

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER  
and  
SHRI ABRAHAM P GEORGE, ACCOUNTANT MEMBER**

IT(TP)A No.1326/Bang/2010  
(Assessment year: 2006-07)

M/s.ThoughtWorks Technologies (India) Pvt.Ltd.  
2<sup>nd</sup> floor, Tower C, Corporate Block,  
Diamond District, Airport Road,  
Bangalore-560008.

... Appellant

Vs.

Deputy Commissioner of Income-tax,  
Circle 12(4),  
Bangalore.

... Respondent

Appellant by: Shri Pravin Prasad.  
Respondent by: Shri G.R. Reddy, CIT(DR).

Date of hearing : 07/07/2015.  
Date of pronouncement: 30/07/2015.

**O R D E R**

**Per Smt. P. MADHAVI DEVI, JM:**

This appeal by the assessee is against the assessment order dated 13/9/2010 passed u/s 143(3) r.w.s. 144C of the Income-tax Act, 1961 [‘the Act’ for short] pursuant to the directions of the DRP u/s 144C of the Act.

2. In this appeal, the assessee has raised as many as 13 grounds of appeal which are as under:

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"The grounds mentioned herein are without prejudice to one another

**Transfer Pricing Related**

- 1 That the order of the learned Deputy Commissioner of Income Tax, Circle 12(4), Bangalore ('Assessing Officer' or 'AO') to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.
- 2 That the learned AO and the learned Dispute Resolution Panel (,Panel') erred in upholding the rejection of Transfer Pricing (TP) documentation by the learned Deputy Director of Income Tax (Transfer Pricing Officer - V) (TPO') and thereby erred in not appreciating that the Appellant had prepared the TP documentation bona fide and in good faith and conducted the comparable analysis based on the detailed Functional Asset and Risk analysis performed with due diligence and the data available at the time of conducting the comparability analysis.
- 3 That the learned AO and the learned Panel erred in ignoring the limited risk nature of the services provided by the Appellant as detailed in the TP documentation and in upholding the conclusion of the learned TPO that no adjustment on account of risk differential is required while determining the Arm's Length Price of the international transactions of the Appellant, but for an adjustment towards differences in the working capital position between the Appellant and the entrepreneurial comparable companies.
- 4 That the learned AO and the learned Panel erred both in facts and law in confirming the action of the learned TPO of making an adjustment to the transfer price of the Appellant by Rs. 17,785,678 in respect of contract software development services, holding that the international transactions do not satisfy the arm's length principle envisaged under the Act and in doing so grossly erred in:
  - 4.1 Upholding the act of the learned TPO of obtaining selective information of the companies by exercising power granted to him under section 133(6) of the Act, that was not available to the Appellant in the public domain and relying on the same for comparability purposes in denial of natural justice to be observed in the assessment

proceedings.

4.2.1. interpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply current year/ single year (i.e. FY 2005-06) data; and

4.2.2. expecting the Appellant to perform act of impossibility in terms of being able to use data subsequently available (i.e. during audit proceedings).

4.2 Disregarding application of multiple year/ prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2005-06) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing the TP documentation, and in doing so have grossly erred in:

4.2.1. interpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply current year/ single year (i.e. FY 2005-06) data; and

4.2.2. expecting the Appellant to perform act of impossibility in terms of being able to use data subsequently available (i.e. during audit proceedings).

4.3 Upholding the rejection of comparability analysis of the Appellant in the TP documentation and confirming the comparability analysis as adopted by the learned TPO in the TP Order by applying additional filters and introduction of companies as comparables that are either functionally dissimilar or have differing asset base and risk profile, and also rejection of other potentially comparable companies.

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- 4.4 Concluding that the amended proviso to section 92C(2) of the Act under Finance (No 2) Act, 2009, would be applicable for Assessment Year 2006-07 and in not appreciating that even if the arms' length price falls outside the 5% tolerance band the adjustment would have to be reckoned after allowing the benefit of +1- 5% variation as provided in proviso to Section 92C(2) of the Act, while determining the arms' length price

**Other than Transfer Pricing Related**

5. That the order of the learned Assessing Officer ('AO') is contrary to the provisions of law and liable to be quashed.
6. That the learned AO erred in not allowing deduction under section 10A of the Income tax Act,1961 ('the Act') in respect of the entire profit of the undertaking registered with the Software Technology Parks of India.
7. That the learned AO erred while computing deduction under section 10A of the Act in treating telecommunication expenses and insurance expenses as 'expenditure attributable to the delivery of software outside India' under Explanation 2(iv) to section 10A of the Act.
8. That the learned AO erred while computing deduction under section 10A of the Act in treating expenditure in foreign currency as 'expenses incurred in foreign exchange in providing technical services outside India' under Explanation 2(iv) to section 10A of the Act.
9. That the learned AO erred while computing deduction under section 10A of the Act in reducing the telecommunication expenses of Rs. 25,13,0001-, insurance expenses of Rs. 1,06,0001- and expenditure in foreign currency of Rs 16,40,0001- from the export turnover.
10. That the learned AO erred in not applying the principles of section 80HHE to section 10A. Consequently, the learned AO erred in not relying on the various judicial decisions on the said matter.

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- 11 Without prejudice to the above, that the learned AO erred in not allowing the reduction of telecommunication expenses of Rs. 25,13,000/-, insurance expenses of Rs. 1,06,000/- and expenditure in foreign currency of Rs 16,40,000/- from the total turnover in computing deduction under section 10A of the Act.
  - 12 The Learned AO has erred in considering interest amounting to Rs 44,859/-, incurred on delayed remittance of tax deducted at source as penal in nature under section 37(1) of the Act and has erred in adding the same to total income.
  - 13 The Learned AO has erred in considering an amount of Rs285,000/-, paid towards rent of serviced apartments, as payment made under section 194C of the Act and has erred in adding back the same to total income on account of non deduction of tax at source under 194C of the Act.
  - 14 That the learned AO erred in consequently levying interest under section 234B of the Act.
  - 15 That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal.
3. Grounds of appeal Nos.1 to 4 are against the TP adjustment made by the Assessing Officer (AO) while grounds of appeal No.5 to 14 are against the corporate issues.
4. Brief facts of the case are that the assessee-company which is engaged in the business of developing and providing custom E-business applications, file on dated 28/11/2006 declaring a total income of Rs.16,89,096/- after claiming deduction of Rs.2,02,64,178/- u/s 10A of the Act. During the assessment

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proceedings u/s 143(3), AO observed that the assessee had entered into international transactions with its Associated Enterprises (AEs). Therefore, he referred the matter to the Transfer Pricing Officer [TPO] for determination of the arms' length price [ALP] of international transactions u/s 92C of the Act. During the transfer pricing study, assessee adopted TNMM as the most appropriate method and adopted 44 comparables. The TPO, accepted the TNMM as the Most Appropriate Method (MAP), however, rejected the comparables selected by the assessee and adopted his own comparables and arrived at the average arithmetical mean of the comparable companies at 20.68% and after reducing the working capital adjustment of 0.24%, he arrived at the average mean of 20.92% on the operating cost and arrived at the adjustment u/s 92CA at Rs.1,77,85,678/-. Pursuant to the order u/s 92CA of the Act, the AO passed the draft assessment order which was furnished to the assessee. Aggrieved by the same, assessee preferred objections before the DRP which granted partial relief to the assessee. In compliance with the directions of the DRP, AO passed the final assessment order making transfer pricing adjustment and against the same, assessee is in second appeal before us.

5. At the time of hearing, the learned counsel for the assessee has filed a chart as well as brief synopsis of the case before us. The same is taken on record and is disposed of on the basis of the

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said chart subject to the arguments advanced by the learned departmental representative.

6. The assessee has also filed additional grounds of appeal for application of turnover filter of rs.1 to 200 crore and to exclude (i) Infosys (ii) Flextronics, (iii) iGate Global Solutions Ltd., (iv) Persistent Systems Ltd., and (vi) Sasken Communications Ltd., from the final list of comparables on the basis of application of the said filter. It is stated that this ground was not raised by the assessee before the authorities below but is now raised before us and since it is a legal issue, the same should be admitted and adjudicated. As all the facts relating to the above issue are on record and no fresh investigation of facts is necessary, we admit this ground of appeal and adjudicate as under:

6.1 We find that the TPO has taken the following 20 companies as comparable companies:

1. Aztec Software Ltd.
2. Geometric Software Ltd.
3. iGate Global Solutions Ltd.
4. Infosys Ltd.
5. KALS Info Systems Ltd.
6. Mindtree Consulting Ltd.
7. Persistent Systems Ltd.
8. R Systems International Ltd.
9. Sasken communication Ltd.(Seg.)
- 10.Tata Elxsi Ltd. (seg.)
- 11.Lucid Software Ltd.
- 12.Mediasoft Solutions Pvt.Ltd.
- 13.R S Software (India) Ltd.
- 14.SIP Technologies & Exports Ltd.
- 15.Bodhtree Consulting Ltd.

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- 16.Accel Transmatics Ltd.(seg.)
- 17.Synfosys Business Solutions Ltd.
- 18.Megasoft Ltd.
- 19.Lanco Global Solutions Ltd.
- 20.Flextronics Software Systems Ltd.

The financial results of the assessee are as under:

Description	Software Development Services	Others	Amount
Operating Revenue	Rs.18,16,90,000/-	Rs.31,02,000/-	Rs.18,47,92,000/-
Operating Cost	Rs.16,49,65,000/-	Rs.34,31,000/-	Rs.16,83,97,000/-
Operating Profit(PBIT)	Rs.1,67,25,000/-	Rs.3,29,00/-	Rs.1,63,95,000/-
<b>Operating Profit to Cost Ratio</b>	<b>10%</b>		

From the above list, it is seen that the turnover of the assessee from international transactions is around Rs.20 crores whereas the following companies have turnover of more than Rs.200/- crores:

Sl. No.	Name of the company	Turnover Rs.
1	iGate Global Solutions Ltd.	527.99 crores
2	Mindtree Consulting Ltd.	448.79 crores
3	Persistent Systems Ltd.	209.18 crores
4	Sasken Communications Ltd.(Seg.)	240.02 crores
5	Flextronics Software Systems Ltd.	595.12 crores

6.2 This Tribunal, in the case of Genesis Integrating Systems (India) P Ltd. vs. DCIT reported in (2012) 20 Taxmann.com 715(Bang.) has held that turnover is a reasonable filter to be adopted and has also prescribed the slabs of Rs.1 to 200 crores, Rs.200 to 500 Crores and Rs.500 and above for the purpose of adopting this filter. Respectfully following the above decision, we direct the TPO to exclude these companies from the final list of comparables.

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6.3 Further, the assessee is also seeking application of RPT of more than 15%. We find that this Tribunal, in various decisions, has been holding that RPT filter of more than 15% is to be adopted for determining the ALP. The assessee has sought exclusion of the following companies on the ground of RPT of more than 15%:

<b>Sl. No.</b>	<b>Name of the company</b>	<b>RPT on sales</b>
1	Aztec Software Ltd.	17.77%
2	Geometric Software Ltd.	19.34%
3	Megasoft Ltd.	17.09%

As observed above, this Tribunal, in various other cases pertaining to the very same assessment year has taken a similar view. Respectfully following the same, we direct the AO to exclude these companies from the final list of comparable companies.

6.4 In addition to the above, assessee is seeking exclusion of the following companies on functional dissimilarity:

1. KALS Info Systems Ltd.
2. Tata Elxsi Ltd. (seg.)
3. Accel Transmatics Ltd. (Seg.)

It is stated by the learned counsel for the assessee that the assessee had raised objections against these companies before the TPO as well as the DRP but the same has not been appreciated by the lower authorities. He relied upon various case-laws for exclusion of these companies on the ground of functional dissimilarity.

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The learned departmental representative, however, supported the orders of the authorities below.

6.5 Having regard to the rival contentions and the material on record, we find that with regard to KALS Info Systems Ltd., even before the TPO, the assessee has claimed that it was functionally different as it was engaged in production of software products and similarly with regard to Accel Transmatics Ltd., the assessee has claimed that it was into software product as well as that it has income from sale of IP rights and further that related party transaction was more than 15%. As regards Tata Elxsi Ltd.(seg.), it was argued that it fails RPT filter and was also functionally different. The learned counsel for the assessee has relied upon the following decisions for exclusion of these companies:

- i. M/s.Ariba Technologies India Pvt.Ltd. (ITA No.1179/Bang/2010)
- ii. Agile Software Enterprise Private Limited (ITA 1172/Bang/2010)
- iii. EMC Data Storage Systems (India) Pvt. Ltd., (ITA No.1274/Bang/2010), and
- iv. Huawei Technologies India Pvt. Ltd.,(ITA No.1338/Bang/
- v. 2010).

In all these cases, the Tribunal had considered the functional dissimilarity of these companies with software development companies like the assessee and has held as under for exclusion of these companies:

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13. Having regard to the rival contentions and the material on record, we find that being the very same assessment year viz., 2006-07 in the case of *M/s.Ariba Technologies India Pvt. Ltd.* this Tribunal had occasion to go into the comparability of these companies with the said company and the Tribunal has held it to be functionally dissimilar from the similar activity of software development service. We find that the Tribunal, at para.12 & 13 of its order, has held as under:

"12. The following were the relevant observations of the Tribunal on the aforesaid comparable companies in the case of Triology E-Business Software India Pvt.Ltd.(supra):

**"(d) KALS Information Systems Ltd.**

As far as this company is concerned, the contention of the assessee is that the aforesaid company has revenues from both software development and software products. Besides the above, it was also pointed out that this company is engaged in providing training. It was also submitted that as per the annual report, the salary cost debited under the software development expenditure was Q 45,93,351. The same was less than 25% of the software services revenue and therefore the salary cost filter test fails in this case. Reference was made to the Pune Bench Tribunal's decision of the ITAT in the case of *Bindview India Private Limited Vs. DCI, ITA No. ITA No 1386/PN/10* wherein KALS as comparable was rejected for AY 2006-07 on account of it being functionally different from software companies. The relevant extract are as follows:

"16. Another issue relating to selection of comparables by the TPO is regarding inclusion of Kals Information System Ltd. The assessee has objected to its inclusion on the basis that functionally the company is not comparable. With reference to pages 185-186 of the Paper Book, it is explained that the said company is engaged in development of software products and services and is not comparable to software development services provided by the assessee. The appellant has submitted an extract on pages 185-186 of the Paper Book from the website of the company to establish that it is engaged in providing of I T enabled services and that the said company is into development of software products, etc. All

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these aspects have not been factually rebutted and, in our view, the said concern is liable to be excluded from the final set of comparables, and thus on this aspect, assessee succeeds.”

Based on all the above, it was submitted on behalf of the assessee that KALS Information Systems Limited should be rejected as a comparable.

We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly software development service provider. We therefore accept the plea of the Assessee that this company is not comparable.”

**“(e) Accel Transmatic Ltd.**

48. With regard to this company, the complaint of the assessee is that this company is not a pure software development service company. It is further submitted that in a Mumbai Tribunal Decision of *Capgemini India (F) Ltd v Ad. CIT 12 Taxman.com 51*, the DRP accepted the contention of the assessee that Accel Transmatic should be rejected as comparable. The relevant observations of DRP as extracted by the ITAT in its order are as follows:

“In regard to Accel Transmatics Ltd. the assessee submitted the company profile and its annual report for financial year 2005-06 from which the DRP noted that the business activities of the company were as under.

(i) Transmatic system - design, development and manufacture of multi function kiosks Queue management system, ticket vending system

(ii) Ushus Technologies - offshore development centre for embedded software, net work system, imaging technologies, outsourced product development

(iii) Accel IT Academy (the net stop for engineers)- training services in hardware and networking, enterprise system management, embedded system, VLSI designs, CAD/CAM/BPO

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(iv) Accel Animation Studies software services for 2D/3D animation, special effect, erection, game asset development.

4.3 On careful perusal of the business activities of Accel Transmatic Ltd. DRP agreed with the assessee that the company was functionally different from the assessee company as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation and therefore assessee's claim that this company was functionally different was accepted. DRP therefore directed the Assessing Officer to exclude ACCEL Transmatic Ltd. from the final list of comparables for the purpose of determining TNMM margin."

Besides the above, it was pointed out that this company has related party transactions which is more than the permitted level and therefore should not be taken for comparability purposes. The submission of the Id. counsel for the assessee was that if the above company should not be considered as comparable. The Id. DR, on the other hand, relied on the order of the TPO.

50. We have considered the submissions and are of the view that the plea of the assessee that the aforesaid company should not be treated as comparables was considered by the Tribunal in *Capgemini India Ltd (supra)* where the assessee was software developer. The Tribunal, in the said decision referred to by the Id. counsel for the assessee, has accepted that this company was not comparable in the case of the assessee's engaged in software development services business. Accepting the argument of the Id. counsel for the assessee, we hold that the aforesaid company should be excluded as comparables."

13. The facts and circumstances under which the aforesaid companies were considered as comparable is identical in the case of the Assessee as well as in the case of Triology E-Business Software India Pvt.Ltd. (supra). Respectfully following the decision of the Tribunal referred to above in the case of Triology E-Business Software India Pvt.Ltd.(supra), we direct that KALS InfoSystems Ltd. And Accel Transmatic Ltd. be excluded from the list of 20 comparable arrived at by the TPO."

.....

17. As far as comparable company chosen by the TPO viz., Tata Elxsi Ltd., is concerned, the comparability of the aforesaid company with that of the software service provider such as the Assessee was considered by the Mumbai Bench of this Tribunal in the case of Logica Pvt.Ltd. IT (TP) 1129/Bang/2011 AY 07-08) wherein on the comparability of the aforesaid company, the Tribunal held as follows:-

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"14. As far as comparable at Sl.No.6 & 24 are concerned, the comparability of the aforesaid two companies with that of the software service provider was considered by the Mumbai Bench of the Tribunal in the case of *Telcordia Technologies India Private Ltd. (supra)* wherein on the aforesaid two companies, the Tribunal held as follows:-

"7.7.Tata Elxsi Limited.:

From the facts and material on record and submissions made by the learned AR, it is seen that the Tata Elxsi is engaged in development of niche product and development services, which is entirely different from the assessee company. We agree with the contention of the learned AR that the nature of product developed and services provided by this company are different from the assessee as have been narrated in para 6.6 above. Even the segmental details for revenue sales have not been provided by the TPO so as to consider it as a comparable party for comparing the profit ratio from product and services. Thus, on these facts, we are unable to treat this company fit for comparability analysis for determining the arms length price for the assessee, hence, should be excluded from the list of comparable parties."

15. In view of the above, the Id. counsel for the assessee fairly admitted that comparable company at Sl.No.6 viz., Flextronics Software Systems Pvt. Ltd. should be taken as a comparable, while comparable at Sl.No.24 viz., Tata Elxsi Ltd. should be rejected as a comparable."

18. In view of the aforesaid decision, we hold that Tata Elxsi has to be excluded from the list of comparable chosen by the TPO.

Respectfully following the same, we direct the AO to exclude these companies from the list of comparables.

7. As regards Infosys Ltd., it is the case of the assessee that the turnover of Infosys was Rs.9028/- crores and it was also functionally different from the assessee as it owns IPR's and intangibles and is involved in diversified operations; is also engaged in development of software products and is also engaged in research and development activity. He has also placed reliance upon the decision of the Hon'ble Delhi High Court in the case of

Agnity India Ltd. (ITA No.1204/2011 dated 10<sup>th</sup> July 2013), for exclusion of the said company from the list of comparables. We find that the Hon'ble High Court, in the case of Agnity had held as under:

"6. Learned counsel for the Revenue has submitted that the tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent- assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.

7. Learned counsel for the appellant Revenue during the course of hearing, drew our attention to the order passed by the TPO and it is pointed out that based upon the figures and data made available, the TPO had treated a third company as comparable when the wage and sale ratio was between 30% to 60%. By applying this filter, several companies were excluded. This is correct as it is recorded in para 3.1.2 of the order passed by the TPO. TPO, as noted above, however had taken three companies, namely, Satyam Computer Service Ltd., L&T Infotech Ltd. and Infosys Technologies as comparable to work out the mean.

8. It is a common case that Satyam Computer Services Ltd. should not be taken into consideration. The tribunal for valid and good reasons has pointed out that Infosys Technologies Ltd. cannot be taken as a comparable in the present case. This leaves L&T Infotech Ltd. which gives us the figure of 11.11 %, which is less than the figure of 17% margin as declared by the respondent-assessee. This is the finding

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recorded by the tribunal. The tribunal in the impugned order has also observed that the assessee had furnished details of workables in respect of 23 companies and the mean of the comparables worked out to 10%, as against the margin of 17% shown by the assessee. Details of these companies are mentioned in para 5 of the impugned order.”

Respectfully following the same, we direct the AO to exclude Infosys also from the list of comparables. Consequently, the issue is now remitted to the file of the AO/TPO for redetermination of the ALP after excluding the above comparable companies as directed by the Tribunal.

8. As regards the grounds relating to non-transfer pricing issues, we find that the grounds No.6 to 10 are relating to computation of deduction u/s 10A of the Act. The learned counsel for the assessee has submitted that the assessee is making an alternative claim to this ground in ground No.11 wherein it is prayed that this expenditure, if reduced from the export turnover, may also be excluded from the total turnover in computing deduction u/s 10A of the Act. As we find that the alternative ground of appeal i.e. ground No.11 to grounds No.6 to 10 is covered in favour of the assessee by the decision of the jurisdictional High Court in the case of *Tata Elxsi Ltd.* reported in 349 ITR 98, respectfully following the same, we direct the AO to reduce these expenses both from export turnover as well as total

turnover for computation of deduction u/s 10A of the Act. Thus grounds 6 to 10 are rejected and ground No.11 is allowed.

9. Ground No.12 is against the disallowance of Rs.44,859/- incurred by the assessee on delayed remittance of tax deducted at source as penal in nature. The learned counsel for the assessee submitted that interest amount paid on delayed remittance of tax is compensatory in nature and is not penal in nature and therefore it is not disallowable u/s 37(1) of the Act. He submitted that interest has arisen due to non-deposit of TDS into the Government account in time and therefore it cannot be held as penal in nature.

The learned departmental representative, however, supported the order of the AO.

10. Having regard to the rival contentions and the material on record, we agree with the contention of the learned counsel for the assessee that interest paid on delayed deposit of TDS amount into Government account cannot be held to be penal in nature. The Hon'ble Supreme Court, in the case of *CIT Vs. Mahalakshmi Sugar Mills* reported in 123 ITR 429(SC) has held as under:

*"Now the interest payable on an arrear or cess under s.3(3) is in reality part and parcel of the liability to pay Cess. It is an accretion to the cess. The arrear of cess 'carries' interest; if the cess is not paid within the prescribed period a larger sum will become payable as cess. The enlargement of the cess liability is automatic under s.3(3). No specific order is necessary in order that the obligation to pay interest should accrue. The liability to pay interest is as certain as a liability to pay cess. As soon as the prescribed*

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*date is crossed without payment of the cess, interest begins to accrue. It is not a penalty, for which provision has been separately made by s.3(5). Nor is it a penalty within a meaning of s.4, which provides for a criminal liability and a criminal prosecution. The penalty payable under s.3(5) lies in the discretion of the collecting officer or authority."*

Thus interest for non-deposit of TDS into Government account in time is only compensatory and not penal in nature. Respectfully following the same, we direct the AO to allow the said expenditure in the hands of the assessee.

11. The next ground i.e. ground No.13 is against non-deduction of tax at source on rent paid towards service apartments. The learned counsel for the assessee submitted that the assessee had incurred expenditure towards training and education of its employees and the assessee has paid rent towards the use of service apartments to the tune of Rs.2,85,000/- for such training. He submitted that the AO has erroneously applied the provisions of section 194C holding that the payment to any contractor for carrying out any work requires deduction of tax at source at the time of credit of such income to the account of the contractor or at the time of payment thereof in cash or by issue of cheque or draft or any other mode whichever is earlier and since the assessee has failed to make such TDS, the AO, disallowed the same. The learned counsel for the assessee submitted that this amount was not paid to the service apartment as a consideration for any service contract but was for usage of the service apartments for a short period and was reimbursed to the employees for the

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expenses incurred by them towards stay during their training period. Therefore, according to him, it is not in the nature of rent and the provisions of sec.194C are not applicable. He further submitted that the amount paid to each of the employees was only Rs.95,000/- whereas the limit fixed under the Act for exemption is Rs.1,20,000/-. He, therefore, submitted that these amounts cannot be treated as rent and TDS provisions cannot be applied.

The learned departmental representative, however, supported the orders of the authorities below.

12. Having regard to the rival contentions, we find that the AO has invoked the provisions of sec.194C to disallow the amounts paid by the assessee to its employees towards the use of service apartments during their training period. The payments made are of Rs.95,000/- each to three of the employees and not to the owner of the service apartments. Further, nothing has been brought on record by the AO that there is any contract between the assessee and the service apartment owner for rendering of any regular service during the relevant previous year. We find that the services rendered by service apartments are similar to service rendered by Hotels and therefore clearly provisions of sec.194C are not applicable. Further as pointed out by the learned counsel for the assessee, even if it is exigible to tax as rent under section 194-I, the limit fixed for such application of the provision is Rs.1,20,000/- for the relevant assessment year and therefore

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provisions of sec.194-I are also not applicable. This ground of appeal is thus allowed.

13. In the result, the assessee's appeal is partly allowed.

*Pronounced in the open court on 30<sup>th</sup> of July, 2015.*

sd/-  
**(Abraham P George)**  
**ACCOUNTANT MEMBER**

sd/-  
**(Smt. P.Madhavi Devi)**  
**JUDICIAL MEMBER**

*eksrinivasulu*

Copy to:

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

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore