

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
AND  
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.5743/M/2015  
Assessment Year: 2011-12**

Income Tax Officer- 1(1)(1), Room No.579, Aayakar Bhavan, M.K. Road, Mumbai - 400020  (Appellant)	Vs.	M/s. Avana Integrated Systems Ltd., Bombay House, 24, Homi Mody Street, Fort, Mumbai – 400 001 <b>PAN: AADCT 1062F</b>  (Respondent)
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**CO No.37/M/2016  
(Arising out of ITA No.5743/M/2015)  
Assessment Year: 2011-12**

M/s. Avana Integrated Systems Ltd., Bombay House, 24, Homi Mody Street, Fort, Mumbai – 400 001 <b>PAN: AADCT 1062F</b>  (Appellant)	Vs.	Income Tax Officer, Circle 1(1)(1), Room No.564, Aayakar Bhavan, M.K. Road, Mumbai - 400020  (Respondent)
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**Present for:**

Assessee by : Ms. Arati Vissanji, A.R.  
Revenue by : Shri Mehul Jain, Sr. A.R.

Date of Hearing : 15 . 03 . 2023  
Date of Pronouncement : 31 . 05 . 2023

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

For the sake of brevity aforesaid appeal and cross objections emanated from same impugned order passed by the Commissioner of Income Tax, (Dispute Resolution Panel-1), Mumbai [hereinafter

referred to as the Ld. DRP] are being taken up for disposal by way of composite order.

2. Appellant Income Tax Officer-1(1)(1), Mumbai (hereinafter referred to as the Revenue) and the cross objector M/s. Avana Integrated Systems Ltd. (hereinafter referred to as the assessee) by filing the present appeal and cross objections respectively sought to set aside the impugned order dated 19.10.2015 passed by the Ld. DRP on identically worded grounds except the difference in amount of addition/disallowance inter-alia that:

**ITA No.5743/M/2015 (Grounds of Revenue):**

*“1. Whether on the facts and circumstances of the case, the DRP erred in retaining a single comparables namely Tamil Nadu Ex Servicemen Corporation Ltd., which is government owned company, contrary to the binding precedent laid down by Jurisdictional ITAT, Mumbai in the case of Novartis Healthcare (P.) Ltd. Vs Additional Commissioner of Income- tax, Range-7(1), Mumbai and in the case of Shell India Markets (P) Ltd. V. Assistant Commissioner of Income-tax, Large Taxpayer Unit, Mumbai, wherein it has been consistently held that Government company cannot be the sole comparable in the final set of comparable.*

*2. Whether on the facts and circumstances of the case, the DRP erred by adopting different yardstick for undertaking functional analysts of comparable companies namely Engineers India Ltd, Tata Consulting Engineers Ltd, and Mahindra Consulting Engineers Ltd. by testing them against a very high degree of comparability but at the same time not testing the case of Tamil Nadu Ex Servicemen Corporation Ltd., against the same high degree of comparability.*

*3. Whether on the facts and circumstances of the case, the DRP erred in not appreciating that broadly all these four comparables namely Engineers India Ltd, Tata Consulting Engineers Ltd, and Mahindra Consulting Engineers Ltd and Tamil Nadu Ex Servicemen Corporation Ltd. are functionally comparable to the assessee company.*

*4. Whether on the facts and circumstances of the case, the DRP was correct in allowing the adjustment on account of capacity utilization at Rs.10,72,349/- failing to note that the rationale for adjustment is the difference in the level of capacity utilization between the assessee and the four comparables applied by the TPO and hence when DRP*

*rejected three of the comparables, the adjustment was also no longer required/ or required calculation.*

*5. Whether on the facts and circumstances of the case, the DRP erred in giving benefit of adjustment of Rs. 10,72,349/ on account of idle manpower to the assessee, ignoring the fact that Hon'ble ITAT, Mumbai in the case of Deputy Commissioner of Income-tax, Rg-8(2) Vs. Petro Araldite (P) Ltd. and in the case of Philips Software Centre (P.) Ltd. V. Assistant Commissioner of Income-tax, Circle 12(2), held that difference in capacity utilization at level of assessee and at level of comparables affects profit margin, hence, adjustment is to be made to profit margins of comparables unlike in this case, wherein, the direction is given to make adjustment to assessee's profit margin."*

