

IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER  
AND SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

IT(TP)A No.912/Bang/2011
Assessment year : 2007-08

Autodesk India Pvt. Ltd., A4, ‘A’ Wing, 2 <sup>nd</sup> Floor, Divyashree Chambers, Langford Road, Bangalore – 560 025. <b>PAN : AABCA 6924B</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 11(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T. Suryanarayan, Advocate
Respondent by	:	Shri G.R. Reddy, CIT-I(DR)

Date of hearing	:	31.08.2015
Date of Pronouncement	:	30.09.2015

**ORDER**

*Per Asha Vijayaraghavan, Judicial Member*

The assessee was set up as a subsidiary of Autodesk US in October 1998 and is engaged in providing technical support services and marketing support services to its overseas associated enterprises. As on 31st March 2007, the entire share capital of Autodesk was held by Autodesk US, with

two shares held by Autodesk Asia Pte. Ltd, Singapore. Autodesk US is engaged in designing software and producing digital content for architectural design and land development, manufacturing, utilities, telecommunications and media and entertainment. Autodesk Singapore is engaged in the business of developing, distributing and supporting software and hardware products and support services in Asia, Australia and the south Pacific. Being a captive service provider, Autodesk India assumes less than normal risks and all significant business and entrepreneurial risks are borne by the overseas affiliates.

2. During the financial year 2006-07 relevant to the assessment year 2007-08, software development (technical support) and marketing support were the only services rendered by Autodesk to its Associated Enterprises (AEs).

3. The TP issue in the present appeal pertains to the aforesaid two international transactions towards which a total adjustment of Rs.6,53,62,861/- was made by the TPO. Also, for the A.Y. 2007-08, the assessee claimed a deduction of Rs. 80,73,695/- on account of advances written off which was debited to the Profit and Loss Account. The AO has made a disallowance of the said amount on the ground that it was a capital expenditure not allowable under Section 37 of the Act.

4. Originally, a draft assessment order was passed on 23.11.2010 challenging which, the assessee filed its objections before the Dispute Resolution Panel (DRP).

5. The DRP upheld the order passed by the AO. Consequently, the AO passed the final order dated 24.08.2011. Based on the final order, the AO raised a demand for the balance tax payable of Rs. 3,86,82,062.

6. The assessee entered into international transaction in respect of software development services of Rs.2,19,38,411 and marketing support services of Rs.33,50,29,288. With respect to software development services, the net margin of the assessee was at 10%. The comparables selected by the assessee were as follows:-

Sl. No.	Name of the Company	Weighted Average (%)
1	Akshay Software Technologies Ltd.	7.36
2	A S M Technologies Ltd.	7.46
3	Aztecsoft Ltd.	18.13
4	Blue Star Infotech Ltd.	9.18
5	Bodhtree Consulting Ltd.	18.12
6	BT TechNet Ltd.	-1.55
7	C M C Ltd.	16.99
8	Computech International Ltd.	6.65
9	Essel Software & Services Ltd.	-0.95
10	Exensys Software Solutions Ltd.	23.10
11	F C S Software Solutions Ltd.	17.34
12	Geometric Software Solutions Co. Ltd.	18.01
13	Goldstone Technologies Ltd.	9.78
14	HCL Technologies Ltd.	22.01
15	Helios & Matheson Information Technology Ltd.	25.63

16	Hexaware Technologies Ltd.	15.53
17	I C S A (India) Ltd.	31.36
18	Infosys Technologies Ltd.	40.66
19	Infotech Enterprises Ltd.	23.53
20	Intertec Communications Ltd.	7.18
21	KALS Information Systems Ltd.	43.66
22	K P I T Cummins Infosystems Ltd.	14.08
23	Lanco Global Systems Ltd.	10.63
24	Larsen & Toubro Infotech Ltd.	11.15
25	Maars Software International Ltd.	5.36
26	Mascon Global Ltd.	10.08
27	Melstar Information Technologies Ltd.	-1.10
28	Mphasis Ltd.	16.51
29	Nav-Parva Technologies Pvt. Ltd.	10.20
30	Orient Information Technology Ltd.	-8.58
31	P S I Data Systems Ltd.	3.01
32	Patni Computer Systems Ltd.	41.29
33	Powersoft Global Solutions Ltd.	20.37
34	Prithvi Information Solutions Ltd.	13.24
35	R S Software (India) Ltd.	12.20
36	R Systems International Ltd.	11.28
37	Ramco Systems Ltd.	-8.85
38	Saksoft Ltd.	30.20
39	S Q L Star International Ltd.	-4.69
40	Sasken Communication Technologies Ltd.	19.06
41	Satyam Computer Services Ltd.	30.83
42	Shree Tulsi Online.Com	2.64
43	Sonata Software Ltd.	13.63
44	Subex Azure Ltd.	4.63
45	Synergy Log-In Systems Ltd.	-5.43
46	Synetairios Technologies Ltd.	11.61
47	Tata Consultancy Services Ltd.	35.50
48	Tata Elxsi Ltd.	24.77
49	V & K Softech Ltd.	4.16
50	V M F Soft Tech Ltd.	5.51
51	Vama Industries Ltd.	20.23
52	Visesh Infotecnics Ltd.	17.76
53	Visualsoft Technologies Ltd.	21.78
54	Wipro Ltd.	35.21
55	Zensar Technologies Ltd.	17.76

7. The Transfer Pricing Officer (TPO) accepted 10 comparables out of 55 comparables selected by the assessee. The TPO applied Prowess Database, Capitaline Plus Database as filters and selected the following comparables:-

Sl. No.	Name of the Company	Mark up (%)	
		Unadjusted	WC adjusted
1.	Accel Transmatic Ltd (Seg)	21.11	20.56
2.	Avani Cimcon Technologies Ltd	52.59	51.65
3.	Celestial Labs Ltd	58.35	54.75
4.	Datamatics Ltd	1.38	-0.21
5.	e-Zest Solutions Ltd	36.12	36.51
6.	Flextronics Software SystemsLtd (Seg)	25.31	25.49
7.	Geometric Ltd (Seg)	10.71	10.04
8.	Helios & Matheson	36.63	34.89
9.	I Gate Global Solutions Ltd	7.49	6.03
10.	Infosys Technologies Ltd	40.30	39.43
11.	Ishir Infotech Ltd	30.12	30.86
12.	KALS Information Systems Ltd (Seg)	30.55	23.86
13.	LGS Global Ltd	15.75	15.59
14.	Lucid Software Ltd	19.37	17.48
15.	Mediasoft Solutions Ltd	3.66	1.99
16.	Megasoft Ltd	60.23	51.80
17.	Mindtree Ltd	16.90	15.79
18.	Persistent Systems Ltd	24.52	23.87
19.	Quintegra Solutions Ltd	12.56	9.65
20.	R S Software (India) Ltd	13.47	13.56
21.	R Systems International Ltd (Seg)	15.07	13.67
22.	Sasken Communication Technologies Ltd (Seg)	22.17	21.52
23.	SIP Technologies & Exports Ltd	13.90	11.13
24.	Tata Elxsi Ltd (Seg)	26.51	26.62
25.	Thirdware Solutions Ltd	25.12	21.96
26.	Wipro Ltd (Seg)	33.65	34.95

8. The arithmetic mean arrived by the assessee was at 14.64, whereas the arithmetic mean arrived by the TPO was at 23.59.

9. The assessee has raised additional grounds of appeal under Rule 11 of the I.T. Rules, which read as follows:-

“4.14 That, Geometric Software Solutions Co. Ltd. ought to stand rejected in view of its related party transactions exceeding 15% of its sales.

4.15 That, Accel Transmatics Ltd., Helios & Matheson Information Technology Ltd. and Thirdware Solutions Ltd. ought to stand rejected in view of them being functionally dissimilar to the Appellant.”

10. Before us, the Id. counsel for the assessee submitted that out of 26 comparables selected by the TPO, the assessee has rejected 19 comparables and the reason for rejection are as follows.

11. Geometric Ltd. (Sl.No.7 of the TPO's comparables) ought to stand rejected in view of its related party transaction exceeding 15% of its sales in view of decision of this Tribunal in the case of *24/7 Customer Com Pvt. Ltd., ITA No.227/Bang/2010 (para 13)*. 9 comparables selected by the TPO at Sl.Nos. 1, 2, 3, 5, 8, 12, 14, 19 & 25 have to be rejected as functionally dissimilar in view of the decision of this Tribunal in the case of *NXP Semiconductors India P. Ltd., ITA No.1174/Bang/2011 (paras 18 to 20 and 26 to 28 of the decision)*. 4 companies at Sl.Nos. 6, 9, 17 & 22 ought to be rejected applying the upper limit of Rs.200 crores to the turnover in view of decision of this Tribunal in *Trilogy E-Business Software India Pvt. Ltd. in ITA No.1054/Bang/2011 (Paras 11 to 20)*. 5 other comparables are to be rejected on application of more than one filter. Companies at

Sl.No.10, 18, 24 & 26 ought to be rejected as functionally dissimilar in view of the decision of this Tribunal in the case of *NXP Semiconductors India P. Ltd. (supra)* [paras 24 to 26], as also applying the upper limit of Rs.200 crores to the turnover as held in *Trilogy E-Business Software India Pvt. Ltd. (supra)*. Ishir Infotech Ltd. at Sl.No.11 fails the TPO's own filter of 25% employee cost as held in *NXP Semiconductors India P. Ltd. (supra)* [paras 20 to 21] as also in view of its RPT exceeding 15% of sales as held in *24/7 Customer Com Pvt. Ltd. (supra)*. Hence the assessee submitted that remaining 7 comparables would be as follows:-

Sl. No.	Name of the Company	Mark up (%)	
		Unadjusted	WC adjusted
1.	Datamatics Ltd	1.38	-0.21
2.	LGS Global Ltd	15.75	15.59
3.	Mediasoft Solutions Ltd	3.66	1.99
4.	Megasoft Ltd	23.11	16.89
5.	R S Software (India) Ltd	13.47	13.56
6.	R Systems International Ltd (Seg)	15.07	13.67
7.	SIP Technologies & Exports Ltd	13.90	11.13
	<b>ARITHMETIC MEAN</b>	<b>12.33</b>	<b>10.37</b>

12. It was further submitted that NCP margin of assessee of 10% would be within the +/- 5% range of arithmetic mean and hence TP adjustment made by the TPO has to be set aside. The assessee also submitted a chart of +/- 5% of the net margin of the assessee for software development services as follows:-

<b>Particulars</b>	<b>Margin</b>
Net Margin of the Assessee	10%
Arithmetical mean of margins of the comparables	10.37%
<b>+5% of the arithmetical mean</b>	<b>15.88%</b>
<b>-5% of the arithmetical mean</b>	<b>4.85%</b>

13. From the chart, we find on acceptance of the 7 comparables selected by the assessee, arithmetic mean of 10.37% would place the assessee in a situation where the TP adjustment would become NIL. Since we find that the comparables worked out by the assessee are acceptable and the rejection of comparables made by the assessee from out of comparables selected by the TPO are justified, we direct the TPO to pass an order accordingly taking arithmetic mean of the assessee at 10.37%. The issue on TP adjustment with respect to software development services is set aside for statistical purposes.

#### **TP adjustment in respect of marketing support services**

14. The operating income was at Rs.33,50,29,288 and the operating profit was at Rs.3,04,57,209 with Operating/Net margin of 10% declared by the assessee. The assessee selected the following comparables for marketing support services:-

Sl. No.	Name of the Company	Mark up on cost (Weighted Average)
1	Empire Industries Ltd.	9.24%
2	IL & FS Academy for Insurance & Finance Ltd.	2.92%
3	Indiacom Ltd.	12.94%

4	MCS Ltd.	13.65%
5	NSIC Ltd.	- 3.78%
6	TSR Darashaw Ltd.	15.38%
	Arithmetic Mean	8.39%

15. After applying the filters, the TPO selected the following comparables:-

Sl. No.	Name of the Company	Operating profit to cost
1	Access Global Solutions Ltd	3.94%
2	Priya International Ltd	15.71%
3	ICC International Agencies Ltd (Seg)	78.67%
4	Empire Industries Ltd	23.98%
	<b>ARITHMETIC MEAN</b>	<b>30.57%</b>

16. The arithmetic mean of the assessee was at 8.39%, whereas that of the TPO was at 30.57%. The assessee submitted that the comparable, ICC International Agencies Ltd. should be rejected as functionally dissimilar and relied on the decision of this Tribunal in the case of *Logica Pvt. Ltd.* It was submitted that on exclusion of this comparable, the final set of comparables will be as follows:-

Sl. No.	Name of the Company	Operating profit to cost
1	Access Global Solutions Ltd	3.94%
2	Priya International Ltd	15.71%
3	Empire Industries Ltd	23.98%
	<b>ARITHMETIC MEAN</b>	<b>14.54%</b>

17. The Id. counsel for the assessee submitted that assessee's NCP margin of 10% would be within the +/- 5% range of arithmetic mean and

thus the TP adjustment made by the TPO should be set aside. We accept the comparables selected by the assessee inasmuch as only one comparable selected by the TPO viz., ICC International Agencies Ltd. was pointed out by the assessee as functionally dissimilar. The arithmetic mean of other three comparables viz., Access Global Solutions Ltd., Priya International Ltd. and Empire Industries Ltd. is at 14.54%. The assessee's NCP margin being 10%, would be within the +/- 5% range. Hence, we are of the opinion that the claim of the assessee has to be allowed. We therefore direct the TPO/AO to redo the assessment accordingly.

18. The next issue is with regard to the disallowance of deduction claimed on advances written off. The brief facts are that the assessee had entered into a lease deed dated 19.04.2006 with M/s Habitat India for lease of a premises situated in New Delhi for a lease period of 3 years extendable by 3+3 years by mutual consent. The objective of taking the premises on lease was to set-up and operate an office in Delhi. Subsequently in September 2006, the assessee entered into an agreement with M/s. Space Matrix Design Consultants P. Ltd., an interior designing firm, for designing the office layout and implementation of the same. As per the agreement, Space Matrix was to provide the following services to Autodesk:

- a. Plan preliminary space at the premises
- b. Develop design concepts and prepare drawings

c. Construct envisaged concepts at the premises.

19. During the financial year 2006-07, based on the work done in the premises, Space Matrix had raised several invoices aggregating to Rs. 80,73,695/- which was duly paid by the assessee. Pending completion of the work, the assessee had recorded the payments as 'advances paid to Space Matrix'. In November 2006, before the work could be completed by Space Matrix, the premises in question was sealed by the Government pursuant to the Order of the Hon'ble Delhi High Court as the premises was not in conformity with the applicable land-use laws. Accordingly, even though the Space Matrix has completed a significant part of its work, the assessee had to prematurely stop the designing of the premises and terminate the contract with Space Matrix. Accordingly, it wrote off the advances in its books of account.

20. For the assessment year in question, the assessee claimed a deduction of the said amount of Rs. 80,73,695/- being 'advances written off' debited to the P & L Account. The Assessing Officer in the assessment order has disallowed the said deduction on the ground that the payments were towards creation of a capital asset providing enduring benefit to the assessee and therefore the expenses were capital in nature.

21. The Id. counsel for the assessee submitted that the payments made to Space Matrix represents expenditure incurred wholly and exclusively in

the course of the business, not being in the nature of capital expenditure. Further, the expenditure was incurred for more efficient conduct of the ongoing business of the assessee and would therefore be revenue expenditure. Moreover, the advances were not made for the purposes of acquisition of capital asset and the services provided by Space Matrix did not also provide any benefit of an enduring nature, given the fact that the assessee was not able to operate out of the premises in question ultimately. Moreover, when the expenditure is incurred in relation to a leased property, the lease being for a short period of three years, no asset can be said to have come into existence. It was thus submitted that the advances written off of Rs. 80,73,695/- ought to be allowed as a deduction under Section 37 of the Act.

22. Without prejudice, and in the alternative, it was submitted that the assessee was remunerated on a cost plus 10% basis by its associated enterprise during the assessment year in question. The cost base included the amount of advances written off and therefore the revenue received by the assessee as 10% of the said cost base was also offered to tax by the assessee, which was accepted by the Assessing Officer. In including the said amount in the cost base and at the same time disallowing the said amounts as a deduction for the purposes of Section 37 of the Act, it was submitted that the AO has contradicted his own position. Considering the above, it was submitted that in the event that it is held that the aforesaid amount of Rs. 80,73,695/- is capital expenditure, then the same ought to

stand excluded from the cost base while computing the profit margin of the assessee for transfer pricing purposes.

23. The Id. counsel for the assessee further relied on the decision of Hon'ble High Court of Karnataka in the case of *CIT v. Infosys Technologies Ltd. (No.2)*,, 349 ITR 588 (Karn) and pointed out that the lease is only for three years with no certainty of further extension and the assessee did not occupy the premises for the expenditure to be treated as revenue expenditure. The Id. counsel for the assessee also relied on the decision of this Tribunal in the case of *Asera Software (India) Pvt. Ltd., ITA No. 1179/Bang/2009*. He gave a note of the details of payments made by the assessee to M/s. Space Matrix Design Consultants P. Ltd., which contained the date of invoices for the services provided.

24. The Id. DR vehemently opposed the claim of expenditure as revenue expenditure and stated that the number of years were totally 9 years and the very nature of expenditure is capital and therefore it could only be treated as capital loss.

25. In the rejoinder, the Id. counsel for the assessee pointed out to the lease deed at page 934 of the Paperbook and submitted that there was only an option for renewal of the lease and the assessee had not occupied the premises at all.

26. We have heard both the parties. We find that the premises has been taken on lease by the assessee and interior design works were carried out for the purpose of business to create ambience. The very fact that the premises was taken on lease for 9 years with a renewal clause would not itself make it a capital expenditure, when the fact remains that the assessee had prematurely stopped the designing work of the premises and terminated the contract with M/s. Space Matrix Design Consultants P. Ltd. It was brought to our notice that the premises was sealed by the Court pursuant to the order of the Delhi High Court as the premises was not in conformity with the applicable land use laws. It is a fact that the advances were written off as the assessee was not able to operate out of the premises and hence the same is allowable as a deduction u/s. 37 of the Act. The expenditure has been incurred for the purpose of the business and in the course of business and is clearly a revenue expenditure. Therefore this issue raised by the assessee is allowed.

27. The Hon'ble Apex Court in the case of *Empire Jute Co. Ltd. v. CIT*, 124 ITR 1 (SC) has held as follows:-

*“(i) It is not a universally true proposition that what may be a capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer.*

*(ii) There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may*

*break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case.*

*(iii) What is an outgoing of capital and what is outgoing an account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process. The question must be viewed in the larger context of business necessity or expediency."*

28. In the result, the appeal is partly allowed for statistical purposes.

Pronounced in the open court on this 30<sup>th</sup> day of September, 2015.

Sd/-

( ABRAHAM P. GEORGE )  
Accountant Member

Sd/-

( ASHA VIJAYARAGHAVAN )  
Judicial Member

Bangalore,  
Dated, the 30<sup>th</sup> September, 2015.

/D S/

Copy to:

1. Appellant
2. Respondents
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar /  
Senior Private Secretary  
ITAT, Bangalore.