

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

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.620/Bang/2016
(Assessment Year: 2011-12)

Assistant Commissioner of Income Tax,
Circle 3(1)(1), Bangalore.

....Appellant

Vs.

M/s. Inmobi Technologies Pvt Ltd.,
Pebble Beach, Ground Floor, B Block,
Embassy Golf Links Business Park,
Off. Intermediate Road,
Bangalore – 560071
PAN AAECM 9170C

.....Respondent.

Assessee By:	Shri L. Bharath, C.A.
Revenue By:	Shri G. Guruswamy, CIT (D.R.)

Date of Hearing :	10.12.2020.
Date of Pronouncement :	16.12.2020.

ORDER

PER SHRI CHANDRA POOJARI, A.M. :

This appeal by the Revenue against the directions of the Dispute Resolution Panel (DRP) dt.29.12.2015 and order passed by the Assessing Officer u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 ('the Act') for the Assessment Year 2011-12.

2. The revenue has raised various grounds; the crux of the grounds are that the DRP erred in holding that the following comparables to be excluded from the list of comparables that though it satisfies all the qualitative and quantitative criteria adopted by the Transfer Pricing Officer (TPO) in Software Development Segment :

- i) Acropetal Technologies Limited
- ii) E-Infochips Limited
- iii) Infosys Limited
- iv) L & T Inoftech limited and
- v) R S Softwre

3. i) Acropetal Technologies Limited - The Id. DR submitted that there is no objection by the assessee before the DRP in spite of that the DRP suo moto excluded this company as comparable which is not possible. According to Id. DR, it satisfies all the filters adopted by the TPO and it should be included as comparable in the list of comparables to determine the Arm's Length Price (ALP). The Id. AR has no serious objection to the argument put forth by the Id. DR.

3.1 We have heard the rival submissions and perused the material on record. We find that there is no objection with regard to this comparable however the DRP suo moto excluded the above company from the list of comparables though it satisfies all the criteria adopted by the TPO. In our opinion, suo moto exclusion of this company by DRP is not proper and there is also no objection from the

assessee. Accordingly, we direct the TPO to include this company as comparable in the list of comparables for determining the ALP.

3.2 (ii) E-Infochips Limited : According to the Id. DR this company service income 100% from sales. Being so, the DRP excluded it from the comparables on the reason that it fails the filter of service income which is 70% of the sales, which is incorrect. On the other hand, the Id. AR submitted that this company has revenue from Software Development Service is less than 75%; functionally and non-functionally not comparable as it has high fluctuation in profit and there is no segmental information available.

3.2.1 We have heard the rival contentions and perused the material on record. This company i.e. E-Infochips Limited has been considered in the Assessment Year 2011-12 in the case of Saxo India Pvt. Ltd. Vs. ACIT in IT(TP)A No.6148/Del/2015 (67 taxmann.com 155) by the co-ordinate Bench of the Tribunal vide order dt.5.2.2016 in para 10.2 held as under :

“ 10.2. After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any

software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables.”

3.2.2 In the present case, the assessment year involved is 2011-12 ; as rightly pointed out by the Id.AR, the revenue from software development services is less than 75% and it is having revenue both from software development and software services and also segmental data was not available. In these circumstances, it cannot be included as comparable in the list of comparables. Accordingly, the exclusion by the DRP is justified.

3.3 Infosys Limited - The TPO/A.O included this company in the list of comparables and the same was accepted by the assessee, however objected before the DRP. The Id. DR submitted that the DRP observed that there was functional difference between the assessee and the Infosys Limited and accordingly it was excluded. Since the assessee has accepted this company as comparable before the TPO, it cannot be excluded. The Id. AR supported the order of lower authorities.

3.3.1 We have heard the rival contentions and perused the material on record. This company has huge turnover of Rs.25,385 Crores as against the assessee’s

turnover of Rs.35.87 Crores. Further the company has high brand value and as such it cannot be considered as comparable. The co-ordinate Bench of this Tribunal in the case of Applied Materials India Pvt. Ltd. Vs. ACIT In IT(TP)A No.17/Bang/2016 for the Asst. Year 2011-12 vide order dt.21.09.2016, this comparable was excluded in the list of comparables. Accordingly, the exclusion of the DRP is justified.

3.4 L & T Infotech Limited - The ld. DR submitted that this comparable cannot be excluded on the reason of high turnover from the list of comparables and more so the assessee itself has considered in its own TP Study. On the other hand, the ld.AR submitted that this company was rejected by the TPO on the reason that this comparable has high turnover of Rs.2,336 Crores and net assets employed by the company is Rs.165.02 Crores which is significantly higher than the assessee and it cannot be compared with the captive service provider like the assessee. More so, this company has engaged in product development. The ld.AR has supported the order of lower authorities.

3.4.1 We have heard the rival contentions and perused the material on record. This company is not functionally comparable to the assessee's case as the company L&T Infotech Limited is predominantly engaged in onsite software development and it was considered in the case of Applied Materials India Pvt. Ltd. Vs. ACIT in

IT(TP)A No.17/Bang/2016 dt.21.09.2016 and observed that it cannot be included vide para 19 as under :

“ 19. We have heard the learned D.R. as well as learned D.R. and considered the relevant material on record. The DRP rejected this company by recording the facts at page 15 as under :

On perusal of schedule to the notes of the accounts, it is noticed by us that expenses incurred in foreign currency are 938.94 crore (48.84%), out of the total expenses of ₹ 1920.46 crore debited in profit and loss account, these expenses include the sub contracting expenses to the extent of ₹ 118.01 crore, which indicates that the company has the on-site revenue of about 50%, it is also noticed by us that in the profit and loss account, the revenue has been shown from software development services and products, in the segmenting account it is mentioned that the segment revenue include sales directly identifiable with/allocable to the segment. In Schedule 18, the revenue have been shown from 3 segments i.e. financial services, manufacturing and telecom. However, in paragraph 23, it is mentioned that the company is mainly engaged in the business of software development. The assessing officer has considered entire revenue from 3 segments from the software development services. Out of the software development expenses of ₹ 1,488.30 crore debited in profit and loss account, salary to overseas staff is ₹ 1200.28 crore which also indicates that the company is predominantly engaged in development of software on-site. In view of the above differences, in our view the above company cannot be retained as comparable, the assessing officer is accordingly directed to exclude the above company from comparable.

We further find that the comparability of this company has been considered by the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) in paras 62 to 65 as under :

“ 62. The assessee has raised objection against this company on the basis of high turnover in comparison to the assessee. It was also contended that related party transaction (RPT) of this company is 18.66%. The DRP rejected objections of the assessee on the ground that TPO has applied 25% filter of RPT and annual report of the company does not show any other services rendered other than software development services provided by this company. Thus the DRP held that software development segment is comparable to the assessee and therefore this company has to be retained as comparable.

63. We have heard the Id. AR as well as Id. DR and considered the relevant material on record. The Id. AR has submitted that this company is having 18.66% RPT and further this company earns revenue from both services and products. Thus, the Id. AR submitted this company is also in the software products and therefore cannot be considered as good comparable. He has further contended that in a series of decisions, the Tribunal has applied 15% RPT filter and since this company is having more than 15% RPT, the same cannot be considered as a good comparable.

64. On the other hand, the Id. DR has submitted that TPO has applied RPT filter of 25% and therefore only for this company, the RPT cannot be reduced to 15%. Further, the DRP has examined annual report of this company and found that this company earns revenue from software development services and accordingly is comparable.

65. We have considered the rival submissions and relevant material on record. We find that in the normal circumstances the tolerance range of RPT should not be more than 15%. In the case of the assessee, the availability of the comparable is not an issue and therefore we do agree with the view taken by the coordinate Benches of the Tribunal that the threshold limit of tolerance range should not exceed 15% as far as RPT revenue is concerned. Therefore, we direct the AO/TPO to apply 15% RPT filter in respect of all the comparables.”

In view of the facts recorded by the DRP as well as the decision of the co-ordinate bench, we do not find any reason to interfere with the directions of the DRP.”

3.4 Similar view was taken in the case of Finstra Software Solutions India Pvt. Ltd. Vs. ACIT in IT(TP)A No.491 & 529/Bang/2016 Dt.2.5.2018 and in the case of Comscope Network (India) Pvt. Ltd Vs. ITO in IT(TP)A Nos.166 & 181/Bang/2016 Dt.22.2.2017. Accordingly, the exclusion of this company from the comparison list by DRP is justified.

3.5 (v) R S Software Limited - This company considered as acceptable by the assessee and the TPO in the TP Study however the DRP excluded it from list of comparables. In our opinion, when the assessee as well as the TPO excluded it as comparable without any objection by the assessee, it cannot be excluded by the

DRP. Accordingly, this company is to be included as a comparable. The exclusion of this company as comparable suo moto by the DRP cannot be approved. We direct the TPO to include this company in the list of comparables.

3.6 In the ITES Segment, the Revenue has raised grounds for inclusion of following comparables as it satisfies all the filters applied by the TPO.

(i) Acropetal Technologies Limited

(ii) Jeevan Scientific Technologies Limited.

(iii) I-Gate Global Solutions Limited

3.7 (i) Acropetal Technologies Limited - The Id. DR submitted that this company is engaged ITES and segmental data could be collected and to be included in the list of comparables. On the other hand, the Id.AR submitted that this company is not functionally comparable, the company performs engineering design services and it involves high end services required high skill, as such it cannot be held as comparable.

3.7.1 We have heard the rival contentions and perused the material on record.

This comparable was considered as not comparable in the following cases :

1. Swiss Re Shared Services Vs. ACIT in ITA No.380/Bang/2016 Dt.8.7.2016

2. Outsource Partners International (P.) Ltd. Vs. DCIT (1017) 87 taxmann.com 332 (Bangalore-Trib)

3. Finstra Software Solutions India Pvt. Ltd. Vs. ACIT in IT(TP)A No.491 & 529/Bang/2016 Dt.2.5.2018

Being so, we direct the TPO to exclude this company from the list of comparables.

3.8 (ii) Jeevan Scientific Technologies Ltd. and (iii) I-Gate Global Solutions Limited : No serious argument was put forth by the ld. DR. Accordingly the exclusion of these two comparables by the DRP is justified. We direct the TPO to exclude these two companies as comparables from the list of comparables.

3.9 The last ground is with regard to finding of the DRP that foreign exchange transactions to be considered as operating in nature ignoring the presence of Rule 10B(2)(d) of the Act that the net profit margin realized by the tax payer in the international transactions shall alone be computed under the TNMM method.

3.10 After hearing both the parties, this issue was considered by this Tribunal in IT(TP)A No.270/Bang/2014 in the case of Cisco Systems Services BE wherein it was held that the foreign exchange fluctuation gain arising to the assessee on realization of trade debtor, payment to creditor, etc. were nothing but operational income. On the same analogy, we are of the opinion that the foreign exchange gain or loss relating to the trading transaction of the assessee should be considered as operating income/expenses. The same view was taken by the ITAT Special Bench in the case of ACIT Vs. Prakash L Shah (306 ITR(AT)01)(SB). Being so, we

are upholding the finding of the DRP on this issue. The ground of appeal taken by the Revenue is rejected.

4. In the result, the appeal of the Revenue is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Dated: 16.12.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore