

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER &
DR. BRR KUMAR, ACCOUNTANT MEMBR**

ITA No.6123/Del/2018
Assessment Year: 2014-15

M/s. Barco Electronic Systems Pvt. Ltd.,E-20, Ist & 2 nd Floor, Hauz Khas, South West Delhi, Delhi-1100 16	Vs.	ACIT, Special Range-2, New Delhi
PAN :AAACB5865F		
(Applicant)		(Respondent)

ITA No.6249/Del/2018
Assessment Year: 2014-15

ACIT, Special Range-2, New Delhi		M/s. Barco Electronic Systems Pvt. Ltd.,E-20, Ist & 2 nd Floor, Hauz Khas, South West Delhi, Delhi-1100 16
PAN :AAACB5865F		
(Applicant)		(Respondent)

Cross Objection No.42/Del/2021
(In ITA No.6123/Del/2018)
Assessment Year: 2014-15

M/s. Barco Electronic Systems Pvt. Ltd.,E-20, Ist & 2 nd Floor, Hauz Khas, South West Delhi, Delhi-1100 16	Vs.	ACIT, Special Range-2, New Delhi
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PAN :AAACB5865F		
(Applicant)		(Respondent)

Appellant by	Shri Mukesh Gupta & Ms. Neha Gupta, CAs
Department by	Shri Mrinal Kumar Das, Sr. DR

Date of hearing	20.03.2023
Date of pronouncement	06.04.2023

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

Captioned appeals by the assessee and Revenue and cross objection by the assessee arise out of a common order dated 19.07.2018 of learned Commissioner of Income-Tax (Appeals)-44, New Delhi pertaining to assessment year 2014-15.

ITA No.6123/del/2018 (Assessee's appeal):

2. At the outset, learned counsel appearing for the assessee did not press ground nos. 1, 3 and 4. Accordingly, these grounds are dismissed as not pressed.

3. In ground nos. 2 and 2.1, the assessee has challenged selection of a comparable viz. Mindtree Ltd.

4. Briefly, the facts relating to this issue are, the assessee is a resident corporate entity and a wholly owned subsidiary of Barco NV, Belgium. As stated, the assessee is in the business of manufacturing of projector, parts and components thereof for control room and other divisions. Further, the assessee is also engaged in trading visual display products as well as development of software application relating to their applications. In the year under consideration, the assessee had entered into various international transactions with its Associated Enterprises (AEs). However, the dispute in the present appeal is confined to the transaction relating to software development services. Though, the assessee undertaking an independent benchmarking exercise claimed the transaction with AEs to be at arm's length, however, the Transfer Pricing Officer (TPO) did not accept assessee's claim. Of course, the TPO agreed with the assessee that Transactional Net Margin Method (TNMM) is the most appropriate method.

5. Out of the nine comparables selected by the assessee, the TPO rejected six comparables. At the same time, he introduced ten new comparables. One amongst them being Mindtree Ltd.

6. Objecting to the selection of this comparable, learned counsel for the assessee submitted, in the previous year relevant to the assessment year under dispute, there was restructuring in case of Mindtree Ltd. He submitted, as a result of restructuring, various divisions were discarded and new divisions were introduced. He submitted, the IT Division, which is comparable to the assessee, was not there. He submitted, segmental data with regard to various activities undertaken by the company in the year are not available in public domain. He submitted, merely because in assessment year 2012-13 the assessee did not dispute inclusion of this company as comparable, for that reason alone, learned Commissioner (Appeals) upheld the selection of the comparable without examining assessee's submission. Thus, he submitted, the issue may be restored back to the Assessing Officer/TPO for examining assessee's submissions on comparability of this company.

7. Though, learned Departmental Representative relied upon the observations of the Assessing Officer and learned Commissioner (Appeals), however, he submitted, the issue can be restored back to the Assessing Officer.

8. We have considered rival submissions and perused material on record.

9. As could be seen from the impugned order of learned Commissioner (Appeals), Mindtree Ltd. was retained as a comparable only because TPO included it in the final list of comparables in earlier assessment year and assessee did not object. However, it is the specific case of the assessee before us that due to restructuring of the company, various other segments have been added to the business of the company, whereas, some segments, including IT segment, have been discarded.

10. From the submissions made before learned Commissioner (Appeals) by the assessee, it is evident that the assessee had taken this plea before him as well. However, such submission has been completely overlooked by learned Commissioner (Appeals).

11. In our view, in case, there is restructuring in the business model of the comparable in the year under consideration, which could have an impact on comparability with the assessee, it requires consideration. Merely because, the company was treated as a comparable in assessment year 2012-13, it cannot be treated as a

comparable in the impugned assessment year, unless, the functional profile remains identical and facts are identical.

12. Considering the fact that assessee's submissions in this regard have not at all been considered by learned First Appellate Authority, we are inclined to restore the issue back to the Assessing Officer for fresh adjudication after duly examining the facts and material available on record including the annual report of the comparable and any other material, which the assessee may bring on record.

13. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue. This ground is allowed for statistical purposes.

14. In addition to the main grounds, the assessee has raised the following additional grounds:

“1. The appellant Asstt. Commissioner of Income Tax/Transfer Pricing Officer in the appeal effect order has erred on facts in not including Maveric Software Ltd. in the final set of comparable even when it satisfies all the filters of TPO – as per directions of CIT(A)-44.

2. The Asstt. Commissioner of Income Tax/Transfer Pricing Officer in the appeal effect order has erred on facts in computing the margin of comparable company Aeropetal Technologies Ltd. at 9.56% whereas the correct margin was -47.71%.

3. The Asstt. Commissioner of Income Tax/Transfer Pricing Officer in the appeal effect order has erred on facts in including Thirdware Solutions Ltd. in the final set of comparable as it does

not satisfy the service income more than 75% of the net sales filter of the TPO-as per directions of CIT(A)-44.”

15. At the time of hearing, learned counsel did not press additional ground no.3. Accordingly, additional ground no.3 is dismissed as not pressed.

16. As regards additional ground nos. 1 and 2, learned counsel for the assessee submitted that while giving effect to the order of learned First Appellate Authority, the TPO has completely overlooked his directions with regard to Maverick Software Ltd., whereas, in case of Acropetal Technology Ltd. he has computed the margin incorrectly, though, the correct margin was furnished by the assessee in reply to show cause notice.

17. Having considered rival submissions, we find while deciding assessee's appeal, learned Commissioner (Appeals) had directed the TPO to include Maverick Software Ltd. if it passes all the filters applied by the Assessing Officer/TPO. However, while giving effect to the order of learned Commissioner (Appeals), the TPO has failed to examine this particular issue. Similarly, as regards Acropetal Technologies Ltd. he directed the TPO to include it as a comparable

however, it is the case of the assessee that the profit margin of the company has been wrongly taken at 9.56%, whereas, the correct margin of the company was (-) 47.71%. He submitted, though, this fact was specifically brought to the notice of the TPO in reply to the show cause notice, however, he has completely ignored the reply of the assessee while computing the margin of the comparable. Thus, he submitted, the issue may be restored back to the AO/TPO with a direction to examine the issue.

18. In view of the aforesaid, we restore the issue raised in the additional ground nos.1 and 2 to the Assessing Officer for examining assessee's claim keeping in view the directions of learned Commissioner (Appeals) and the submissions made by the assessee. These grounds are allowed for statistical purposes.

19. In the result, appeal is allowed for statistical purposes.

ITA No.6249/Del/ (Revenue's appeal):

20. In ground nos. 1 and 2, the Revenue has raised the issue relating to exclusion/inclusion of the following comparables:

- a) ICRA Techno Analytics Ltd.;
- b) Kals Information System Ltd.;
- c) Persistent Systems Ltd.;
- d) Tata Elxsi;

- e) Infosys Ltd.;
- f) Larsen & Toubro Infotech Ltd.; &
- g) Acropetal Technologies Ltd.

21. We have considered rival submissions and perused material on record with reference to the comparables in dispute before us.

22. As regards ICRA Techno Analytics Ltd. learned Commissioner (Appeals) after perusing the annual report of the company has noticed that extraordinary events had happened in case of the company in the relevant assessment year. She has noted that the company had undertaken substantial expansion in the year by acquiring stake in a California based company. Thus, it is quite probable, the extraordinary events might have impacted the profitability of the company. For this reason, we uphold the decision of the learned Commissioner (Appeals). In so far as Kals Information System Ltd. is concerned, learned Commissioner (Appeals) has rejected this company for two reasons; firstly, it is functionally incomparable and secondly, segmental information was not available. From the discussions of learned Commissioner (Appeals), it is observed, this company is in the business of software services and software products, whereas, segmental information is not available. The factual finding of learned

Commissioner (Appeals) could not be controverted by the Revenue.

Therefore, we uphold the decision of learned Commissioner (Appeals).

23. Next comparable in dispute is Persistent System Ltd.

24. Learned Commissioner (Appeals) has excluded this company primarily for two reasons, firstly, it is functionally different as the company is engaged in software product development and is dealing in outsourcing of software development. Whereas, the assessee has provided Software Development Services. The aforesaid factual position could not be controverted by the Revenue through cogent material.

25. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals). In so far as Tata Elxsi is concerned, learned Commissioner (Appeals) has excluded it considering the fact that the company was engaged in diverse activities like product design services, innovation design engineering services and visual computing labs and had specialized and niche domain of software products/services. The aforesaid factual finding of learned Commissioner (Appeals) has remained uncontroverted before us.

Therefore, we do not find any reason to interfere with the decision of learned Commissioner (Appeals). In so far as Infosys Ltd. is concerned, learned Commissioner (Appeals) has rejected it as a comparable considering the huge turnover compared to the assessee. In our view, Infosys Ltd. cannot be treated as comparable due to various factors including huge turnover of more than 1783 times of assessee's turnover.

26. Besides the above, Infosys Ltd. cannot be a comparable to a captive service provider like the assessee because of brand value, diversified activities, intangibles owned etc. Therefore, we uphold the decision of learned Commissioner (Appeals).

27. In so far as Larsen & Toubro Ltd., it is observed, learned Commissioner (Appeals) excluded this company because it undertook certain restructuring activities and consolidated the engineering services business under a separate subsidiary. We are in agreement with the aforesaid decision of the learned Commissioner (Appeals) as it is quite probable the extraordinary event of restructuring might have impacted the profitability of the company. For this reason, we uphold the decision of learned Commissioner (Appeals).

28. As regards Acropetal Services Ltd., it is observed, in assessment year 2012-13 it was found to be a good comparable to the assessee. Since, there is no functional difference between the assessee and the comparables in the impugned assessment year, there is no reason, why the company cannot be treated as comparable to the assessee. Therefore, we uphold the decision of learned Commissioner (Appeals). Grounds are dismissed.

29. In ground no.3, the Revenue has challenged the deletion of TP adjustment of Rs.2,07,901, being interest on receivable.

30. Having considered rival submissions, we find, learned Commissioner (Appeals) deleted the adjustment considering the fact that as a principle, assessee does not charge any interest either from the AE or from unrelated parties. She has further observed that the assessee is a debt free company. Since, the aforesaid finding of fact of learned Commissioner (Appeals) could not be controverted by the Revenue, we uphold the deletion of TP adjustment. This ground is dismissed.

31. Ground no.4 being a general ground, it is dismissed.

32. In the result, the appeal is dismissed.

C.O. No.42/Del/2021:

33. At the time of hearing, on instructions, learned counsel appearing for the assessee sought permission to withdraw the cross objection. Accordingly, cross objection is dismissed as withdrawn,

34. In the result, assessee's appeal is partly allowed for statistical purposes. Revenue's appeal and assessee's cross objection are dismissed.

Order pronounced in the open court on 06th April, 2023.

Sd/-
(DR. BRR KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 06th April, 2023.

Mohan Lal

Copy forwarded to:

1. Applicant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi