead of directing ld TPO to consider the margin of IT segment, ITAT directed that the margin of ITes segment be considered. This was the mistake pointed out before the coordinate bench and it was accepted and therefore if the margin of information technology services segment is adopted, there is no grievance. It was further stated that the correct margin of the IT segment be adopted by the learned transfer pricing officer. According to the assessee, correct margin of this comparable for that particular segment is 0.81%.
014. The learned departmental representative did not have any objection to this aspect subject to verification of the margin.
015. Accordingly, we direct the learned transfer-pricing officer to consider the margin of this comparable company of IT segment. The margin as stated by the assessee at 0.81% may be verified.



016. With respect to the aspire system India Ltd, this comparable was prayed for rejection by the assessee, this was rejected by the ITAT as per order dated 21 May 2018. In the miscellaneous application dated 27 May 2019 the ITAT recalled order to that extent for adjudication on comparability of this comparable.
017. The argument of the learned authorized representative is that this comparable company should be rejected for the reason that it is engaged in IT consulting and outsourced product development, which has over 20 years of experience in developing software products. The learned authorized representative also referred to various products of that company. Further, in the annual report it has made addition to its intangible assets, which were developed internally to show that it is developing products also. It was further contended that segmental details between product development and software services are not available. Further, the coordinate bench for the same year has already rejected companies, which are into outsourced product development. The assessee referred to the appellate order in case of aspire systems India private limited for assessment year 2009 - 10 dated 25/2/2015 wherein in paragraph number 2 it is stated that assessee is in the business of providing outsourced Product services. The website extract of expired products was also demonstrated which itself shows that it is a software product development company.
018. The learned departmental representative vehemently supported the orders of the learned transfer pricing officer and learned dispute resolution panel
019. We have carefully considered the rival contention and perused the orders of the lower authorities. Assessee argued before the learned transfer-pricing officer that this company is functionally not comparable because it is providing services including outsourced product development, software testing and infrastructure application support and Oracle services. It also contended that the operation of the software segment and the nature of IT consulting services and outsource software development. The learned transfer-pricing officer rejected the same for the reason that companies engaged in providing software development and outsourced solution is comparable functionally. Before the dispute resolution panel the assessee challenged the above comparable that the segment, which is compared with



the margins of the assessee, is in the nature of IT consulting services and outsource software development. The learned dispute resolution panel also held that it is functionally comparable to the functions of the assessee. Before us, the assessee has submitted a detailed chart. It was submitted that the complete annual report and financial data of the company is not available and only the balance sheet and notes to the accounts are available. The profit and loss account of this company is also not available. On these ground itself the learned transfer-pricing officer has rejected the companies selected in the transfer pricing study report. Further, the learned transfer pricing officer himself used information available in the profit and loss account in order to reject the assessee's other comparables. Therefore, on the same reasoning, this comparable company should also be excluded. We find that if the annual accounts in its all completeness are not available, it cannot be included in the comparability analysis. In the present case, the argument of the learned authorized representative is that profit and loss account of the company is not available. Therefore in absence of the profit and loss account the margin, income stream, nature of functions performed resulting into expenditure incurred are not known to the assessee. In such circumstances, this comparable company should be excluded from comparability analysis. We direct the learned transfer-pricing officer accordingly.

020. Thus, the issues recalled are decided in favour of the assessee and appeals of the assessee are allowed.

Order pronounced in the open court on 20.02.2023.

Sd/-
(KAVITHA RAJAGOPAL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 20.02.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT



5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai