

IN THE INCOME TAX APPELLATE TRIBUNAL
‘A’ BENCH : BANGALORE
BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.94/Bang/2016
Assessment Year : 2011-12

Radisys India Pvt. Ltd., 6 th Floor, Electra Wing B Exora Business Park, Behind Prestige Tech Park, Marathahalli – Sarjapura Outer Ring Road, Bengaluru-560 103. PAN – AACCC 3169 M	Vs.	The Dy. Commissioner of Income-Tax, Circle-5(1)(1), Bengaluru.
APPELLANT		RESPONDENT

IT(TP)A No.367/Bang/2016
Assessment Year : 2011-12

The Dy. Commissioner of Income-Tax, Circle-5(1)(1), Bengaluru.	Vs.	Radisys India Pvt. Ltd., 6 th Floor, Electra Wing B Exora Business Park, Behind Prestige Tech Park, Marathahalli – Sarjapura Outer Ring Road, Bengaluru-560 103. PAN – AACCC 3169 M
APPELLANT		RESPONDENT

Assessee by	:	Shri Mahaveer C Jain, C.A
Revenue by	:	Ms. Neera Malhotra, CIT (DR)

Date of Hearing	:	08-03-2021
Date of Pronouncement	:	14-06-2021

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals has been filed by assessee against final assessment order dated 13/11/2015 passed by Ld.DCIT Circle 5(1)(1), Bangalore under section 143(3) read with 144C(3) of the Act on following grounds of appeal:

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1. *The direction of the Dispute Resolution Panel are opposed to the law and not on the facts and circumstances of the case.*
2. *On the facts and circumstances of the case, the Ld.DRP erred in directing the Assessing officer to reduce the expenditure incurred in foreign currency, both from the Export Turnover as well as total Turnover for the purpose of computation of deduction u/s 10 of the IT act without appreciating the fact that the statute allows exclusion of such expenditure only from ETO by way of specific definition of export turnover as envisaged by sub-clause(4) of explanation 2 below sub section 8 of section 10A. On the other hand , there is no specific provision in section 10A warranting exclusion of above expenses from total turnover also.*
3. *Whether the DRP is correct in excluding E-Infochips Limited while the comparable is qualifying the service income to turnover filter of 75% and the company is functionally a software development company.*
4. *Whether the DRP is correct in excluding ICRA Techno Analytics Limited while the comparable is qualifying all the qualitative and quantitative filters applied by the TPO.*
5. *Whether the DRP is correct in excluding Infosys Technologies Limited while the comparable is qualifying all the qualitative and quantitative filters applied by the TPO.*
6. *For these and other grounds that may be urged upon, direction of the Dispute Resolution Panel may be reversed and that assessment order be restored.*
7. *The appellant craves leave to add, alter, amend or delete any other grounds on or before hearing of the appeal.”*

ITA No. 367/B/2016

1. *The learned Transfer Pricing Officer has erred in proposing a transfer pricing adjustment and Hon'ble Dispute Resolution Panel has erred in confirming the same. By doing so, they have ignored the fact that, since the Appellant is availing tax holiday under Section 10A of the Income Tax Act, there is no intention to shift the profit base out of India and accordingly there is no motive for tax avoidance;*

2. *The Learned Transfer Pricing Officer/Hon'ble Dispute Resolution Panel have grossly erred by arbitrarily rejecting the companies selected /accepted by the Appellant as comparables on unjustifiable grounds.*

3. *The learned Transfer Pricing Officer has grossly erred by disregarding the functional profile of the Appellant and comparing it with a company having different functional profile and the Hon'ble Dispute Resolution Panel has erred in confirming the same.*

4. *The Hon'ble Dispute Resolution Panel has grossly erred in applying 'onsite revenue filter'.*

5. *The Hon'ble Dispute Resolution Panel has grossly erred by rejecting comparables having expenditure in foreign currency of less than 75% to total revenue under 'onsite revenue filter'.*

