

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. VIJAYPAL RAO, JUDICIAL MEMBER

I.T(IT).A No.137/Bang/2015
(Assessment Year : 2010-11)

Deputy Commissioner of Income tax,
Circle -3(1)(1), Bangalore

.. Appellant

v.

M/s. Ikanos Communication India Pvt. Ltd,
3rd floor, Corporate Miller,
No.332/1, Thimmaiah Road,
Vasanthnagar, Bangalore 560 052
PAN : AABCI1928F

.. Respondent

Cross objection No.109/Bang/2015
(In I.T(IT).A No.137/Bang/2015)
(Assessment Year : 2010-11)
(By the Assessee)

Assessee by : Shri. Ajit Tolani, CA
Revenue by : Shri. Sanjay Kumar, CIT - III

Heard on : 27.10.2015
Pronounced on : 10.11.2015

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

These are appeal and cross objection by the Revenue and assessee respectively, directed against an assessment made by the AO u/s.143(3) of

the Income-tax Act, 1961 ('the Act' in short), pursuant to the directions of the DRP under section 144C of the Income-tax Act, 1961 ('the Act' in short).

02. Appeal of the Revenue is taken up first for disposal. Revenue has altogether taken six grounds out of which, grounds 1, 5 and 6 are general needing no specific adjudication.

03. Vide grounds 2 and 3, grievance raised by the Revenue is that DRP directed exclusion of expenditure deducted from export turnover, from total turnover also while computing eligible deduction u/s.10A of the Act. We find that CIT (A) had relied on the decision of jurisdictional High Court in the case of CIT v. Tata Elxsi Ltd (349 ITR 98), wherein it was held unequivocally by their Lordships that items excluded from export turnover had to be excluded from the total turnover also while working out the eligible deduction. Since the CIT (A) had followed the judgment of jurisdictional High Court, just for a reason that an SLP has been filed before the Supreme Court, we cannot deviate from the view taken by the CIT (A). Accordingly we dismiss grounds 2 and 3 of the Revenue.

04. Vide its ground 4, grievance raised by the Revenue is that DRP directed exclusion of M/s. Infosys Ltd, M/s. ICRA Techno Analytics Ltd,

M/s. Kals Information Systems Ltd and M/s. Persistent Systems Ltd from the list of comparables considered by the TPO for analysing the pricing of the international transactions of the assessee with its Associated Enterprises (AE).

05. Ld. DR submitted that assessee was providing contract software development services to its principal at USA, called Ikanos Communications Inc. USA and Ikanos Technology Ltd, Cayman Island. As per the Ld. DR, both the assessee as well as the TPO had followed TNMM for bench marking the pricing of its international transactions with its AE. Ld. DR pointed out that assessee had before the TPO objected to Infosys Ltd being taken as a comparable for reasons like huge turnover, software product revenues, owning of intangibles and significant R & D expenditure. As per the Ld. DR, TPO had pointed out that Infosys Ltd was comparable with the assessee since the assessee had itself selected certain comparables which had branding expenditure in its profit and loss account. As per the Ld. DR revenue from software products sale of Infosys Ltd was only 4.3% of its total revenues and its R &D expenditure was only 1.26% of its revenues. Relying on the decision of Mumbai Bench of the Tribunal in the case of Capgemini India Pvt. Ltd v. ACIT [(2014) 147 ITD 330],

Ld. DR submitted that size of the company had no relevance and there was no correlation between sales volume and profits in software development services. According to him, DRP had simply relied on the annual report of Infosys Ltd, while direction its exclusion without closely verifying the reasons why TPO had rejected the contentions of the assessee.

06. Per contra, Ld. AR supported the order of the DRP. Reliance was also placed on the decision of Hyderabad bench of this Tribunal in the case of Pegasystems Worldwide India P. Ltd v. ACIT [ITA.1758 & 1936/Hyd/2014, dt.16.10.2015. As per the Ld. AR, Pegasystems Worldwide India P. Ltd, was also into software development services and the Tribunal had considered the comparability of Infosys Ltd, in the said case.

07. We have perused the orders and heard the rival contentions. It is not disputed that Infosys brand has a significant intangible value and it had revenue from software product segment also. Hon'ble Delhi High Court in the case of CIT v. Agnity India Technologies P. Ltd [93 DTR 375], while affirming a decision of this Tribunal where it was held that Infosys Ltd could not be considered as a comparable, had upheld the view that it was a giant company in the area of development of software, assuming all risks

leading to higher profits. Further in the case of Pegasystems Worldwide India P. Ltd (supra), which was also for the very same assessment year, this Tribunal had held as under at para 22 of its order :

22. Ground No.2 pertains to rejection of Infosys Technologies Ltd., from the list of comparables by DRP. We have already considered the opinion of DRP which is consistent not only in Assessee's case but also in the case of M/s. Sumtotal Systems India Pvt. Ltd., (supra), extracted above while considering the exclusion of L&T Infotech Ltd. Since DRP's decision is consistent with the stand taken by the Revenue in other cases and also by the ITAT in a number of cases on reason of turnover, brand equity, functional dissimilarity, we are of the opinion that DRP is correct in excluding the above company from the list of comparables. Therefore, there is no merit in the Revenue's ground and the same is rejected.

Accordingly we are of the opinion that DRP was justified in directing exclusion of Infosys Ltd from the list of comparables.

08. Assailing the direction of the DRP directing exclusion of ICRA Techno Analytics Ltd, , Ld. DR pointed out that assessee had cited functional incompatibility for excluding this company before the TPO. As per the Ld. DR, Directors' report of the said company mentioned that it was providing technology solutions and the services rendered done by it were not different from that of the assessee. As per the Ld. DR, DRP had erroneously held that services segment of the said company comprised of

software consultancy, engineering services, web development, web hosting etc., in addition to software development and segmental information was not available. As per the Ld. DR even if segmental information was not readily available, DRP should have directed the AO to obtain such data from the concerned company instead of directing its exclusion.

09. Per contra, Ld. AR submitted that segmental results being unavailable, ICRA Techno Analytics Ltd, could not be considered as a good comparable. As per the Ld. AR, revenue of the said company included licensing and sub-licensing fee, web development and hosting, but these were not separately available for analysis. As per the Ld. AR, the said company was purchasing and reselling branded computer software. Reliance was placed on the directors' report of the said company for F. Y. 2009-10.

10. We have perused the orders and heard the rival contentions. Notes to accounts of ICRA Techno Analytics Ltd forming a part of its audited financial statement of accounts and annual report for year ended 31.03.2010 mentions as under :

- Significant accounting policies and Notes to Accounts (Page 169 of the Annual report)

BACKGROUND:- The Company was incorporated on July 27, 1992 as Computer Exchange Private Limited (CEPL) and subsequently became wholly owned subsidiary of ICRA Limited on August 25, 2005 and was renamed as ICRA Techno Analytics Limited (ICTEAS). The company is engaged in the software development & consultancy, engineering services, web development & hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing.

In the note detailing of the revenue recognition which also form a part of its annual report it has been stated that its revenue stream consisted of software development consultancy, engineering services, web development and hosting. Thus ICRA Techno Analytics had more than one segment. There is no case for the Revenue that the segmental results were separately available in public domain or was not obtained by the TPO from the said company, invoking the powers vested on him. In such a situation the DRP, in our opinion, was justified in directing exclusion of ICRA Techno Analytics Ltd from the list of comparables.

11. Ld. DR assailing the order of DRP for exclusion of Kals Information Systems Ltd, submitted that Kals Information Systems Ltd was a software development services company not a software product development company. As per the Id. DR though the assessee had stated that Kals Information Systems Ltd was a full-fledged product development company,

the data which was relied on by the assessee for coming to such conclusion was not available in the annual report. As per the Ld. DR, the said company did not own any software product of its own, but was only providing software development services to other parties. According to him, conclusion of the DRP that it was into product development and not providing software development services was incorrect.

12. Per contra, Ld. AR supported the directions of the DRP.

13. We have perused the orders and heard the rival contentions. In the annual report for F. Y. 2009-19 of Kals Information Systems Ltd, background of the said company has been mentioned as under :

1. Background

The company was incorporated under the Companies Act 1956 as a Private Limited Company in the year 1993. Subsequently the company was converted into a public limited company in the year 2000. The company is engaged in development of Software and Software products since its inception. The company consisting of STPI unit engaged in Development of Software and Software Products and a Training Centre engaged in training of Software professionals on online projects.

14. Said company was having significant inventory coming to 27% of its current assets. Inventory held by Kals Information Systems Ltd came to Rs.60,47,977/-. We also find that Hyderabad bench in the case of Pegasystems Worldwide India P. Ltd (supra) had held as under at para 10.1 of its order vis-à-vis the comparability of M/s. Kals Information Systems Ltd :

10.1. Assessee's main objection before us is on functionality of the comparable company. As seen from the annual report of 2008-09 and 2009-10 and comparative statement placed by Assessee, the company classified itself as 'the company engaged in development of software and software products since its inception'. The company consisting of STPI unit engaged in development of software and software products and a training centre engaged in training of software professionals on on-line projects. This indicates that company is engaged in development of software and products and its inventory also indicates that Assessee has been using its readymade libraries for sales. This company was rejected in earlier year on functional analysis by ITAT in the case of Planet Online Pvt. Ltd., in ITA No. 464/Hyd/2014 where in it was held that company is engaged in development of software products. Since its annual report states the same facts in this assessment year also, we are of the opinion that the company cannot be selected as a comparable as it was engaged in development of software and software products. Accordingly, Assessee's objections are accepted and AO is directed to exclude the company.

Accordingly we are of the opinion that DRP was correct in directing exclusion of the said company from the list of comparables.

15. Assailing the directions of the DRP for exclusion of Persistent Systems and Solutions Ltd, Ltd. DR submitted that assessee had not raised any objection on this comparable before the TPO. According to him assessee had for the first time assailed its comparability before the DRP, while accepting it as a good comparable before the TPO. According to him, DRP had accepted the contentions of the assessee without verifying the data furnished by it.

16. Per contra, Ld. AR submitted that Persistent Systems and Solutions Ltd was rendering outsourced product development services and not any software development as such. According to him, its revenue was from sale of product software development services and segmental results were not available. Relying on the annual report of Persistent Systems and Solutions for F. Y. 2009-10, Ld. AR submitted that it was providing end to end product development services. Further as per the Ld. AR web-site of the said company clearly indicated that it was developing products like paxpro, ChemLMS, VieMOR, CLAP, e2GMigrator, TLALOC, eMee. Thus according to him, directions of the DRP were just and proper.

17. We have perused the orders and heard the rival contentions. No doubt assessee had raised no objections with regard to inclusion of Persistent Systems and Solutions Ltd as a comparable, when it was so suggested by the TPO. However before the DRP assessee had stated that the said company was engaged in outsourced product development services and not into software development services. Annual report of Persistent Systems and Solutions, states as under :

Established in 1990, Persistent Systems is recognised as an award-winning technology company and a leading provider of end-to-end software product development services - from Research to Testing to Professional Services and Customer Support.

Our philosophy is to leverage our product development skills and provide our customers with world class engineering and operations related services to augment their product development capabilities.

It is also mentioned that they were providing out-sourced product development services and significant portion of its revenue was from export of software services as well as products. In the P & L account for the year ending 31.03.2010, revenue from sale of software services and products came to Rs.5,044.13 millions. There was no segmentation of the results into software services and software product development. Thus segmental results were not available and the assessee has also shown that M/s. Persistent Systems & Solutions Ltd, was developing products like paxpro, ChemLMS, VieMOR, CLAP, e2GMigrator, TLALOC, eMee. In such a situation we are of the opinion Ld. DRP rightly directed exclusion of Persistent Systems and Solutions Ltd from the list of comparables. DRP has also given a finding that assessee was rendering contract software development services to its principal abroad and such services were provided by it through projects and assignments contracted to it by their principals abroad. Thus, according to us, DRP was justified in directing

exclusion of persistent Systems and Solutions Ltd, considering the functional profile of the assessee as dissimilar from that of Persistent Systems and Solutions Ltd.

18. To summarise we are of the opinion that no proper reasons have been shown by the Revenue for interfering with the directions of the DRP to exclude Infosys Ltd, ICRA Techno Analytics Ltd, Kals Information Systems Ltd and Persistent Systems and Solutions Ltd from the list of comparables considered by the TPO for bench marking the pricing of the international transactions in the nature of software development services rendered by the assessee to its AE abroad. Ground 4 of the Revenue therefore stands dismissed.

19. When the cross objection of the assessee was taken up, Ld. AR submitted that he was not pursuing the cross objection.

20. In the result, both the appeal of the Revenue as well as cross objection of the assessee are dismissed.

Order pronounced in the open court on 10th day of November, 2015.

Sd/-
(VIJAYPAL RAO)
JUDICIAL MEMBER

Sd/-
(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER

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