

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" , HYDERABAD**

BEFORE

**SHRI LALIET KUMAR, HON'BLE JUDICIAL MEMBER
AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER**

ITA No.194/Hyd/2021		
Assessment Year: 2016-17		
M/s. Benu Networks Packet Switch Private Limited, Hyderabad. PAN : AAECB4902B	Vs.	The ACIT, Circle – 1(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri Ashish Jain, CA and Ms. M. Sripada, CA.	
Revenue by:	Ms. TH a Vijaya Lakshmi, CIT-DR	
Date of hearing:	20.06.2024	
Date of pronouncement:	29.07.2024	

ORDER

PER LALIET KUMAR, J.M.

This appeal is filed by the assessee aggrieved by the assessment order passed by the Commissioner of Income Tax (National Faceless Appeal Centre), Delhi dt.25.03.2021 invoking proceedings under section 143(3) r.w.s. 144C(13) r.w.s. 143(3A) & 143(3B) of the Income Tax Act, 1961 (in short, "the Act") for A.Y. 2016-17.

2. The revised grounds raised by the assessee reads as under :

Ground No. 1:

The Hon'ble DRP has grossly erred in rejecting Appellant's comparables appearing in its Transfer Pricing Study without applying their minds or going through the evidence provided by the Appellant.

Ground No. 2:

The Learned TPO ("Ld. TPO") erred by rejecting the following comparable companies selected by the Appellant, on unjustifiable grounds even though they are functionally comparable to the assessee :

- (i) *Sagarsoft (India) Limited*
- (ii) *Athena Global Technologies Limited*
- (iii) *Akshay Software Technologies Limited*
- (iv) *Batchmaster Software Private Limited*
- (v) *Celstream Technologies Private Limited*
- (vi) *Isummation Technologies Private Limited*
- (vii) *Evoke Technologies Private Limited*
- (viii) *DCIS DOT COM Solutions India Private Limited*
- (ix) *Maveric Systems Limited*
- (x) *Orangescape Technologies Limited*
- (xi) *Sasken Communication Technologies Limited*
- (xii) *Infomile Technologies Limited*
- (xiii) *E-Zest Solutions Limited*

Ground No. 3:

The Ld. TPO and Hon'ble DRP erred on facts and law by comparing the Appellant with the following companies having high turnover, despite the same failing the legally accepted criteria of turnover being greater than Rs. 200 crores in various judicial precedents:

- (i) *Larsen & Toubro Infotech Limited (Seg)*
- (ii) *Tata Elxsi Limited (Seg)*
- (iii) *Nihilent Technologies Limited*

- (iv) *Persistent Systems Limited*
- (v) *Aspire Systems (India) Private Limited*
- (vi) *Infosys Limited*
- (vii) *Thirdware Solution Limited*
- (viii) *Cybage Software Private Limited*

Ground No. 4:

The Ld. TPO erred on facts and law by comparing the Appellant with the following companies, which have an entirely different functional and risk profile:

- (i) *Larsen & Toubro Infotech Limited (Seg)*
- (ii) *Tata Elxsi Limited (Seg)*
- (iii) *Nihilent Technologies Limited*
- (iv) *Inteq Software Private Limited*
- (v) *Persistent Systems Limited*
- (vi) *Infobeans Technologies Limited*
- (vii) *Aspire Systems (India) Private Limited*
- (viii) *Infosys Limited*
- (ix) *Thirdware Solution Limited*
- (x) *Cybage Software Private Limited*

Ground No. 5:

The Ld. TPO has erred in making adjustment in the case of delay in receipts of sale proceeds from Associated enterprise. In doing so:

- a. *The learned TPO has erred in considering the delay in receipts of sale proceeds from Associated enterprise as 'International Transaction' within the purview of Section 92B of the Income Tax Act, 1961.*
- b. *The Ld. TPO has erred in making an adjustment on account of notional interest on delay in receipts of sale proceeds even though the Appellant has not borrowed any funds or incurred any interest cost.*
- c. *The Ld. TPO has erred in computing notional interest using SBI short term deposit rates instead of LIBOR.*

d. The Ld. TPO has also erred in computing notional interest on invoices not raised in FY 2015-16.”

3. The brief facts of the case are that assessee is company is engaged in the business of development and support of computer software. Assessee company filed its return of income for A.Y.2016-17 on 09.08.2017 declaring income of Rs.1,56,45,860/- under normal provisions. Thereafter, the case of the assessee was selected for scrutiny under CASS. Accordingly, notices u/s 143(2) of the Act was issued on 10.08.2018 and u/s 142(1) of the Act was issued on 21.08.2018 and on 03.12.2019. During the year under consideration, assessee company has international transactions with its Associated Enterprise (AE), and therefore, a reference was made to the Transfer Pricing Officer (TPO), who vide its order dt. 30.10.2019 suggested total TP adjustments u/s 92CA on international transactions for A.Y. 2015-16 totaling to Rs.1,22,00,037/-, in respect of software development services at Rs.1,04,23,539/- and interest on delayed receivables at Rs.17,76,498/-.

3.1. Accordingly, the Assessing Officer passed the draft assessment order on 30.10.2019 u/s 92CA(3) of the Act. Aggrieved such draft assessment order, assessee preferred objections before the Dispute Resolution Panel (DRP) and pursuant to the directions of the DRP dt. 16.02.2021, Assessing

Officer finalized the assessment, by making addition of TP adjustment and thereby assessed the total income at Rs.2,78,45,897/-. Hence, this appeal

4. With respect to ground Nos.1 and 2, ld. AR has submitted that the TPO has rejected the following comparables :

- (i) *Sagarsoft (India) Limited*
- (ii) *Athena Global Technologies Limited*
- (iii) *Akshay Software Technologies Limited*
- (iv) *Batchmaster Software Private Limited*
- (v) *Celstream Technologies Private Limited*
- (vi) *Isummation Technologies Private Limited*
- (vii) *Evoke Technologies Private Limited*
- (viii) *DCIS DOT COM Solutions India Private Limited*
- (ix) *Maveric Systems Limited*
- (x) *Orangescape Technologies Limited*
- (xi) *Sasken Communication Technologies Limited*
- (xii) *Infomile Technologies Limited*
- (xiii) *E-Zest Solutions Limited*

4.1. The TPO while rejecting the TP objection of the assessee held that these comparables were not appearing in the search matrix of the appellant TP Study Report. It was submitted by the assessee by referring to the TP order that the contention of the TPO was incorrect and the DRP has not considered the submission of the assessee that the data of these comparables were available in the public domain. Our attention was drawn to the order of the TPO.

5. Per contra, ld. DR in respect of these companies has submitted that once the TPO has rejected the TP Study Report, the assessee has not asked for inclusion of these companies. Therefore, the TPO and the DRP were correct in rejecting these companies.

6. We have heard the rival submissions and perused the material on record. Unfortunately, the assessee has sought inclusion of these companies in the TP Study Report, however, for the reasons best known to the TPO, it was stated that these companies were not meeting the search matrix and accordingly, they were rejected by the TPO. Since the assessee has shown us that these companies are appearing in search matrix, therefore, it would be in the interests of justice the issue of inclusion of these companies are remanded back to the file of TPO with a direction to examine whether these companies are functionally comparable with the assessee company or not after applying the applicable filters. If these companies were functionally comparable, then the TPO is directed to include these companies for the purpose of computing the ALP. Thus, these grounds are allowed for statistical purposes.

7. Ground no.3 is with respect to the erroneous comparison made by the Ld. TPO and Hon'ble DRP, who compared the Appellant companies with companies having high turnover despite these companies failing to meet the legally accepted criteria of turnover being greater than Rs. 200 crores in various judicial precedents.

7.1. At the outset, ld. AR has submitted that huge turnover leads to positive internal economies of scale thereby reducing cost and increasing the profitability of the company and hence, those kind of companies should be rejected as comparables. However, TPO selected companies which have higher turnover as compared to the assessee company and held that turnover is not a relevant filter since there is no impact of turnover on the cost plus margin method.

7.2. In support of its case, ld. AR has filed written submissions, which are to the following effect :

“First and foremost, we would like to draw the Hon'ble Bench's attention towards the following provision of the Income Tax Rules and OECD Guidelines wherein the emphasis is laid on the eliminating material differences for the purpose of comparability:

Determination of arm's length price under section 92C

10B. (1). . . .

(e) transactional net margin method, by which,—

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction [or the specified domestic

transaction] and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(2). . . .

3) An uncontrolled transaction shall be comparable to an international transaction [or a specified domestic transaction] if—

- (i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from, such transactions in the open market; or
 - (ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.
- Further, Chapters I and III of the OECD Transfer Pricing Guidelines, Guidance on comparability adjustments in paragraph 3.47 – 3.54 and the Annexure to Chapter III explains that the conditions of a controlled transaction are generally compared to the conditions of comparable uncontrolled transaction when applying the arm’s length principle. In this context, to be comparable means that:
 - None of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or
 - Reasonably accurate adjustments can be made to eliminate the effect of any such differences. These are called “comparability adjustments”.
 - Thus, an overall reading of both Rule 10B and the OECD Guidelines make it abundantly clear that while establishing comparability to arrive at an appropriate arm’s length price, any material differences should be eliminated.
 - It is pertinent to note that turnover filter is a material filter as it has a direct impact on profit margins, economies of scale, brand value, market share, etc.
 - Further, reliance is placed on the judgment of **Hon’ble Bombay High Court** in the case of **CIT vs Pentair Water India Pvt Ltd** (Tax Appeal No. 18 of 2015) wherein it was held that turnover is a relevant criterion for choosing comparable companies for determination of ALP.
 - Further, we would like to draw the attention of the Hon’ble Bench to the below table which depicts the judicial cases wherein various Benches of Hon’ble ITAT has rejected the stated companies for AY 2016-17 having turnover exceeding Rs. 200 crores and accordingly not comparable to a captive software development company like the Appellant.
 - The Hon’ble ITAT in the below cases have placed reliance on the Bombay High Court case of Pentair Water India as well as Rule 10B and OECD

Guidelines and decided that high turnover is a ground for exclusion of companies. Relevant extract is reproduced below:

“19. The Tribunal in the case of Autodesk India Pvt.Ltd. Vs. DCIT (2018) 96 Taxmann.com 263 (Bangalore-Tribunal), took note of all the conflicting decision on the issue and rendered its decision and in paragraph 17.7. of the decision held as that high turnover is a ground for excluding companies as not comparable with a company that has low turnover.

.....

In view of the aforesaid decision, we hold that the 8 companies listed in Sl.No.(a) to (i) in paragraph -13 of this order, which the assessee seeks exclusion and whose turnover in the current year is more than Rs.200 Crores should be excluded from the list of comparable companies”

- (i) M/s. Auriga Software Technologies Private Limited vs ITO, Bangalore ITAT, IT(TP)A No. 178/Bang/2021, AY 2016-17, 03/02/2022 - Appendix AT*
- (ii) M/s. Prism Networks Private Limited vs ACIT, Bangalore ITAT, IT(TP)A No. 349/Bang/2021, AY 2016-17 - Appendix AU*
- (iii) M/s. Capco Technologies Private Limited vs DCIT, Bangalore ITAT, IT(TP)A No.204/Bang/2021, AY 2016-17, 18/11/2021 - Appendix AW*
- (iv) M/s. Atmecs Technologies Private Limited vs ITO, Bangalore ITAT, IT(TP)A No.187/Bang/2021, AY 2016-17, 20/12/2021 - Appendix AX*
- (v) M/s OLF (India) Software Pvt. Ltd. vs ACIT, Bangalore ITAT, IT(TP)A No.182/Bang/2021, AY, 28/09/2021 2016-17 - Appendix AS*

	L&T Infotech Ltd	Tata Elxsi Ltd	Nihilent Technologies Ltd	Cybage Software Pvt Ltd	Persistent Systems Ltd	Aspire Systems Pvt Ltd	Infosys Technologies Ltd	Thirdware Solution Ltd
Turnover (₹ in Crore)	2,919.07	1,041.46	251.22	722.25	1,447.13	230.80	53,983.00	221.36
M/s OLF (India) Software Pvt. Ltd.	✓	✓	✓	✓	✓	✓	✓	✓
M/s. Auriga Software Technologies Private Limited	✓		✓	✓	✓	✓	✓	✓
M/s. Prism Networks Private Limited	✓		✓	✓	✓	✓	✓	✓

M/s. Capco Technologies Private Limited	✓		✓	✓	✓	✓	✓	✓
M/s. Atmecs Technologies Private Limited	✓	✓	✓	✓	✓	✓	✓	✓

- *The Hon'ble Bench in the recent cases of:*
 - a. **iMedx Information Services (P.) Ltd. Vs DCIT**, ITA TP No. 1755 (HYD.) OF 2019, AY 2015-16
 - b. **Infor (India) Private Limited, Hyderabad vs DCIT**, ITA No. 193/Hyd/2023, AY 2018-19
Have held that companies having turnover in excess of 10 times of the Assessee cannot be considered as comparable to the Assessee.
- *In arriving at the said decision, reliance was placed on the following rulings of the various Benches of the ITAT as well as the High Court wherein it has been clearly laid out that companies having high turnover and brand value play a significant role in its ability to garner profits and negotiate contracts and accordingly such companies should not be considered as comparable to the Assessee. The same are stated below for the reference of the Hon'ble Bench:*
 - a. *The Hon'ble Bombay High Court in the case of CIT vs. M/s. Pentair Water India Pvt. Ltd. (2016) TAX APPEAL NO. 18 of 2015*
 - b. *The Hon'ble Karnataka High Court in the case of PCIT vs. M/s. Obopay Mobile Technology India Private Ltd., ITA No. 586/2016*
 - c. *The Hon'ble Delhi High Court in the case of PCIT vs. New River Software Services (P) Ltd., IT APPEAL NO. 924 OF 2016*
 - d. *The Hon'ble Delhi High Court in the case of PCIT vs. Oracle (OFSS) BPO Services (P) Ltd., IT APPEAL NO. 124 OF 2018*
 - e. *The Hon'ble Hyderabad ITAT in the case of TNS India (P) Ltd., vs. DCIT, IT APPEAL NO. 573 (HYD.) OF 2017*
 - f. *The Hon'ble Hyderabad ITAT in the case of S&P Capital IQ (India) (P) Ltd., vs. DCIT, IT(TP)APPEAL NO. 1652 (HYD.) OF 2019*
 - g. *The Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd., vs. ITO, IT APPEAL NO. 223 OF 2017*
 - h. *The Hon'ble Karnataka High Court in the case of PCIT vs. Swiss Re Global Business Solutions India (P) Ltd., IT APPEAL NO. 384 OF 2017*
- *In the above-mentioned case of Infor India, the coordinate bench has in its order dated October 26, 2023 clearly stated that:*

“13. In these circumstances, following the foot prints of the Hon'ble Karnataka High Court in the case of Obopay Mobile Technology India

Private Ltd., (supra), we hold that the turnover is a relevant criteria for choosing companies as comparables in determining the ALP in Transfer Pricing cases.

14. Now turning to the next question as to the appropriate turnover filter, in all the decisions relied upon by the learned AR, a consistent view is taken that the application of tolerance range of turnover of ten times on both sides of assessee's turnover was proper. Following the same, we direct the learned Assessing Officer to adopt the same for a fresh search. With this view of the matter, we set aside the findings of the authorities below and **direct the learned Assessing Officer/learned TPO to take the range of turnover filter at ten times on both the ends and conduct search afresh to take a plausible view.**"

(Kindly refer Page 7 of case law of Infor India)

- Similarly, in the recent case of **iMedx Information Services**, the Hon'ble Bench has itself directed in its order dated May 10, 2023 for the application of the turnover filter at 10 times of the turnover of the Appellant. The relevant extract from the said case is reproduced below:

"17. We accordingly set aside the findings of the authorities and **direct the learned Assessing**

Officer/learned TPO to take the range of turnover filter at ten times on both the ends and

conduct search afresh to take a plausible view. These grounds are accordingly treated as

allowed for statistical purposes."

(Kindly refer Page 7 of case law of iMdex Information Services)

- In conclusion, since the Hon'ble Bench has itself directed for application of upper turnover filter capped at 10 times and accordingly, we pray before the Hon'ble Bench to reject the below TPO comparable companies that have a turnover in excess of 10 times of Benu India's turnover of Rs. 10.75 crore:

- (i) Larsen & Toubro Infotech Limited (Seg) – Rs. 2,919 crore
- (ii) Tata Elxsi Limited (Seg) – Rs. 1,041 crore
- (iii) Nihilent Technologies Limited – Rs. 251 crore
- (iv) Persistent Systems Limited – Rs. 1,447 crore
- (v) Aspire Systems (India) Private Limited – Rs. 230 crore
- (vi) Infosys Limited – Rs. 53,983 crore
- (vii) Thirdware Solution Limited – Rs. 221 crore
- (viii) Cybage Software Private Limited – Rs. 722 crore"

8. Per contra, ld. DR had relied upon the orders of lower authorities.

9. We have heard both sides and perused the material on record. This Tribunal has continuously been following the turnover of the filter of ten times x and $1/10^{\text{th}}$ of the turnover of the assessee on both the sides. In view of the above, we deem it appropriate to remand back this issue to the file of Assessing Officer / TPO with a direction to apply ten times filter lower and upper on both the sides. The companies which are having turnover of more than 10 times are required to be excluded from the list of comparable and similarly, the companies whose turnover are less than $1/10^{\text{th}}$ of the turnover of the assessee are also required to be excluded from the list of comparable. In the light of the above, the TPO is directed to exclude the comparable in the light of the above said directions. Thus, this ground is allowed for statistical purposes.

10. Ground No.4 is with respect to exclusion of various comparable. The ld.AR the outset, had insisted only for exclusion of Infobeans Technologies Limited at Sl.No.vi on the ground that the lower authorities have rejected the plea of the assessee for exclusion of Infobeans Technologies Ltd on the wrong presumption that this company is functionally comparable with that of the assessee. The ld.AR has drawn our attention to pages 369 - 370

of the paper book and also the Pages 523 - 524 of the paper book I. On the basis of the above, it was submitted that the financials of this company were available in public domain and therefore, and perusal of the financials, make it clear that this company is into Automation Engine and customized software and content management system, which is functionally different from that of assessee and hence, is required to be excluded in the list of comparable.

11. Per contra, the ld.DR relied upon the orders of lower authorities.

12. We have heard the rival submissions and perused the material on record. The ld.DRP while dismissing the objections of the assessee has recorded that the functions of the assessee are required to be examined based on the profile of the assessee as available in public domain and not on the basis of the dynamic website of the assessee. It was also noted that the assessee has not brought to the notice that the function performed by the company are appearing in annual report are different than that of the assessee. We may reproduce para 2.2.6.2 wherein the finding of the DRP was given to the following effect :

“2.2.6.2. It was contended that the company is engaged in functionally dissimilar activities referring to certain information said to be available in the website of this company. As already discussed at para 2.1.2 above, we note that the information put in website cannot be given much credence, as they are mere forward looking statements with the motive of advertisement and other promotional interests. Further, the information in website is dynamic and cannot be related to a particular period. The information in the website in the year 2018-19 or 2019-20 will show the functionality for the current period which may be very much different from that existing in 2015-16, the year of scrutiny. There is no way to verify whether the said information have relevance for the year under scrutiny. Therefore, as a principle, this Panel strictly goes by the information in the annual report which is based on audited financial statements which categorically mentions that the company is engaged in software services. Therefore, we reject the pleas raised and uphold the selection of this company as functionally comparable to the assessee.”

12.1. Furthermore, if we look into the financials of the company wherein the company's overview was mentioned as under : (Page 2141)

“Company Overview :

InfoBeans operating at CMMI level 3, is a software services company specializing in business IT Services. Our business is primarily engaged in providing custom developed services to offshore clients. InforBeans provides software engineering services primarily in Custom Application Development (CAD), Content Management Systems (CMS), Enterprise Mobility (EM), Big Data Analytics (BDA).”

12.2. From the conjoint reading of the above, it is clear that this company was into software development services and cannot be said to be a KPO for any purposes. When the TNMM method is

applied to benchmark the transaction, then the slight / little variation in the profile of the comparable company are required to be permitted for applying TNMM method, otherwise, the other methods as available are required to apply if the transaction entered by the assessee with its AE matches with the profile of the comparable company. Therefore, we do not find any error in the order passed by the lower authorities. Accordingly, the ground raised by the assessee is rejected. With respect to the other companies, the assessee has not raised any objection and it was submitted that these companies would be taken care being the subject matter of turnover filter. Hence, the ground no.4 of the assessee is dismissed subject to our finding with respect to turnover filter.

13. Ground No.5 is with respect of adjustments made in the case of delay in receipts of sale proceeds from AE.

14. Before us, ld. AR has submitted that the assessee is accepting the order passed by the lower authorities whereby they have restricted to interest on trade receivable at as SBI short-term interest rate for the subject year as the ALP interested. It was submitted that the SBI 6% rate as upheld by this tribunal, in several cases, may kindly be applied in the case of the assessee for the assessment year under consideration.

15. The ld.DR has relied upon the order passed by the lower authorities.

16. We have heard the rival arguments and perused the material available on record. Admittedly, this Tribunal in the case of Satyam Ventures Engineering Services Vs. ACIT, Zeta Interactive Systems India Private Limited, M/s. Apache Footware India Private Limited etc has decided the issue in favour of the Revenue by holding that the SBI bank rate of 6% with a credit period of 60 days is to be applied for determining the interest on delayed trade receivables. In the present case, says the assessee has agreed for application of has very deposited of 6% for benchmarking the interest on trade receivable, therefore we don't want to decide the issue and accordingly direct the AO /TPO to apply the SB rate of 6% to the transaction in dispute for with a credit. 60 days. In the light of the above the issue is decided in favour of the assessee and against the revenue.

17. No other grounds have been agitated before us by the Ld.AR for the assessee and therefore, we have not decided any ground specifically, though the assessee had raised many grounds in the appeal.

18. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 29th July, 2024.

Sd/-

Sd/-

(G. MANJUNATHA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER
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Hyderabad, dated 29.07.2024.

TYNM/sps

Copy to:

S.No	Addresses
1	M/s. Benu Networks Packet Switch Private Limited, Hyderabad, C/o.8-2-120, 1 st Floor, Block A, Palace View Estate, Road No.2, Banjara hills - 500034, Hyderabad.
2	The Assistant Commissioner of Income Tax, Circle – 1(2), Hyderabad.
3	Pr.CIT, Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order