6. *The learned Transfer Pricing Officer has grossly erred on facts by making arithmetical errors in the computation of the comparables NCP margin.*

7. *The learned Transfer Pricing Officer has grossly erred by not making suitable adjustments to account for differences in the risk profile of the Appellant vis- a-vis the comparables and the Hon'ble Dispute Resolution Panel has erred in confirming the same.*

8. *The learned Assessing Officer has erred in initiating penalty proceedings under Section 271 (1)(c) of the Income Tax Act mechanically and without recording any adequate satisfaction for such initiation.*

The Appellant prays that each of the above grounds be considered discretely and without prejudice to each other.

The Appellant craves leave to add, omit or alter grounds of appeal before or during the hearing of the appeal.”

Brief facts of the case are as under:

2. Assessee is a company and has filed its return of income for year under consideration on 29/11/2011 declaring income of Rs.76,595/-. Return was processed under section 143 (1) of the act. The case was subsequently selected for scrutiny and notice under section 143 (2) of the Act was issued along with notice under section 142 (1). In response to statutory notices,

representative of assessee appeared before the Ld. AO and filed requisite details as called for.

3. The Ld.AO observed that, assessee had international transactions with associated enterprises exceeding Rs.15 crores, and therefore, reference was made to the Transfer Pricing officer under section 92C of the Act.

4. On receipt of reference, the Ld. TPO called upon assessee to file the economic details of international transaction with its associated enterprises.

5. The Ld. TPO from the details filed, observed that, assessee is a wholly owned subsidiary of Continuous Computing Corporation, USA, and it is established in India mainly to assist and support the business of its AE through development and support of computer software to its holding company. It was observed that, assessee had following international transactions during the year under consideration with its AE:

International Transactions	Amount (in Rs.)
Software Development services	35,65,84,106/-
Interest free loan from AE	2,34,06,912/-
Movable Property acquired on loan	2,34,02,412/-
Recovery of expenses	4,92,605/-
Receipt on loan basis of computers/	6,46,04,968/-
Total	46,84,91,003/-
Operating Income (OR)*	35,65,84,106/-
Expenditure (OC)**	31,01,48,418/-
Operating Profit (OP)	4,64,35,688/-
OP/OC	14.97%
OP/OR	13.02%

6. Ld.TPO observed that assessee used TNMM as most appropriate method and applied OP/OC as PLI to compute its

margin at 14.97%. Assessee had selected 11 comparables with average margin of 12.22%, thereby holding the transaction entered into between assessee and its AE to be at arms length.

7. During Transfer Pricing proceedings, assessee furnished additional comparables, out of which 2 comparables were accepted by the Ld.TPO.

8. The Ld.TPO thereafter undertook fresh search and selected following final set of 13 comparables with average margin of 24.82%.

S1.No	Name	PLI
1	Acropetal Technologies Ltd.(seg)	31.98%
2	e zest solutions (from Capitaline)	21.03%
3	E-infochips Ltd	56.44%
4	Evoke (from Capitaline)	8.11%
5	ICRA Techno Analytics Ltd. (in 000)	24.83%
6	Infosys Ltd	43.39%
7	Larsen & Toubro Infotech Ltd.	19.83%
8	Mindtree Ltd.(seg)	10.66%
9	Persistent Systems & Solutions Ltd.	22.12%
10	Persistent Systems Ltd.	22.84%
n	R S Software (India) Ltd.	16.37%
12	Sasken Communication Technologies Ltd	24.13%
13	Tata Elxsi Ltd (seg)	20.91%
	AVERAGE MARGIN	24.82%

9. The Ld.TPO thus proposed an adjustment of Rs.2,54,87,730/-being shortfall.

10. On receipt of the Transfer Pricing Order, the Ld.AO passed draft assessment order. In the draft assessment order the Ld.AO disallowed a sum of Rs.24,58,203/- being deduction claimed under section 10A of the Act. The Ld.AO made the disallowance on the ground that, the appeal against decision of *Hon'ble Karnataka High Court* in case of *Tata Elxsi*, reported in (2011) 247 CTR 334, has been filed by revenue before *Hon'ble Supreme Court* which was pending during relevant period.

