

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B”BENCH: BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER  
AND  
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.593/Bang/2016

Assessment Year: 2011-12

JCIT (LTU), Bangalore	<b>Vs.</b>	M/s. Dell International Services India Pvt. Ltd. (Formerly Perot Systems TSI (India) Pvt. Ltd. 12/1, 12/2A, 13/1A, Divyashree Gardens Challagutta Village VarthurHobli Bangalore -71  <b>PAN No.AAACH1925Q</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

IT(TP)A No.638/Bang/2016

Assessment Year: 2011-12

M/s. Dell International Services India Pvt. Ltd. (Formerly Perot Systems TSI (India) Pvt. Ltd. 12/1, 12/2A, 13/1A, Divyashree Gardens Challagutta Village VarthurHobli Bangalore -71	<b>Vs.</b>	JCIT (LTU), Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri Muzaffar Hussain, D.R.
<b>Respondent by</b>	:	Shri T. Surya Narayana, A.R.

Date of Hearing	:	12.08.2021
Date of Pronouncement	:	01.09.2021

**ORDER**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

These cross appeals are directed against the final assessment order dated 27.1.2016 passed by the A.O. for assessment year 2011-12 u/s 143(3) r.w.s. 144C(13) of the Income-tax Act,1961 [the

Act' for short] in pursuance of directions given by Ld. Dispute Resolution Panel (DRP).

2. The assessee has raised grounds with regard to
  - (a) the TP adjustment made in software development segment
  - (b) Short credit of TDS & advance tax and
  - (c) denial of setting off of brought forward business loss.
  
3. The revenue has raised grounds relating to
  - (a) TP adjustment made in respect of software development segment
  - (b) TP adjustment made in respect of ITES segment and
  - (c) the issue relating to deduction u/s 10A of the Act.
  
4. The assessee herein is engaged in the business of providing software development services and IT enabled services to its Associated Enterprises (AE). This assessee is an amalgamating entity and has got a history. Initially two companies named M/s. Dell International Services India Pvt. Ltd. and Perot Systems Business Process Solutions Pvt. Ltd. got amalgamated with M/s. Perot Systems TSI (India) Pvt. Ltd., vide order passed by Hon'ble High Court of Karnataka u/s 391 to 394 of the Companies Act. The amalgamating company M/s. Perot Systems TSI (India) Pvt. Ltd is the assessee herein, whose name now stands changed to M/s. Dell International Services Pvt. Ltd.
  
5. We shall take up first the appeal filed by the assessee. The first issue urged by the assessee relates to transfer pricing assessment made in respect of Software development services (also referred as "Information Technology Services"). The turnover of the assessee in software development segment is Rs.1197.60 lakhs.

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The assessee adopted TNM method as most appropriate method and operating profit by operating cost (OP/OC) as profit level indicator (PLI). The assessee declared PLI of 15.05%. The assessee selected 13 comparable companies whose average margin was 13.71%. Accordingly, the assessee claimed that international transaction of export of software is at arm's length.

6. The Ld. TPO rejected the TP study of the assessee and he selected 13 comparables. After giving credit for working capital adjustment, the average margin of the comparable companies selected by TPO was determined at 23.55%. Accordingly, the TPO made transfer pricing adjustment of Rs.88.46 crores. The Ld. DRP excluded 10 comparable companies and retained 3 comparable companies, viz., Persistent Systems & Solutions Ltd., Persistent Systems Ltd. and Sasken Communication Technologies Ltd. It is pertinent to note that the Ld DRP suo motu excluded three companies viz., R.S Software (India) Ltd, Evoke Technologies P Ltd and Mind Tree Ltd. Pursuant to the directions of the Ld. DRP, the TP adjustment was reworked to Rs.87.90 crores in the final assessment order.

7. In its appeal, the assessee seeks exclusion of all the three companies retained by Ld DRP and inclusion of following five companies:-

- (a) R.S Software (India) Ltd
- (b) Evoke Technologies P Ltd
- (c) Mind Tree Ltd.
- (d) Akshay Software Technologies Ltd and
- (e) LGS Global Ltd.

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8. The Ld A.R first invited our attention to the additional ground raised by the assessee, which reads as under:-

*“The appellant submits that the arm’s length mark-up on cost arrived at during the MAP resolution between the U/s. and Indian competent authorities for transactions with AEs based in USA for the IT segment, ought to be accepted as the arm’s length mark-up on cost for international transactions entered into with the non-USA based AEs for the IT segment”*

The Ld A R submitted that the above said additional ground has been raised consequent to the settlement of USA based transactions under Mutual Agreement Procedure (MAP) resolution process. He submitted that the assessee has withdrawn the grounds in so far as it is related to SWD services provided to USA based entities. Accordingly, he submitted that only international transactions with non-USA based entities in respect of SWD services (also known as “IT services”) requires to be tested under Arm’s length principles.

9. The Ld A.R submitted that, underMAP resolution, the margin has been fixed at 16.99%, while the margin shown by the assessee for entire international transactions relating to SWD segment was 15.05%. He further submitted that contention of the assessee for inclusion and exclusion and inclusion of comparable companies are fully supported by the decisions rendered by the Tribunal, in which case, following five comparable companies will remain:-

(a) R.S Software (India) Ltd	-	7.78
(b) Evoke Technologies P Ltd	-	9.03
(c) Mind Tree Ltd.	-	15.98
(d) Akshay Software Technologies Ltd	-	14.21
(e) LGS Global Ltd.	-	3.62
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		50.62
		=====

He submitted that the average margin of above said companies would work out to 10.12% only and hence profit margin declared by the assessee would be at arms length. He fairly agreed that the revenue would dispute the prayer of the assessee and further the

revenue has also raised objections to the decision rendered by Ld DRP in respect of some of the companies. Accordingly, all those companies are required to be examined vis-à-vis the Tribunal decisions and facts relating to each of the comparable companies.

10. The Ld A.R submitted that the assessee is making an alternative prayer in the additional grounds in order to put quietus to this matter, i.e., the assessee is agreeable for adopting the margin at 16.99% in respect of non-USA based transactions also. He submitted that the non-USA based transactions constitute major portion of the transactions, still the MAP settled rate of 16.99% may be adopted to those transactions also, as neither the assessee nor TPO treated the USA and non-USA transactions separately. In this regard, he placed his reliance on the decision dated 03.08.2021 rendered by co-ordinate bench in the case of assessee's own case for AY 2010-11 in IT(TP)A No.637/Bang/2016, wherein the assessee had settled under MAP solution in respect of ITES services for USA based transactions at 15.69% and the Tribunal has directed for adoption of the same rate for non-USA based transactions also.

11. We heard Ld D.R on this additional ground and perused the record. We notice that the co-ordinate bench has given direction to adopt the rate determined under MAP resolution for USA based transactions to other non-USA based transactions also in the assessee's own case for AY 2010-11 (referred supra) for ITES segment. The relevant observations made by the co-ordinate bench are extracted below:-

*“37. In its appeal, the assessee has raised the following issues with regard to the determination of ALP in the ITES segment. That the arm's length mark-up on cost arrived under the Mutual Agreement Procedure Resolution to be applied for transactions with Non-US based entities for the*

*ITES segment. (Additional Ground). The DRP erred in suo moto excluding Sundaram Business Services Ltd. from the list of comparable companies. (Ground No. 1.4). The DRP erred in including Fortune Infotech Limited, ICRA Online Limited and Informed Technologies India Limited from the list of comparable companies. (Ground No. 2.14).*

*38. In its appeal, the Revenue has challenged the order of DRP in excluding certain comparables chosen by the TPO viz., Infosys BPO Ltd., E-Clerx Services Ltd., Acropetal Technologies Ltd., Jeevan Scientific Technology Limited and Accentia Technologies Ltd. (Ground Nos. 1 to 5)*

*39. The additional ground is a legal ground and has a bearing on determination of tax liability of the assessee and hence the same is admitted for adjudication.*

*40. As far as the additional ground is concerned, it is seen that subsequent to filing of the present appeal, the Assessee's AE located in the United States of America ("US") opted for the Mutual Agreement Procedure ("MAP") proceedings pursuant to [Article 25](#) of the India-US Double Taxation Avoidance Agreement ("DTAA") with respect to the transfer pricing adjustment made to the ITES revenue earned by the Assessee from its AE located in the US. Thereafter, the Assessee has accepted the terms of the MAP resolution under [Article 27](#) of the India-US DTAA on 13.07.2020 with respect to its ITES rendered to the AEs based in the US at a margin of 15.69%. Accordingly, the IT(TP)A Nos.637 and 639/Bang/2016 Assessee has withdrawn the grounds in the appeal insofar as it related to the ITES provided by the Assessee to its AE based in the US.*

*41. It is the plea of the assessee in the additional ground of appeal filed along with application dated 24.02.2021 for admitting additional ground that the profit margin of the assessee adopted in MAP ought to be adopted as ALP mark-up for non-US based AE transactions also. It is submitted that the transactions entered by the Assessee with its US based AE is similar to the transactions entered into with the non-US based AEs and that no distinction has been made by the Assessee between the two in its TP study and while preparing its audited financial statements. It has further been submitted that no distinction has been made by the TPO also in the comparability analysis carried out by him. Therefore, the assessee prays that the Tribunal may adopt the same arm's length mark-up cost for the international transactions entered into with the Non-US AEs as well and, accordingly, dispose of the TP grounds with respect to the ITES revenue earned by the Assessee from its Non-US based AE transactions.*

*42. The learned Counsel for the assessee in this regard placed reliance on the decisions of this Tribunal in the case of CGI Information System & Management Consultants (P.) [Ltd v. DCIT](#) ([2017] 81 taxmann.com 169 (Bangalore - Trib.)) and the Hon'ble Tribunal - Mumbai Bench in J.P Morgan Services (P.) [Ltd. v. DCIT](#) ([2016] 70 taxmann.com 228 (Mumbai -*

*Trib.)) wherein, the same margin as the US transactions was directed to be applied for the Non-US transactions. The learned Counsel for the assessee also pointed out that the Commissioner of Income-tax (Appeals) in its own case for the AYs 2005-06, 2007-08 and 2008-09, adopted the arm's length price determined in the MAP resolution for the international transactions entered into with the Non- US AEs. The learned DR could not point out any infirmity in the submissions on the additional ground of appeal made by the learned Counsel for assessee.*

12. Though the above said decision has been rendered by the coordinate bench in respect of ITES segment, we are of the opinion that the ratio of above said decision may conveniently be adopted for SWD segment also. Accordingly, we direct the AO/TPO to adopt the net margin rate of 16.99% for non-USA based transactions also and compute the Transfer pricing adjustment for SWD segment (IT services segment) accordingly.

13. In view of the above, the grounds no.1.4 and 1.5 urged by the assessee and grounds (i) to (xii) urged by the revenue under the heading "Software development would stand adjudicated by the above said decision.

14. The ground nos. 1.1 to 1.3 are general in nature and no arguments was advanced in respect of these grounds.

15. In ground numbers 2.1 to 2.10 and grounds 3-5, the assessee is contesting the decision of Ld DRP in respect of certain comparables under ITES segment. The Ld A.R submitted that the T.P adjustment after the order of Ld DRP has become NIL. He submitted that the revenue has appeal challenging the order passed by Ld DRP and hence the grounds urged by the assessee would be relevant depending upon outcome of the revenue's appeal. Accordingly he did not advance his arguments at this stage.

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16. The next ground urged by the assessee relates to the grievance of non-granting of proper credit for TDS and advance tax. The Ld A.R submitted that the assessee has claimed credit or payment of advance tax of Rs.74.53 crores and TDS of Rs.7.39 crores. However, the AO has allowed credit of Rs.43.00 crores and Rs.3.04 crores respectively as against the above said claim. The Ld A.R submitted that the TDS deduction as well as advance tax payment has happened under PAN number of merged entities. Accordingly he submitted that the AO may be directed to allow credit for correct amount.

17. We heard the parties on this issue and perused the record. It appears that the AO has given credit for the amounts wherein the PAN number of the present assessee is shown. It is the case of the assessee that the payments made under the name and PAN number of merged entities also should be given credit, when the corresponding income is assessed in the hands of the present assessee. We find merit in the said contentions. However, this issue requires factual verification. Accordingly we restore this issue to the file of the AO for examining the claim of the assessee in accordance with law.

18. The last issue urged by the assessee relates to the issue of rejection of set off of brought forward business loss of Rs.16.60 crores claimed in the return. We notice that the AO has not assigned any reason for not allowing set off of brought forward business loss. Accordingly, we restore this issue to the file of the AO for examining the claim of the assessee in accordance with law.



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19. We shall now take up the appeal of the revenue. The grounds urged by revenue in Software development segment have been covered by our decision rendered for this segment in assessee's appeal.

20. The next issue urged by the revenue relates to the transfer pricing adjustment made in respect of ITES segment. The assessee had declared operating income of Rs.1009.28 crores and PLI of 14.14% under ITES segment. It selected 7 comparables whose arithmetic mean was 14.38%. Accordingly, the assessee claimed its international transactions related to IT enabled services at arms length. The TPO rejected transfer pricing study conducted by the assessee under IT enabled services. The TPO selected 10 comparables companies. The adjusted mean margin of those companies was 23.85% and accordingly the TPO made transfer pricing adjustment of Rs.85.88 crores.

21. The Ld. DRP directed exclusion of 8 comparable companies and retained 2 comparable companies. As a result, the TP adjustment under IT enabled services segment became Nil while passing the final assessment order. The revenue is challenging the decision of Ld. DRP in respect of the following 3 companies.

- a) Acropetal Technologies Limited
- b) Jeevan Scientific Technology Limited
- c) Infosys BPO Limited.

22. The decision rendered by Ld. DRP in respect of the above said 3 companies are extracted below:

***Acropetal Technologies Limited (segmental):***

*It is submitted that the company is not functionally comparable, to support the exclusion of the above company from the comparables, the assessee relied on several judicial pronouncements.*

***Having considered the submissions, on perusal of the Annual Report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment. Hon'ble ITAT, Bengaluru in IT(TP)/A/1678/Bang/2012 in the case of Global E Business Operations, directed to exclude the above company by observing that 'we have considered the submission of the learned counsel for the assessee, on perusal of note no.15 of notes to accounts, which gives segmental revenue of this company, it is clear that the major source of the income for this company is from providing engineering design services and information technology services. The function performed by the engineering design services of the company cannot be considered as comparable to the ITES /BPO function performed by the assessee. The performance of the engineering design services is regarded as providing high end services amongst the BPO which require high skill whereas the services performed by the assessee are routing low end ITES function. We therefore hold that this company could not have been selected as comparable, especially when it performs engineering design services which only a knowledge processing outsourcing (KPO) would do and not a business processing outsourcing (BPO).'*** Similar View was taken by Hon'ble Bengaluru ITAT in the case of - Symphony Marketing Solutions India Pvt, Ltd. vs. ITO (IT (TP) A No. 1316/Banr:<sup>1</sup>2012), held that Acropetal cannot be considered as comparable as it performs engineering design services accordingly we direct the assessing officer to exclude the company from the comparables.

**Infosys BPO Limited**

***Having considered the submissions, it is noticed by us that the Hon'ble ITAT, Bengaluru in the case of Symphony Marketing Solutions India Pvt Ltd (presently merged with Genpact India) [(IT(TP)A No.1316/Bang/2012, TS-234-ITAT-2013 (Bang) TP ITAT Bengaluru ] and the Hon'ble Hyderabad ITAT in the case of International Speciality Products (I) Pvt Ltd in ITA No.210/Hyd/2014 for A.Y. 2009-10 has excluded the company by observing that 'we are of the view that it cannot at all be considered as comparable to the assessee not only because of its size but also due to its brand value, diversified activities and other functional disabilities. Different branches of this Tribunal are consistent in their view that the company cannot be treated as a comparable to a captive service provider like the assessee 'Similar***

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*view was taken by Hon'ble Hyderabad ITAT in the case of Excellence Data Research Pvt Ltd in ITA No.159/Hyd/2014, respectfully following the above decisions, we direct the assessing officer to exclude the above company from the comparables.)*

***Jeevan Scientific Technologies Limited:***

*Having considered the submissions, it is noticed by us from the perusal of Annual Report that the foreign exchange earning of Rs.79.21 lakh is only from BPO operations and there is no foreign exchange earning in respect of ERP segment. Therefore, the ERP segments cannot be considered as it does not have any revenue from the export. It is also noticed by us that the ERP segment is not otherwise comparable to the functions of the assessee company. The BPO segment alone cannot be considered as comparable as the revenue to the total revenue ratio is only 32.28%. It is also noticed by us that there is a huge fluctuation in the margin of the company from F.Y. 2008-09 to 2012-13 viz., in BPO segment 15.66%, 18.22%, 6.24%, 14.42% and (-)56.89%, which indicate that certain peculiar circumstances influencing the profit margin of the company and the company fails the revenue earning filter of 75% applied by the TPO, in view of the above differences, we direct the A.O. to exclude the above company from the comparables.*

23. In respect of M/s. Acropetal Technologies Ltd. we notice that the LD. DRP has taken note of the fact that major source of income for this company is from Engineering Design Services which is an activity falling under the category of "Knowledge Process Outsourcing (KPO)" while the activities carried on by the assessee falls under the category of "Business process outsourcing (BPO)". Further, the Ld. DRP has followed the decision rendered by the coordinate bench in the case of Symphony Marketing Solutions India Pvt. Ltd. (surpa). Hence, we do not find any reason to interfere with the decision of Ld. DRP on this comparable company.

24. In respect of Jeevan Scientific Technologies Ltd., the Ld. A.R. placed his reliance on the decision rendered by coordinate bench in the case of DCIT Vs. C-Cube Solutions Pvt. Ltd. (109 Taxmann.com 293) and Finastra Software Solutions (India) Pvt. Ltd. (93

Taxmann.com 460). In the case of C-Cube Solutions Pvt. Ltd. the coordinate bench has excluded this company with the following observations:

*5.3.1 We have heard the rival contentions and perused and carefully considered the material on record. We find that the DRP has dealt with the comparability of the company 'Jeevan' at pages 7 and 8 of its order and excluded it from the list of comparables to the assessee, by holding as under:*

*"Jeevan Scientific Technology Ltd: The objection against the wrong PLI becomes academic in nature in view of our findings in the subsequent para wherein this company has been rejected on functional analysis.*

*2.6 Ground of Objection 7: The Learned Transfer Pricing Officer and in turn the Assessing Officer erred in its functional analysis of Jeevan Scientific technologies Ltd, and went on to wrongly consider the same as a comparable company.*

*Having considered the submissions, it is noticed by us from the perusal of Annual Report that the foreign exchange earnings of 79.21 lakhs is only from BPO operate and there is no foreign exchange earning in respect of ERP segment. Therefore, the ERP segments cannot be considered as it does not have any revenue from the export. It is also noticed by us that the ERP segment is not otherwise comparable to the functions of the assessee company. The BPO segment alone cannot be considered as comparable as the revenue to the total revenue ratio is only 32.28%. It is also noticed by us that there is a huge fluctuation in the margin of the company from F.Y. 2008-09 to 2012-13 viz., in BPO segment 15.66%, 18.22%, 6.24%, 14.42% and (-)56,89%, which indicate that certain peculiar circumstances influencing the profit margin of the company and the company fails the revenue earning filter of 75% applied by the TPO, in view of the above differences, we direct the A.O. to exclude the above company from the comparables."*

*5.3.2 On a careful consideration of the DRP's order and the facts on record, we find that Revenue has challenged the exclusion of 'Jeevan' from the list of comparables to the assessee by the DRP on grounds of application of service income filter of 75%; which was infact a filter applied by the TPO. Apart from raising this ground (supra), Revenue has not placed on record any factual material evidence to controvert the DRP's finding that this company 'Jeevan' had passed the 75% revenue filter applied by the TPO. Even otherwise, the DRP has, inter alia, excluded 'Jeevan' on grounds of its huge fluctuating margins over the last few years which has not been challenged by Revenue. In this factual matrix of the case, as discussed above, we uphold the action of the DRP of excluding this*

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*company 'Jeevan Scientific Technology Ltd.,' from the list of comparables for failing the 75% revenue filter applied by the TPO and on account of its hugely fluctuating margins over the last few years which indicate that there were certain peculiar circumstances influencing the profit margins of the company. Consequently, grounds 2(a to c) raised by Revenue (supra) are dismissed."*

We notice that the Ld. DRP has given identical reasoning for excluding this company in this case also. Accordingly, following the decision rendered by the coordinate bench in the case of C-Cube Solutions Pvt. Ltd., we confirm exclusion of this company.

25. The revenue is challenging exclusion of Infosys BPO Limited by Ld DRP. Before us the Ld. A.R. placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of PCIT Vs. H&S Software Development and Knowledge Management Centre Pvt. Ltd. (Order dated 3.1.2018 passed in ITA No.912/2017). We notice that the Ld. DRP has followed the decisions rendered by the coordinate benches in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) and in the case of International Speciality Products Pvt. Ltd. (ITA No.218/Hyd/2014), wherein it is observed that Infosys BPO Limited cannot at all be considered as comparable to the assessee not only because of its size but also due to its brand value, diversified activities and other functional disabilities. The Hon'ble Delhi High Court in the case of H & S Software Development and Knowledge Management Centre Pvt. Ltd. (supra) has expressed the view that the ITAT has correctly held that the Corporate entities had a significant brand presence for profits and large corporate size, which could not be compared with the assessee before the Hon'ble High Court of Delhi. In view of the above, we are of the view that Ld. DRP has rightly excluded this company.

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26. The next issue urged by the revenue relates to computation of deduction u/s 10A of the Act. The revenue is aggrieved by the decision of Ld. DRP in directing the A.O. to exclude certain expenditure both from export turnover and total turnover while computing deduction u/s 10A of the Act. This issue is now settled by Hon'ble Supreme Court in the case of CIT Vs. HCL Technologies Ltd. (404 ITR 179) SC and this decision support the view taken by the Ld. DRP. Accordingly, we uphold the decision of DRP on this issue.

27. In the result, the appeal filed by the assessee is treated as partly allowed and the appeal of the revenue is dismissed.

Order pronounced in the open court on 1<sup>st</sup> Sept, 2021

**Sd/-**  
**(George George K.)**  
**Judicial Member**

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 1<sup>st</sup> Sept, 2021.  
VG/SPS

**Copy to:**

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

By order

Asst. Registrar, ITAT, Bangalore.