### **CO No.37/M/2016 (Grounds of Assessee):**

*"The Hon'ble Dispute Resolution Panel (DRP) Learned Transfer Pricing Officer (TPO) Learned Assessing Officer (AO), respectively and as the case may be, in the facts and circumstances of the case and in law, erred in*

*1.1 passing the impugned assessment order U/s.143(3) read with Section 144C(13) of the Income Tax Act, 1961 read with 3 proviso of Section 153(1) of the Income-tax Act, 1961 (the Act), which is illegal and bad in law;*

*1.2 not satisfying himself about the necessity and requirement of referring the matter for determination of arm's length price in respect of the international transaction between the appellant and the AEs and consequently the reference by the Learned AO to the Learned TPO is illegal and bad in law;*

*1.3 making the transfer pricing adjustment under the provisions of Section 92CA of the Act though same is not the 13 "charging provision" under the Income Tax Act, 1961 and there is no corresponding provision to charge "such adjustments" as income of the appellant U/s.4 of the Act and U/s5 of the Act;*

*1.4 making the reference to the Ld. TPO as per the CBDT Instruction No.10/2013 dated 05-08-2013 as regards threshold limit of Rs.15 Crores as the said "administrative limits" under the said Circular had no force in law and the reference made by following the said Circular by the Learned AO was illegal and bad in law;*

*2. On the facts and circumstances of the case and in law, consequent to the directions of Hon'ble DRP, if a single comparable company is retained, then, the same cannot be considered as bad in law,*

3. *On the facts and circumstances of the case and in law, the Hon'ble Members of the Dispute Resolution Panel (DRP) ought to have accepted the following adjustments in computing the appellant's Operating Margin on Cost:*

*(a) Reduction of the "pass through cost", being the re-imburement of travelling and conveyance expenses of Rs.4,98,93,649/- incurred in connection with the personnel sent on deputation of providing technical support services to AEs overseas project(s) from "operating revenue" and from 'operating cost"*

*(b) Reduction of start-up cost of Rs. 1,33,95,000 from operating cost as the same was incurred for conducting a detailed survey for Tata Steel Limited, Jamshedpur Plant, the contract for which materialised in the financial year 2014-2015; and*

*(c) Reduction of operating cost by 5% on account of under utilization of capacity, as the current year was the appellant's first year of operations and the operation of the assessee company were not at its optimum level.*

4. *Alternatively and without prejudice to any of the above grounds, on the facts and circumstances of the case and in law, the Hon'ble DRP ought to have accepted the following companies as comparables:*

*(a) Cades Digitech Private Limited;*

*(b) Mistral Solutions Private Limited; and*

*(c) Siemens Building Technologies Private Limited.*

5. *On the facts and circumstances of the case and in law, the Ground No.4 of the Department's Appeal in had in law as the adjustment of Rs. 10,72,349/- on account of idle capacity was given by the TPO and not by the Hon'ble Bombay High Courtble DRP and hence the same cannot be appealed against by the department before the Hon. ITAT*

6. *On the facts and circumstances of the case and in law, if as a consequence of disposing off the Department's Grounds of Appeal, and Cross Objections of the appellant, the appellant's Operating Margin on Cost and the Arithmetical Margin on Cost of the comparable companies have to be re-worked, then-*

*(a) the AO should be directed to accept the arm's length price of the international transactions with the AEA if the revised operating margin of the appellant is greater than or is within the 5% variation (tolerance band") of the revised arithmetical mean of the operating margin of the final comparable companies*

*And if the above parameter is not satisfied, then*

*(b) the AO should be directed that the arm's length price adjustment should be made only in respect of appellant's international transactions with its AEs."*

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee is a joint venture between Tata Advanced Systems Limited and AG Technologies Holding Ltd., Cyprus (AGT) holding 51% and 49% of the capital respectively is into the business of providing homeland security solutions and into providing personnel for rendering technical project management and implementation services in connection with AGT group's overseas projects for providing homeland solutions to their customers. During the year under consideration the assessee entered into international transactions with its Associate Enterprises (AEs) as reported in form 3CEB as under:

No.	Nature of International Transactions	Amount (Rs.)	Method by assessee
1	Professional charged paid for services availed	1,97,82,797	TNMM
2	Technical support services rendered by the assessee	11,89,41,144	TNMM
3	Reimbursement of expenses to AE	4,98,93,649	TNMM
	Total	18,86,17,590	

4. The assessee in order to benchmark its international transactions with its AEs applied Transactional Net Margin Method (TNMM) at entity level with operating profit/operating cost (OP/OC) as profit level indicator (PLI) as the Most Appropriate Method (MAM), chosen three comparables viz. Cades Digitech Private Limited, U.B. Engineering & Shakya Technologies Ltd. having mean margin of 6.48% as against assessee's entity level margin of 8.27% and found its transaction at

arms length, however, the transfer pricing analysis made by the assessee has been rejected by the Ld. Transfer Pricing Officer (Ld. TPO) who has proceeded to make fresh TP study. The Ld. TPO selected 4 comparables to which the assessee has raised objection. The assessee again given two more comparables which were also rejected by the Ld. TPO. The Ld. TPO computed the margin of the 4 comparables so chosen at 30.20% as against margin of the assessee at 8.91% and proposed the arms length margin at 24.54.% on the operating cost and proposed the adjustment of Rs.3,00,11,075/-.

5. The assessee carried the matter before the Ld. DRP by way of filing objections which have been partly accepted by rejecting the three comparables namely **Engineers India Ltd., Tata Consulting Engineers Ltd. and Mahindra Consulting Engineers Ltd.** out of 4 comparables finally selected by the Ld. TPO. Feeling aggrieved with the impugned order passed by the Ld. DRP the Revenue as well as the assessee have come up before the Tribunal by way of filing the present appeal and cross objections respectively.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

### **Ground Nos.1 to 3**

7. During the transfer pricing proceedings the Ld. TPO finally selected four comparables by accepting the method adopted by the

assessee i.e. TNMM at entity level with OP/OC as the PLI as the MAM, which are as under:

SR. NO.	NAME OF THE COMPANY	OP/OC
1	Tamil Nadu Ex Servicemen Corporation Ltd.	9.40%
2	Mahindra Consulting Engineers Limited	30.85%
3	Tata Consulting Engineers Limited	27.70%
4	Engineers India Limited.	30.20%
	Arms length margin	24.54%

8. The Ld. DRP after accepting the contentions raised by the assessee rejected three comparables namely Engineers India Ltd., Tata Consulting Engineers Ltd. and Mahindra Consulting Engineers Ltd. out of four comparables chosen by the assessee by returning following findings:

*“4.5.1 It has been submitted on the basis of profile that Engineers India Limited is a leading design and engineering organisation in South Asia. It provides EPC services focused on oil and gas, Infrastructure, water and waste management, solar and nuclear power, fertilizers and petrochemical Industries. It is a total solution engineering Consultancy Company providing services from concept to commissioning of a project. Hence it cannot be compared with the assessee.*

*We have carefully considered the facts and the submissions made. The assessee is not into providing services similar or comparable to EIL. The assessee provides homeland security solutions tailored for the Indian threat environment and leverage cutting edge technology deployed globally by the AGT group to protect critical assets. It provides Technical support services to the AEs. Mere providing engineers on deputation basis to the AE do not mean that services similar to EIL or end to end engineering services are provided. In providing services like EIL, responsibilities for the design, engineering and commissioning of the project are to be borne by EIL. Hence, TPO is directed to reject EIL as comparable.*

*4.5.2 It has been submitted on the basis of profile that Mahindra Consulting Engineers Limited is into Project design and Engineering including planning and scheduling, statutory and regulatory approvals, procurement advisory, vendor evaluation, bid process, project supervision, etc. services and hence it is not comparable.*

*We have carefully considered the facts and the submissions made. The assessee is not into providing services similar or comparable to Mahindra Consulting Engineers. The assessee provides homeland security solutions tailored for the Indian threat environment and leverage cutting edge technology deployed globally by the AGT group to protect critical assets. It provides Technical support services to the AEs. A service of mere providing engineer on deputation basis to the AE does not mean that services similar to Mahindra are provided. Hence, TPO is directed to reject Mahindra as comparable.*

*4.5.3 It has been submitted on the basis of profile that Tata Consulting Engineers Limited offers integrated engineering consultancy solutions including commissioning solutions in construction management, advanced technologies, power, nuclear, infrastructure, Industrial, mining, minerals, steels and metals, transportation, water, building, manufacturing, spatial planning, environment etc. considering the facts, the services provided by this comparable cannot be equated with the services provided by the assessee. TPO is directed to reject it.*

9. The Ld. D.R. for the Revenue challenging the impugned exclusion of 3 comparables by the Ld. DRP contended that the Ld. DRP has adopted a different yardstick in accepting 4<sup>th</sup> comparable namely Tamil Nadu Ex Servicemen Corporation Ltd. vis-à-vis Engineers India Ltd. as both are government owned companies.

10. We are of the considered view that there is no thumb rule not to accept the government company for comparability analysis to benchmark the international transactions merely because of the fact that it is a government company. Each and every comparable is to be examined for comparability on its own facts. The co-ordinate Bench of the Tribunal in case of Shell India Markets (P.) Ltd. vs. ACIT (2015) 55 taxmann.com 487 (Mumba-Trib.) has considered this issue and held that “where government companies are excluded as a comparable not for the reasons only that they are government owned companies but because of their functional dissimilarities.” So the contention of the L. D.R. for the Revenue as per ground

No.1 is not sustainable. If the profit & loss account of a government company shows some preferential treatment to the government company, impacting profit only then government company can be excluded.

11. However, in case of **Engineers India Ltd.** Ld. DRP has found it functionally dissimilar vis-à-vis the assessee who is into providing homeland security solutions tailored for the Indian Threat Environment and Leverage Cutting Edge Technology deployed global by AGT Group to protect critical assets. Whereas as per annual report available at page 41 to 46 of the paper book Engineers India Ltd. is into providing certification services, project management services, process design services, engineering services, commissioning services, construction management services, procurement services etc. which is not comparable to the assessee. So the Ld. DRP has rightly rejected this comparable chosen by the Ld. TPO.

12. So far as the question of excluding **Mahindra Consulting Engineers Ltd. (MCEL)** as a comparable to benchmark the international transactions vis-à-vis the assessee is concerned, it is also functionally dissimilar being into project design and engineering including planning and scheduling statutory and laboratory approvals, procurement advisory, venture evaluation, bid process, project supervision etc. whereas the assessee is providing homeland security solution to their customer. As such the Ld. DRP has rightly excluded MCEL as a comparable vis-à-vis assessee.

13. So far as case of excluding **Tata Consulting Engineers Ltd. (TCEL)** as a comparable vis-à-vis assessee is concerned the same

is again excluded by the Ld. DRP on the ground of functional dissimilarity.

14. We have perused the comparable of TCEL available at page 50 to 57 of the paper book wherein it is shown to be engaged in integrated engineering consultancy solution including commissioning solutions in construction management, advanced technologies, power, nuclear, infrastructure, industrial, mining, minerals, steels and metals, transportation, water, building, manufacturing, spatial planning, environment etc. again which is not comparable to the assessee who is into providing homeland security solutions to their customers. So the Ld. DRP has rightly excluded TCEL as a comparable vis-à-vis assessee. Ground Nos.1 to 3 are decided against the Revenue.

#### **Ground Nos.4 & 5**

15. The Revenue has challenged the order passed by the Ld. DRP in allowing the adjustment on account of capacity utilization of Rs.10,72,349/- on the ground that the rationale for adjustment is the difference in the level of capacity utilization between the assessee and the four comparables applied by the Ld. TPO. When the Ld. DRP has rejected three of the comparables the adjustment was no longer required.

16. We are of the considered view that these grounds raised by the Revenue are not maintainable as the adjustment on account of capacity utilization has been given by the Ld. TPO himself by returning following findings:

*“The assessee has asked for an adjustment on account of the idle manpower cost. The assessee has worked out this adjustment to*

*Rs.10,72,349/- as per the date of joining and the date of deployment of that person on a project.*

*TPO Comments*

*The assessee's submission is accepted as this is the first year of operations of the assessee, and provision of this adjustment will help in better comparability with the comparable companies who are operating since much before.”*

17. So when the adjustment with regard to the idle capacity utilization has been given by the Ld. TPO these grounds raised by the Revenue are not maintainable, hence the ground Nos.4 & 5 are dismissed.

**Cross objections by the assessee:**

18. Cross objections filed by the assessee do not survive having been become infructuous as candidly admitted by the Ld. A.R. for the assessee.

19. In view of what has been discussed above, the appeal filed by the Revenue is hereby dismissed. At the same time the cross objections filed by the assessee are also dismissed having been become infructuous.

**Order pronounced in the open court on 31.05.2023.**

**Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 31.05.2023.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent

The CIT, Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.