

**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.670/Bang/2011  
(Assessment year: 2004-05)

M/s.Bosch Ltd.,  
Hosur Road, Adugodi,  
Bangalore-560030.  
*PAN:AAACM99840P*

... Appellant

Vs.

Asst. Commissioner of Income-tax, (LTU),  
Bangalore.

... Respondent

**AND**

IT(TP)A No.695/Bang/2011  
(Assessment year: 2004-05)  
(By the Revenue)

Assessee by: Shri Percy Pardiwala, Sr. Counsel.  
Revenue by: Shri G.R. Reddy, CIT(DR).

Date of hearing : 07/07/2015.  
Date of pronouncement: 20/08/2015.

**O R D E R**

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

These are cross appeals both by the assessee as well as the revenue against the order of the CIT(A) LTU, Bangalore, dated 28/03/2011 for the assessment year 2004-05.

**IT(TP)A No.670/Bang/2011 (Assessee's appeal):**

2. The assessee has raised as many as 10 ground of appeal out of which ground of appeal Nos.1 and 10 are general in nature and need no adjudication.

3. Ground No.2 to 7 are against the transfer pricing (TP) adjustment made by the Transfer Pricing Officer (TPO) u/s 92CA of the Income-tax Act, 1961 [ 'the Act' for short].

3.1 At the time of hearing, the learned counsel for the assessee submitted that the assessee is seeking exclusion of only 2 comparable companies i.e. Alpha Geo (India) Ltd., and Vimta Labs from the final list of comparables for the purpose of determination of the arms' length price (ALP). He submitted that the assessee had entered into international transactions with its Associated Enterprises (AEs) for basic development and the application development of starter motors and alternators. Thus, according to him, the activity falls under the category of research and development of machinery. He submitted that in the TP study, the assessee has adopted TNMM as the Most Appropriate Method (MAM) and thereafter after making a detailed search for the comparable companies in the Databases 'Prowess' as well as 'Capitaline' has arrived at 8 companies as comparables and the arithmetical mean margin of these 8 companies was 6.44% and since the assessee's margin of 10.01% was more than the average arithmetical mean of the comparable companies, the assessee treated the international transaction to be at arms'

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length. On a reference to the TPO for determination of the ALP, the TPO also accepted TNMM to be the most appropriate method (MAM). Thereafter, he accepted the companies selected by the assessee as comparables except for Esquire Engineers and consultants Ltd., and Gilcon Project Services Ltd., and rejected them on the ground that no financial data was available in the data base with regard to these companies. Thereafter, the AO made further search for ascertaining independent comparable companies which are functionally similar to the tax-payers' business segment. He found an independent comparable i.e. M/s.Alpha Geo Ltd. who had earned a profit margin of 55.52% for the year 2003-04. He included the same in the list of 6 comparables selected in the TP document and arrived at the profit margin of the comparable at 32.09%. He accordingly made ALP adjustment consequent to which the Assessing Officer (AO) brought the ALP to tax.

3.2 Aggrieved, the assessee preferred an appeal before the CIT(A) seeking exclusion of M/s. Alpha Geo Ltd., on the ground of functional dissimilarity and also Vimta Labs on account of high profit margin. The CIT(A), however, confirmed the order of the AO and the assessee is in second appeal before us.

3.3 The learned counsel for the assessee, while reiterating the submissions made by the assessee before the authorities below, submitted that M/s.Alpha Geo Ltd., was into Seismic

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Services comprising of data acquisition, data processing and data interpretation which is totally a different type of service involving different types of functions and risks. Thus, according to him, it is functionally dissimilar to the assessee and therefore this company has to be excluded from the final list of comparables. As far as Vimta Labs is concerned, he submitted that though the company has been selected by the assessee itself as one of the comparables, he had challenged the inclusion of the same on the basis of the assessment order in the assessee's own case for the assessment year 2005-06 wherein it has been rejected as uncomparable on the ground that Vimta Labs was into research and development of various drugs involving human beings. He has drawn our specific attention to various documents filed by the assessee in support of his contention and submitted that this company should be excluded from the final list of comparables as the activities of Vimta Labs for the relevant financial year were also the same.

3.4 The learned departmental representative, on the other hand, supported the orders of the authorities below and submitted that the assessee itself had included Vimta Labs in its TP study and had not raised any specific ground before the TPO or the CIT(A) against consideration of the same as comparable company. He submitted that the assessee cannot take different stand before different authorities according to his convenience. As regards, M/s.Alpha Geo (India) Ltd., is concerned, the learned

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departmental representative submitted that the assessee was into research and development work as in the case of M/s.Alpha Geo (India) Ltd., and that the area of work may be different but since the functions are similar, the said company has been rightly chosen as the comparable company to the assessee. He, therefore, prayed that the assessee's grounds may be rejected.

3.5. Having regard to the rival contentions and the material on record, we find that the assessee had filed a copy of the development agreement between the assessee and its AEs which is placed at page 5 of the paper book filed by the assessee. As is evident from this agreement, the object of the agreement is to carry out the basic development and the application development of starter motors and alternators. Thus it is clear that the research and development is for the components of automobiles. During its TP study, the assessee had considered 705 companies and accepted only 9 out of the same as comparable to the assessee which includes Vimta Labs. At page 33 of the paper book is filed the brief description of the comparable companies adopted by the assessee, which is reproduced hereunder for the sake of convenience and ready reference.

***"Brief business descriptions of comparable companies***

***Chokshi Laboratories Ltd.***

*Chokshi Laboratories Ltd. is a commercial testing and analysis laboratory based in Indore, Central India. The Company is engaged in analyzing (for clients or as a regulatory requirement) for food and agricultural products,*

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*cement and building materials, chemicals, drugs and paints. Other services rendered by the Company are calibration services, consultancy and pollution control.*

**Engineers India Ltd.**

*Engineers India Ltd., was established in 1965 to provide engineering and related technical services for petroleum refineries and other industrial projects. The company has diversified into and excelled in other fields such as pipelines, petrochemicals, oil and gas processing, offshore structures and platforms, fertilizers, metallurgy and power. Engineers India Ltd. now provides a complete range of project services in these fields and has emerged as Asia's leading design and engineering company. Services provided by the company include feasibility studies, project management, planning and scheduling, cost engineering, process & equipment design, detailed engineering, procurement & construction management, materials & maintenance services etc.*

**Esquire Engineers & Consultants Limited**

*Esquire Engineers & Consultants Ltd. was incorporated in 1984. It is a subsidiary of Best & Crompton Engineering Ltd and offers consultancy services in power & energy, industrial & chemical projects, civil & structural engineering, environmental engineering and project management.*

**Gilcon Project Services Limited**

*Gilcon Project Services Ltd. is engaged in the provision of consultancy services such as site investigation, feasibility studies, detailed designs and working drawings, tender and contract document preparation.*

**Mahindra Acres Consulting Engineers Limited**

*Mahindra Acres Consulting Engineers Ltd was incorporated in 1993, and is a part of the Mahindra & Mahindra group. The company is engaged in the provision of technical and engineering services in the fields of environmental engineering, solid waste management, agro and food processing and power.*

**RITES Limited**

*RITES Ltd. is an internationally recognized leading consultant with operational experience of over 50 countries in Africa, South East Asia, Middle East and Latin America. Most of the company's foreign assignments are for national governments and other apex organizations. In India, the clients range from state Governments, public sector undertakings and corporations to industrial establishments and private enterprises. The company provides services such as pre-project planning involving project identification, feasibility studies and project appraisal, project support activities comprising surveys, environmental impact assessment, geo-*

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*technical and other investigations, project preparation activities of detailed engineering, design, tender documentation, bid evaluations etc and also economic and financial evaluations.*

**Vimta Labs Limited**

*Vimta Labs Ltd provides testing and analytical services. This includes activities such as sample preparation, data generation and other testing activities.*

**Water and Power Consultancy Services (India) Limited (WAPCOS)**

*WAPCOS provides consulting services in the domestic and international water and power sectors. Services offered include market intelligence, feasibility studies, planning/project formulation, field investigations and testing, engineering design, contract management, quality assurance & management and human resource development. Apart from the ;Indian sub-continent, WAPCOS renders consultancy services in over 30 developing countries."*

From a reading of the above description of the various comparable companies, we find that all the companies are engaged in similar type of functions i.e. research and development in various products including power, petroleum, refinery, power energy, site investigation, environmental engineering, project preparation activities, sample preparation and domestic and international water and power sector. Thus it can be seen that the comparable companies have been selected by the assessee itself on the basis of functions and not on the basis of the products in respect of which such functions are performed. The objection of the assessee to M/s.Alpha Geo Ltd., is that it is engaged in seismic services and therefore is totally different. While it is the case of the CIT(A) that the assessee itself had selected various comparables on the basis of functions

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performed and not on the basis of similarity of the products being dealt with. Therefore, it is now pertinent to examine the criteria to be analyzed for the transfer pricing exercise. The transfer pricing exercise/study involved FAR analysis as in dealings between two independent enterprises, compensation usually reflects and depends on the functions that each enterprise performs taking into assets used and risks assumed. Therefore, the foremost criteria to be considered is the functions performed by entities to ascertain their comparability. For this purpose, the economically significant activities and responsibilities which affects the price charged in a transaction become relevant and as basis for determination of ALP. Such functions add more value to the transaction and therefore are expected to fetch higher returns for the entity performing such functions. Therefore the focus should be only on identifying the maximum number of functions but on identification of critical functions performed by the related parties which, includes Research and development. In the case before us, the assessee is carrying on the research and development activity in the field of automobile industry while the Alpha Geo is involved in research in seismic services. Therefore, there is no functional dissimilarity. The next criteria to be considered are the assets used and the risks assumed and also the industry to which the assessee belongs to for determining market comparability and economic condition of the industry. In the case before us, assessee has conducted functional analysis by

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adopting the companies performing similar functions and activities without any similarity of products or industry. We find that M/s.Alpha Geo Ltd., is also in the business of research and development of seismic data, functions similar to the functioned performed by the assessee herein. There is no human interface or involvement in any of the activities above. The assessee has not brought out any difference in the assets employed or risks assumed by Alpha Geo. Therefore, we do not see any reason to interfere with the order of the CIT(A) on this issue.

3.6 As regards Vimta Labs is concerned, we find that Vimta Labs is a research and development company researching into effects of various drugs on human beings. Though the function is similar i.e. research and development, there is involvement of living beings both animals and human beings and the margin would definitely depend on the result from such research and development involving human interface. Therefore, the said company cannot be considered as comparable to the assessee herein, particularly since the TPO himself has rejected the said company as a comparable to the assessee in the subsequent assessment year i.e. 2005-06. We are therefore inclined to direct the TPO/AO to exclude this company from the final list of comparables and direct the AO to re-determine the ALP in accordance with law. Grounds of appeal No.2 to 7 are therefore partly allowed.

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4. As regards ground of appeal No.8 is concerned, against the order of the CIT(A) in upholding the order of the AO in not allowing deduction for provision made towards interest payable to Central Excise Department and Sales Tax Department at Rs.4,29,67,460/-, the learned counsel for the assessee submitted that this issue is covered against the assessee by the decision of this Tribunal in the assessee's own case for assessment year 2000-01 and 2001-02 which is placed at pages 3 to 58 of the case-laws paper book filed before us. The Tribunal, at para.6 of its order, has observed that this issue stands covered by the decision of this bench of the Tribunal in the assessee's own case for assessment years 1994-05 and 1999-00 wherein the action of the CIT(A) in disallowing interest payable to Central Excise Department has been upheld by the Tribunal. Respectfully following the same, this ground of appeal (No.8) of the assessee is rejected.

5. As regards ground of appeal No.9 against the order of the CIT(A) in upholding the action of the AO in disallowing the assessee's claim for deduction of Rs.64,28,890/- u/s 80-O of the Act, is concerned, the learned counsel for the assessee has submitted that this issue is also covered against the assessee by the decision of the Tribunal in the assessee's own case for the assessment year 2001-02. A copy of the said order is filed before us at pages 230 to 241 of the case-laws paper book.

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5.1. After going through the decision of the Tribunal in ITA No.102/Bang/2011 dt.18/07/2012 for assessment year 2001-02, we find that the Tribunal has extensively considered the issue of the allowability of deduction u/s 80-O of the Act. At para 13 to 20, the Tribunal has held as under:

"13. We have given a careful consideration to the rival submissions. Sec. 80-O of the Act as it existed prior to its amendment w.e.f 1-4- 98 allowed deduction in respect of any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, and such income is received in convertible foreign exchange in India....

The portions in bold letters were omitted w.e.f. 1-4-98 and therefore any consideration received for use outside India in respect of the aforesaid items would not be eligible for deduction u/s.80-O of the Act. The nature of services rendered by the Assessee in the present appeal upto AY 97-98 would clearly fall within any of the categories of use referred to in Section 80-O of the Act as it existed upto AY 97-98. But from AY 98-99 the scope of deduction became restricted and the case of the Assessee has to be tested on the basis of the provisions as it existed after 1-4-98.

14. As we have already seen the consideration received by the Assessee from Bosch has to be for the use outside India by Bosch of any patent, invention, design or registered trade mark and such income should be received in convertible foreign exchange in India. The dispute in the present case as we have already seen is as to whether there was use outside India by Bosch of any patent, invention, design for which the consideration in question was paid by Bosch to the Assessee. In this regard the Assessee has to prove that there was use outside India by Bosch of Patent, invention or design of the Assessee.

15. In the original proceedings the Assessee's stand was very vague. In the statement of facts filed before the CIT(A) against the original order of assessment, the Assessee claims that it carried out research/design/development works in respect of products such as single cylinder pumps of the type PF, Compact Alternator type GCB1, Spark Plug U-type etc., In the consideration for the use of the result of such research/design/development during the FY 2000-01, the Assessee received fees amounting to Rs.4,85,77,690/. The further claim of the Assessee was that the development works carried out by it resulting in bringing into existence new designs or inventions which was allowed by the Assessee to be used by Bosch for which Bosch made payments.

16. From the terms of the Agreement between the Assessee and Bosch, which we have already set out in the earlier part of this order, it is clear that the Assessee was required to carry out some development work for Bosch. The agreement contemplates that the manner in which the work is to be conducted would be in accordance with separate individual schedules and specifications which Bosch may stipulate and the Assessee might agree. Bosch agreed to provide all technical information necessary for conducting specific work. It is also provided in the agreement that in case the Assessee becomes aware of property rights which may be relevant in connection with the development to be conducted by the Assessee, then the Assessee should inform Bosch and shall not use such rights without Bosch's prior permission/agreement. The agreement also provides that any results arising from or in connection with the development agreement which incorporates an invention, a patent and /or utility model in India shall be applied for in the name of the Assessee or in the name of Bosch. In case the application is made in the name of Bosch, the Assessee was to give the necessary endorsement for such application. The agreement also provides that after a period of 8 weeks from the date of application for any such patent and/or utility model in India, Bosch was free to use and/or exploit such invention and may, at its sole discretion, apply for patents and/or utility models in any country outside India and is free to maintain or lapse any property rights arising therefrom including those in India. The 11 compensation for such rights is included in the compensation paid by Bosch to the Assessee under the agreement. The terms of the agreement nowhere talks of any design to be developed by Assessee and given to Bosch.

17. In the proceedings before the AO after remand by the Tribunal, the emphasis of the Assessee has been more on supply of design. In this regard it is worthwhile mentioning that the Tribunal in its order has very categorically held that to be eligible for deduction the Assessee has to establish its ownership to patent. The Assessee's ownership for patent did not exist for any of the products for which it developed any patent during the previous year relevant to AY 2001-02 except for two Patents for An asbestos free sealant and a process for preparation of an asbestos free sealant material for use as sealant at joints in fuel injection pumps-Dry method and for wet method for a period of 20 years from 5.11.1999. Even in respect of such patent the registration came much later. Thus the case of the Assessee that consideration received by it from Bosch is for right to use patent, in our view cannot be said to have been established.

18. As far as the claim of the Assessee that the consideration received was for right to use design developed by the Assessee, we find that the evidence filed by the Assessee is very sketchy. In the first place there is no evidence let in by the Assessee nor confirmation by Bosch that designs were developed by the Assessee and transmitted to Bosch and that Bosch used it outside India for which the consideration in question was paid. The evidence filed by the Assessee in the form of tabular statements also do not confirm this fact. These tabular statements cannot be said to be reports contemplated by the Tribunal in its order dated 12.6.2008. In any event these documents are not relatable to the agreement between the Assessee and Bosch, which we have already seen nowhere mentions development of any design or a right to use design developed by the Assessee by Bosch. There is nothing on record to establish the ownership of the Assessee over these drawings. Apart from the above, the Assessee has not been able to link payments with the right to use any particular design or patent. Despite repeated request by the AO to file such link, the Assessee failed to comply with the request of the AO.

19. In our view facts with regard to the claim for deduction u/s.80-O are within the exclusive knowledge of the Assessee. It is for the Assessee to let in cogent evidence to substantiate its claim. The Assessee in our view has failed to do so and in the circumstances, the revenue authorities were justified in not allowing the claim for deduction. The conclusions of the CIT(A) in our view were therefore justified and calls for no interference.

20. The Agreement between the Assessee and Bosch for carrying out development started in the year 1991. The claim of the Assessee for deduction u/s.80-O of the Act in AY's prior to AY 98- 99, as we have already observed, would have been sustainable upto AY 97-98 because of the larger coverage of activities for which deduction was allowed u/s.80-O of the Act. There is every reason to suspect that the Assessee has attempted to camouflage its claim for deduction u/s.80-O of the Act for AY 2001-02, so as to be in conformity with the amended provisions of law, though the nature of services remained the same as it existed prior to AY 98-99. We are also conscious of the fact that the present proceedings are pursuant to the order of remand by the Tribunal and the scope of such proceedings is limited to the directions of the tribunal. But our conclusions that the Assessee is not entitled to deduction u/s.80-O of the Act, is based on the fact that the Assessee has failed to establish its claim for deduction on the basis of the conditions contemplated by the amended provisions of law."

Respectfully following the same, this ground of appeal of the assessee is rejected.

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

7. As regards the revenue's appeal (IT(TP)A No.695/Bang/2011) is concerned, though the revenue has raised as many as 8 grounds of appeal, we find that ground Nos.1, 7 and 8 are general in nature and need no adjudication.

7.1 Grounds No.2 and 3 relate to deduction u/s 80HHC of the Act. Brief facts of the case are that while considering the computation of deduction u/s 80HHC of the Act, the AO excluded 90% of the fee for design and development work received from Robert Bosch from profits of the business for the purpose of computing deduction u/s 80HHC of the Act.

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7.2 Against the same, the assessee preferred an appeal before the CIT(A) who allowed the same by following the decision of the ITAT in the assessee's own case for the assessment year 2004-05 to hold that the consideration received for development work from Robert Bosch was not liable to be reduced under Explanation (baa) to sec.80HHC of the Act.

7.3 Against the same, the revenue is in appeal before us. The CIT(A) had considered the decision of the jurisdictional High Court in the case of assessee's own case for assessment year 1994-95 to hold that the consideration received for development work from Robert Bosch was not liable to be reduced under Explanation (baa) in computing the profits of the business. Since the issue is covered by the decision of the jurisdictional High Court in the assessee's own case for the earlier assessment year and the CIT(A) has only followed the judicial precedent on the issue, we do not see any reason to interfere with the same. This ground of appeal is accordingly rejected.

8. As regards the issue in grounds of appeal No.4 to 6 is concerned i.e. exclusion of 90% net interest received from the business profits for the purpose of deduction u/s 80HHC by the AO, we find that the CIT(A) has followed this Tribunal's order in assessee's own case for the assessment years 2000-01 and 2001-02 in ITA Nos.335 & 336/Bang/2005 dated 12/06/2008 to hold that only net interest is to be excluded from the business profits

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for the purpose of computation of deduction u/s 80HHC of the Act. The learned counsel for the assessee has also placed reliance upon the judgment of the Hon'ble Delhi High Court in the case of *CIT vs Delhi Brass & Metal Works* reported in 313 ITR 352. We find that this issue is now covered in favour of the assessee by the above decision. Therefore, we see no reason to interfere with the order of the CIT(A) which is in consonance with the judicial precedent on the issue.

9. In the result, the assessee's appeal is partly allowed and the revenue's appeal is dismissed.

*Pronounced in the open court on 20<sup>th</sup> of August, 2015.*

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

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

*eksrinivasulu*

Copy to:

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

By order

Assistant Registrar  
Income-tax Appellate Tribunal  
Bangalore