

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

IT(TP)A No.931/Bang/2011

Assessment year : 2007-08

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| M/s. Affiliated Computer Services Of India Pvt. Ltd., Level 6, ITPL Innovator Block, Whitefield Road, Bangalore – 560 066. PAN: AADCA 8386M | Vs. | The Deputy Commissioner of Income Tax, Circle 11(1), Bangalore. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri Keerthi Narayan, CA |
| Respondent by | : | Ms. Neera Malhotra, CIT(DR) |

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| Date of hearing | : | 25.07.2016 |
| Date of Pronouncement | : | 26.08.2016 |

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of DRP
inter alia on the following grounds, which are as under:-

“Based on the facts and circumstances of the case, Affiliated Computer Services Of India Private Limited (hereinafter referred to as "the Appellant"), respectfully submits in respect of the order passed by the learned Deputy Commissioner of Income - tax "AO") Circle 11 (1), Bangalore under section 143(3)/144C of the

Income-tax Act, 1961 (hereinafter referred to as the 'Act') on the following grounds:

TRANSFER PRICING

1. The learned Assessing Officer ("AO") based on the directions received from learned Dispute Resolution Panel ("DRP") has erred in law and on facts, in upholding the adjustment to the transfer price made by the learned Transfer Pricing Officer ("TPO").
2. The learned AO/DRP/TPO has erred, in law and on facts by not appreciating that the Appellant is a captive service provider, carrying out limited functions and assuming limited risks.
3. The learned AO/DRP/TPO has erred, in law and on facts by making an addition of Rs 53,341,104 to the taxable income of the Appellant and in holding that the transactions between the Appellant and its associated enterprise ("AE") with respect to its software development services were not at arm's length.
4. The learned AO/DRP/TPO has erred, in law and on facts by making an addition of Rs 265,190,759 to the taxable income of the Appellant and in holding that the transactions between the Appellant and its AE with respect to its IT enabled services were not at arm's length.
5. The learned AO/DRP/TPO have erred in law and on facts by rejecting the Transfer Pricing documentation prepared by the Appellant in the manner as required under the provisions of the Act and Income-tax Rules, 1962 ("the Rules").
6. The learned AO/DRP/TPO have erred in law by conducting a fresh search for comparable companies and by rejecting the search process carried out by the Appellant, without giving adequate reasons for the rejection.
7. The learned AO/DRP/TPO erred in law and on facts by replacing the filters adopted by the Appellant with the new filters based on his own judgment and perception and that the filters applied by the TPO were not correctly applied.

8. The learned AO/DRP/TPO erred in law and on facts by identifying incorrect set of comparable companies.
9. That on the facts and circumstances of the case and in law, the learned AO/DRP/TPO has erred in not accepting consolidated financial statements for potentially comparable companies.
10. The learned AO/DRP/TPO have erred in law and on facts by rejecting the certain comparables considered by the Appellant, on the grounds of functional dissimilarity and by applying the filters of onsite revenue, export earnings, employee cost, different year ending, declining revenue, revenue from relevant segment less than 75 percent of total revenue and persistent loss.
11. The learned AO/DRP/TPO have erred in law and on facts by not applying the sales turnover filter.
12. The learned AO/DRP/TPO have erred in law and on facts by not following the consistent approach while applying filters in software development and ITeS segment.
13. The learned AO/DRP/TPO have erred in law and on facts by Including giant companies in view of their turnover, brand and high profitability as comparable to Appellant.
14. The learned AO/DRP/TPO have erred in law and on facts by not following consistency and adding certain companies as comparables, which fails the qualitative and quantitative filters adopted TPO.
15. That AO/DRP/TPO erred on the facts and circumstances of the case and in law by using only the current year (i.e. financial year 2006-07) data for computation of arm's length price.
16. The learned AO/DRP/TPO has failed to appreciate the Appellant's commercial judgment about the application of arm's length principle which Is tied to the business realities.
17. That AO/DRP/TPO erred on the facts and circumstances of the case and in law by ignoring the provisions of Rule 10B(3) of the Rules, international commentaries and judicial

pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.

18. That AO/DRP/TPO erred on the facts and circumstances of the case and in law by not providing a relief on account of differences in risk profile levels between the Appellant and the potential comparables for both Software and ITeS segments.
19. The learned AO/DRP/TPO have erred in law and on facts by including certain companies as comparable and in rejecting certain comparables considered by Appellant, based on the information gathered under section 133(6) of the Act, though the same Information was not available in public domain, to the Appellant at the time of conducting its own TP study.
20. The learned AO/DRP/TPO has erred in by failing to appreciate the fact that transfer pricing is an anti-avoidance mechanism. In the instant case the Appellant is registered as an entity registered under the STPI and has claimed tax benefits under section 10A of the Act and has no reason to suppress its profit from its operations to manipulate the transfer prices.
21. The learned AO/DRP/TPO have erred in law and on facts, in making several observations and findings which are based on incorrect interpretation of law and contrary to facts of the case.
22. The learned AO/DRP/TPO has erred, in law and on facts, by not providing the Appellant the benefit of 5 percent range as provided by the proviso of section 92C(2) of the Act.
23. The learned AO/DRP/TPO has erred by not carrying out the determination of arm's length price as required under section 92C of the Act read with rule 100 of Income Tax Rules, 1962.
24. The learned collegium of Commissioners comprising the DRP erred in law and on facts, by not adhering to the procedure laid down in section 144C(5), 144C(6) and 144C(7) was not followed.

25. The learned AO has erred in initiating penalty proceedings under section 271 (1)(c) of the Act.
26. The learned AO has erred, in law and on facts, in charging interest under section 234B and 244A of the Act.

CORPORATE TAX

1. Re computation of deduction allowable under section 10A

- a) The learned AO has erred in re-computing the deduction under section 10A of the Act after reducing the telecommunication expenses of Rs. 37,073,942 from Export Turnover alone.
- b) The learned AO has also erred in not accepting the contention of the appellant company that the definition of "Total Turnover" under section 80HHC/80HHE should be used to compute the deduction under section 10A of the Act.
- c) The learned ACIT has not accepted the assessee's contention that should the telecommunication expenses be reduced from the export turnover, the expenses should also be reduced from the total turnover in arriving at the deduction under section 10A of the Act.
- d) Further, the learned ACIT has also erred in not relying on the decision of the Special Bench of the Chennai Tribunal in the case of Sak Soft Limited v. ITO (ITA No. 91 & 1953/Mds/2007) wherein it has been held that if the telecommunication, freight and insurance expenses are reduced from the export turnover then the same would also have to be reduced from the total turnover in order to compute the deduction under section 10A.
- e) Further, the learned ACIT has also erred in not relying on the following decisions of the Honourable ITAT:
- CIT v. Gem Plus Jewellery India Limited [2010] 194 TAXMAN 192 (BOM.)
 - ITO v. D.E. Block India Software (P) Lid, ITA 983 & 984 - Hyderabad Tribunal

- Dell International services India Pvt Ltd., ITA No.'s 362 & 363/B/07 - Bangalore Tribunal
- Tata Elxsi v. CIT-ITA No 315 - Bangalore Tribunal
- M/s. i-Gate Global Solutions Ltd v. The ACIT - ITA NO.248 & 249/Bang/2007 - Bangalore Tribunal
- Patni Telecom (P) limited v. ITO (22 SOT 26) - Hyderabad Tribunal
- Nous Infosystems (P) Ltd v. ITO ITA No. 1042/Bang/07(AY 2003-04). Bangalore Tribunal
- ANZ operations & Technology Private limited v. CIT-ITA No. 30/Bang/200B- Bangalore Tribunal
- KPIT Cummins Infosystems (Bangalore)(P) Ltd. V. ACIT - 26 SOT 529 - Bangalore tribunal
- ACIT v. Honeywell Technology Solutions Lab. Pvt. Ltd (ITA No. 344 & 345 Bang./2009) - Bangalore Tribunal
- 12 Technologies India Private limited v. ACIT - ITA No. 277/Bang/2009 Bangalore Tribunal

2. Consequential interest levied under section 234B

The learned AO has also erred in levying interest under section 234B of Rs. 57,469,967 which is consequential in nature.

3. Consequential interest levied under section 234D

The learned AO has also erred in levying interest under section 234D of Rs. 235,314 which is consequential in nature. Further, in the assessment order the above mentioned amount of interest has been inadvertently mentioned as interest under section 244A instead of section 243D.

The above grounds are independent and without prejudice to each other.

For the above and any other grounds, which may be advanced at the time of hearing, your Appellant prays that the order of the learned AO may be please set aside.

The Appellant prays for leave to add, alter, amend and/ or modify any of the grounds of appeal at or before the hearing of the appeal.”

2. The Id. counsel for the assessee has moved an application stating therein that the assessee has accepted the MAP Resolution and craves leave to withdraw the grounds of appeal relating to TP adjustments, which was one of the matters pending before the Tribunal for adjudication.

3. The other matter for adjudication pertains to corporate tax adjustments i.e., computation of claim of deduction u/s. 10A of the Income-tax Act, 1961 [“the Act”]. In this regard, it was contended that the issue is squarely covered by the judgment of Hon'ble jurisdictional High Court in the case of *CIT v. Tata Elxsi Ltd. & Ors.*, 349 ITR 98 in favour of the assessee.

4. The Id. DR did not dispute these facts. She, however, contended that against the order of the Hon'ble jurisdictional High Court in the case of *CIT v. Tata Elxsi Ltd. (supra)*, the revenue has filed SLP before the Hon'ble Supreme Court and the same has been admitted. Therefore, the judgment of the Hon'ble jurisdictional High Court should not be followed.

5. Having carefully examined the dispute in these appeals and the assessee's letter, we find that since the assessee has accepted the MAP Resolution with respect to TP adjustments, the grounds of appeal becomes infructuous. We accordingly dismiss the same.

6. So far as the objection to deduction u/s. 10A is concerned, we are of the view that since filing of SLP in the Hon'ble Supreme Court against the judgment of Hon'ble jurisdictional High Court in the case of *CIT v. Tata Elxsi Ltd. (supra)* does not amount to stay of operation of the judgment of the Hon'ble High Court, we being in the jurisdiction of the Hon'ble jurisdictional High Court, are bound to follow the judgment of the Hon'ble jurisdictional High Court. Therefore, following the same, we deice the issue of computation of deduction u/s. 10A of the Act in favour of the assessee.

7. In the result, the appeal of the assessee is partly allowed.

Pronounced in the open court on this 26th day of August, 2016.

Sd/-

(A.K. GARODIA)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 26th August, 2016.

/D S/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.