11. On receipt of the draft assessment order, the assessee preferred objections before DRP. The DRP accepted the submissions of assessee and directed Ld.AO to exclude following:

Acropetal Technologies Ltd.

e-Zest Solutions

E Infotech Ltd.

ICRA Techno Analytics Ltd.

Infosys Technologies Ltd.

Tata Elxsi Ltd.

Mindtree Ltd.

RS Software Ltd.

Larsen and Toubro Infotech Ltd.

Evoke Technologies Ltd.

12. DRP also allowed the plea of assessee regarding computation of deduction under section 10A of the in accordance with the decision of *Hon'ble Karnataka High Court* in case of *CIT vs Tata Elxsi Ltd.* (supra)

13. On receipt of the order passed by DRP, the Ld.AO, passed the final assessment order.

14. Aggrieved by the final assessment order passed by Ld.AO, assessee as well as revenue are in appeal before us now.

15. At the outset, both sides submitted that appeal filed by revenue is not maintainable due to low tax effect.

16. Accordingly, based on the above submission we dismiss the appeal filed by revenue relying on the Circular No.17/2019 issued by CBDT dated 8/8/2019.

In the result, appeal filed by revenue stands dismissed.

17. In respect of the appeal filed by assessee, the Ld.AR submitted that, assessee wishes to argue only 3 comparables excluded by Ld.AO/DRP raised in Ground no.1-2:

RS software Ltd.

Evoke Technologies Ltd.

CG-Vak Software and Exports Ltd.

18. It was further submitted by the Ld.AR that in respect of Evoke Technologies and CG-Vak Software and Exports Ltd., assessee had not raised any objection against the 2 companies before DRP. However, the DRP rejected these 2 companies on its own. It has been submitted that these comparables were acceptable to both assessee as well as the Ld.TPO, and therefore needs to be restored to the final set of comparables.

19. As regards R.S.Software Ltd., Ld.AR submitted that the DRP excluded this comparable *suo moto*, by applying on-site revenue filter. It was submitted that, this filter was not applied by the

Ld.TPO for selecting the final set of comparables. Both revenue as well as assessee urged that these comparables may be restored back to the final list of comparables.

20. We have perused submissions advanced by both sides in light of records placed before us.

21. We found the submissions by Ld.AR to be true and accordingly direct Ld.AO to include R.S Software Ltd. ,Evoke Technologies Ltd., CG-Vak Software and Exports Ltd. to the final list of comparables.

22. Apart from the above comparables the Ld.AR did not argue for any other comparables raised in these grounds.

Accordingly, these grounds raised by assessee stands partly allowed in respect of the comparables argued before us.

23. It is been submitted by Ld.AR that assessee do not wish to press the other grounds raised in the appeal.

Accordingly, remaining grounds are dismissed as not pressed.

In the result appeal filed by assessee stands partly allowed as indicated here and appeal filed by revenue stands dismissed.

Order pronounced in the open court on 14th June, 2021

Sd/-
(CHANDRA POOJARI)
Accountant Member
Bangalore,
Dated, the 14th June, 2021.
/Vms/

Sd/-
(BEENA PILLAI)
Judicial Member

Copy to:

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

By order

Assistant Registrar, ITAT, Bangalore

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	-4-2021		Sr.PS
3.	Draft proposed & placed before the second member	-4-2021		JM/AM
4.	Draft discussed/approved by Second Member.	-4-2021		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	-4-2021		Sr.PS/PS
6.	Kept for pronouncement on	-4-2021		Sr.PS
7.	Date of uploading the order on Website	-4-2021		Sr.PS
8.	If not uploaded, furnish the reason	-4-2021		Sr.PS
9.	File sent to the Bench Clerk	-4-2021		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS