

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

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

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|---------------------------|
| IT(TP)A No.2028/Bang/2016 |
| Assessment Year: 2005-06  |

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|---|------------|--|
| NTT Data Global Delivery Services Pvt. Ltd. (Formerly Keane India Limited)<br>17 & 17/1, South End Road<br>Basavangudi<br>Bengaluru-560 004<br><br><b>PAN NO : AABCK7777J</b> | <b>Vs.</b> | Deputy Commissioner of<br>Income-tax<br>Circle-5(1)<br>Bangalore |
| <b>APPELLANT</b>  |            | <b>RESPONDENT</b>  |

|                      |   |                          |
|----------------------|---|--------------------------|
| <b>Appellant by</b>  | : | Shri Nageshwar Rao, A.R. |
| <b>Respondent by</b> | : | Shri Pradeep Kumar, D.R. |

|                       |   |            |
|-----------------------|---|------------|
| Date of Hearing       | : | 16.12.2020 |
| Date of Pronouncement | : | 17.12.2020 |

**ORDER**

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

The assessee has filed this appeal challenging the order dated 19.7.2016 passed by Ld. CIT(A)-44, New Delhi and it relates to assessment year 2005-06.

2. Though the assessee has raised many grounds and additional grounds, the Ld. A.R. restricted its arguments on the following issues:

- 1) Transfer pricing adjustment - Exclusion of 4 comparable companies
  - 2) Whether provision made for bonus is a contingent liability or ascertained liability for the purpose of section 115JB of the Act.
  - 3) Disallowance u/s 14A of the Income-tax Act, 1961 ['the Act' for short].
3. The facts relating to the case are stated in brief. The assessee was earlier known as Keane India Limited. The assessee is engaged in providing software development solutions to Keane USA and also select unrelated parties in Europe. The work performed by the assessee include application outsourcing, e-business and total IT management. There is no dispute that the assessee falls under the category of “software development” company.
4. The first issue relates to transfer pricing adjustment made by the TPO. The assessee as well as TPO adopted TNM method for benchmarking the transaction. The profit level indicator (PLI) was operating profit/total cost (OP/TC). The assessee had selected 29 companies for benchmarking its transactions with Associated Enterprises (AE). The TPO rejected the transfer pricing study of the assessee. He selected two companies namely Bodhtree Consulting Ltd. and Tata Elxsi Ltd. The assessee had arrived at average margin (PLI) 12.78% and the TPO arrived at average margin of 24.60%. Accordingly, the TPO made transfer pricing adjustment of Rs.15,89,13,316/-.
5. In the appellate proceedings before Ld. CIT(A), the assessee furnished detailed submission with regard to various companies. Hence, the Ld. CIT(A) called for the remand report from TPO, wherein the TPO suggested inclusion of 21 more companies. After analysing

various companies suggested by the TPO and also by the assessee, the CIT(A) finalised a list of twelve comparable companies as given below.

1. Geometric Software Solutions Co. Limited
2. Bodhtree Consulting Limited
3. Flextronics Software Systems Limited (Seg.)
4. Tata Elxsi Limited (Seg.)
5. Sasken Communication Technologies Limited (Seg.)
6. Visual Soft Technologies Limited (Seg.)
7. Goldstone Technologies Limited
8. Akshay Software Technologies Limited
9. Gebbs Infotech Limited
10. GTL Limited
11. ICSA (India) Limited
12. LGS Global Limited (Lanco Global Solutions Limited)

Accordingly, he modified the transfer pricing adjustment made by the AO.

6. In the appeal filed before us, the assessee seeks exclusion of following four companies:

1. Geometric Software Solutions Co. Limited
2. Bodhtree Consulting Limited
3. Flextronics Software Systems Limited (Seg.)
4. Tata Elxsi Limited (Seg.)

7. The Ld. A.R. submitted that all the above said four companies have been excluded by the coordinate bench in the case of Sharp Software Development India Pvt. Ltd.(IT(TP)A No.1109/Bang/2011 dated 25.1.2017 relating to assessment year 2005-06).

8. We heard Ld D.R and perused the record. We notice that all the four companies referred above were considered by co-ordinate bench in the case of Sharp Software Development India P Ltd (supra) and they have been held to be not good comparable companies. For the sake of convenience, we extract below the relevant observations made by the co-ordinate bench in the above said case:-

**1. Geometric Software Solutions Company Ltd.,:**

10.8. Even though this company was accepted as comparable in ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) and Cordys Software India P. Ltd., in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (supra) and was not objected to, we find that the Co-ordinate Bench at Banalore in the case of DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 has considered that this is in product development. We have perused the TPO's order. In page 85 and 86 of the order, this comparable was analysed. TPO records that there are product sales to the extent of 18%. Segmental profits are not available. On assumptions, this company was retained. We are of the opinion that being a product based company, the same is not strictly comparable to a service company like Assessee. In the absence of segmental profit of service income, we have to exclude the same. Following the decision in the case of DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013 (supra), this company is accordingly excluded.

**2. Bodhtree Consulting Ltd**

10.3. This company was retained by Ld.CIT(A) but Assessee objects on the basis of functionality. However, as seen from the orders of Co-ordinate Benches in the case of ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) as well as DCIT Vs. Toshiba embedded Software (I) Pvt. Ltd., in IT(TP)A No. 1/Bang/2012 dt. 10-05-2013, Bodhtree Consulting Ltd., was accepted as a comparable. However, in the case of Cordys Software India P. Ltd., in ITA No. 1451/Hyd/2010 dt. 13-06-2014 (Where one of us, AM is the author) has considered in detail and excluded the same for the following reasons:

“1. Bodhtree Consulting Ltd. The learned counsel submitted that this company should be rejected under the following TPO's filters: • Related party transactions filter: As per schedule 4 of the balance sheet, the company has investments in Perigon, LIC, USA and as per the response u/s 133(6); the company has export sales to Perigon LIC, USA of Rs. 133.90 lakhs, being 34.68% of the total turnover. IT(TP)A No.1109/Bang/2011 & CO 13/Bang/2012 Page 16 of 33

• Functionally different filter: The company in its response to notice u/s 133(6) has stated that it provides e-paper solutions, data cleansing software, website development and other customized software and also state that the e-paper solutions and data cleansing services would come under the category of IT enabled services”

Considering the above, we direct that the above company has to be excluded on the reason of RPT of more than 25% and functionality.

**3. Flextronics Software Systems Ltd.,:**

10.10. This company was objected to on functional dissimilarity. This was considered in ITO Vs. M/s. Sunquest Information Systems (India) Private Limited, in IT(TP)A No. 1302/Bang/2011 dt. 11-06-2015 (supra) as under:

“26. As far as Flextronics Software Limited is concerned, we find that at page 90 of his Order, the TPO has also observed that IT(TP)A No.1109/Bang/2011 & CO 13/Bang/2012 Page 25 of 33 the said company has incurred expenditure for selling of products and has incurred R & D expenditure for development of the products. The above facts clearly demonstrate that there is functional dissimilarity between the Assessee and these companies and without making adjustment for the dissimilarities brought out by the TPO himself, these companies cannot be taken as comparable companies. The method adopted by the TPO to allocate expenditure proportionately to the software development services and software product activity cannot be said to be correct and reasonable. Wherever, the Assessing Officer/TPO cannot make suitable adjustment to the financial results of the comparable companies with the Assessee company to bring them on par with the Assessee, these companies are to be excluded from the list of comparables. Therefore, we direct the Assessing Officer/TPO to exclude these three companies from the list of comparables”

Respectfully following, we exclude the same.

**4. Tata Elxsi Limited**

28. We have considered his submission and find that the ITAT Hyderabad Bench (CNO IT Services (India) Pvt Ltd (ITA No.1280/Hyd/2010 dated 12.2.2014 for AY 2005-06) on identical facts, held on comparability of TATA Elxsi Ltd. as follows:

“15.7. TATA ELXSI LIMITED : The objection of the Assessee is that TATA Elxsi operating two segments – system communication services and software development services. The TPO accepted the software development services segment in his T.P. analysis and Assessee’s objection is that the software development services segment itself comprises of three subservices namely (a) product design services (b) design engineering services and (c) visual computing labs. It was submitted that these services are not akin to Assessee software services and segmental information of only product design services could have been accepted by the TPO as a comparable but not the entire software development service. Since company’s operations are functionally different as such, the same is not comparable. Further, Assessee is also objecting on the basis of intangible scale of operations. The coordinate bench in the case of Intoto (supra) considered the issue as under in para 22:

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*"22 Tata Elxsi Limited : As regards this company, the learned Counsel appearing on behalf of the Assessee, filed before us the reply of Tata Elxsi Limited to the Addl. CIT (Transfer Pricing), Hyderabad, wherein the concerned Officer has been informed that Tata Elxsi Limited is specialised Embedded Software IT(TP)A No.1109/Bang/2011 & CO 13/Bang/2012 Page 22 of 33 Development Service Provider and that it cannot be compared with any other software development company. It was submitted that because of the specialisation and also because of diverse nature of its business, it is very difficult to scale-up the operations of Tata Elxsi Limited. In view of this, Tata Elxsi Limited has informed that it is not fair to use its financial numbers to compare it with any other company. The communication dated 25th August, 2009 to the TPO is placed before us. As this communication was not before the TPO at the time of transfer pricing adjustment we deem it fit and proper to remand this issue also to the file of the TPO to reconsider adopting this company as the comparable in the light of observations of this company to the TPO in the case of another Assessee. In the result, the Assessing Officer/TPO is directed to reconsider the issue in accordance with law, after affording a reasonable opportunity of being heard to the Assessee."*

*Keeping the Assessee's objections and the decisions of the Coordinate Bench, prima facie, we are of the view that TATA Elxsi Limited is functionally different and has incomparable size to that of the Assessee. Further, we are unable to verify whether the segmental profits adopted by the TPO pertain to entire software development services or pertain to limited service akin to Assessee services. Since, these aspects are not clear from the data furnished before us, we direct the TPO to examine and in case, the segmental profits of a particular service is not available, then, to exclude the TATA Elxsi Limited from the list of comparables. Accordingly, this issue is restored to the file of TPO for examination and to decide in accordance with law and facts, after affording reasonable opportunity of being heard to Assessee."*

*29. Though the issue has been set aside to the AO in the aforesaid decision, the ITAT Hyderabad in the case of NTT Data India Enterprise Application Services Pvt.Ltd., ITA No.1612/Hyd/2010 order dated 23.10.2013 and in a subsequent ruling in the case of Invensys Development Centre (India) Pvt.Ltd., ITA No.1256/Hyd/2010 order dated 28.2.2014, held that TATA Elxsi IT(TP)A No.1109/Bang/2011 & CO 13/Bang/2012 Page 23 of 33 is not functionally comparable with that of a software development service provider such as the Assessee.*

*30. In view of the aforesaid decision rendered on identical facts and circumstances, we are of the view that TATA Elxsi Ltd., should be excluded from the list of comparable companies.*

We notice that the co-ordinate bench in the case of Sharp Software Development India P Ltd has followed the decision rendered by another co-ordinate bench in the case of ACIT vs. McAfee Software (India) P Ltd (IT(TP)A Nos. 04/Bang/2012 & 1338/Bang/2011). Accordingly, following the decision rendered by the co-ordinate bench in the case of Sharp Software Development India P Ltd (supra), we direct exclusion of four companies cited above.

9. The next issue urged by the assessee relates to computation of book profit u/s 115JB of the Act. The AO noticed that the assessee has debited its Profit and Loss account with "Provision for Bonus" of Rs.3.49 crores. The A.O. took the view that the Provision for bonus is a contingent liability and hence, the same is required to be added to the net profit for the purpose of computing book profit u/s 115JB of the Act. Accordingly, the A.O. added the same to the net profit. The Ld. CIT(A) also confirmed the same.

10. The Ld. A.R. submitted that the assessee has provided for bonus payable by it as at the year end as per the accounting principles followed by the assessee, since it is a known liability. He further submitted that the assessee had paid the above said amount of bonus in the succeeding year. Accordingly, he submitted that the provision for bonus cannot be considered as contingent liability.

11. We heard Ld. D.R. on this issue and perused the record. We notice that the nature of liability in respect of "provision for bonus" was examined by Chennai bench of Tribunal in the case of ACIT Vs. Sun Paper Mills Ltd. (ITA No.806/MDS/2011 dated 14.7.2011) and it was decided as under:

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*“We find that the provision made by the assessee towards bonus was not an unascertained liability. The assessee was bound to pay bonus to its employees and in fact the bonus was actually paid by the assessee company. The only thing is that the bonus was paid after the close of the previous year. The Hon’ble Supreme Court in the case of Bharat Earth Movers V. CIT (245 ITR 428) has held that in such cases of provision for bonus, it is to be seen that the liability is not unascertained but at the maximum the quantum alone is exactly not ascertainable. It is not possible to hold that the liability itself was unascertained. But in the present case, we further find that even the quantum has already been ascertained by the assessee and it was brought in a provision only for the reason that it was not paid during the relevant previous year. Therefore, the Commissioner of Income-tax (Appeals) has rightly held that the adjustment made by the assessing authority was not permitted in law.”*

We also notice that the above said decision was rendered by Chennai Bench of Tribunal in the context of Section 115JB only. The Ld A.R also submitted that the assessee that the assessee has actually paid the bonus in the succeeding year. Accordingly, we hold that the provision for bonus created by the assessee is an ascertained liability. Accordingly, we set aside the order passed by Ld. CIT(A) on this issue and direct the A.O. to exclude it from book profit.

12. The next issue relates to disallowance made u/s 14A of the Act. During the year under consideration, the assessee earned dividend income of Rs.41.02 lakhs and claimed the same as exempt. However, the assessee did not make any disallowance u/s 14A of the Act. The A.O. computed the disallowance by applying rule 8D(2)(iii) of I.T. Rules. Accordingly, the A.O. disallowed a sum of Rs.7,87,830/- out of administrative expenses u/s 14A of the Act. The Ld. CIT(A) confirmed the same.

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13. The Ld. A.R. submitted that the provisions of rule 8D has been held to be prospective in operation by Hon'ble Supreme Court in the case of CIT Vs. Essar Tele Holdings Ltd. (2018) 401 ITR 445 and hence it is not applicable to any assessment year prior to assessment year 2008-09. The Ld. A.R. submitted that the assessment year under consideration is AY 2005-06 and hence the tax authorities are not justified in applying the provisions of rule 8D for the year under consideration. He further submitted that the assessee has not incurred any expenditure in earning the dividend income and hence no disallowance u/s 14A of the Act is called for. In this regard, he placed his reliance on the decision rendered by Hon'ble Karnataka High Court in the case of CIT vs. Syndicate Bank (2020)(115 taxmann.com 287).

14. We heard Ld D.R and perused the record. Since the provisions of Rule 8D has been held to be prospective in nature, i.e., from AY 2008-09 onwards, the tax authorities are not justified in applying the same to the assessment year under consideration. However, the provisions of sec.14A shall apply to the exempt income. Hence the disallowance u/s 14A should be made on a reasonable basis. We notice that the decision in the case of Syndicate Bank Ltd (supra) has been rendered in the facts prevailing in that case. We notice that the Hon'ble Bombay High Court, in the case of Godrej Agrovet Ltd (IT Appeal No.934 of 2011 dated 01-08-2013) has upheld disallowance of 2% of the dividend income to meet the requirements of sec.14A prior to insertion of Rule 8D. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to restrict the disallowance u/s 14A to 2% of the exempt dividend income.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 17<sup>th</sup> Dec, 2020

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

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

Bangalore,  
Dated 17<sup>th</sup> Dec, 2020.  
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.