

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.150/Bang/2016
(Assessment Year: 2011-12)

M/s. Huawei Technologies India Pvt. Ltd.,
Sy No.37, Divyashree Techno Park,
Near EPIP Industrial Area,
Kundalahalli Village, Whitefield,
Bangalore-560 037
PAN AAACH 8599L

....Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 3(1)(2), Bangalore.

.....Respondent.

Assessee By:	Shri Aliasgar Rampurwala, C.A.
Revenue By:	Shri G. Gurusamy, CIT (D.R)

Date of Hearing :	08.12.2020.
Date of Pronouncement :	16.12.2020.

ORDER

PER SHRI CHANDRA POOJARI, A.M. :

This appeal filed by the assessee is directed against the final assessment order passed by the Assessing Officer u/s.143(3) r.w.s. 144C of the Income Tax Act, 1961 ('the Act').

2. The assessee has raised the following grounds :

1. “ That the order passed by the learned Deputy Commissioner of Income-tax, Circle 3(1)(2), Bangalore ('Assessing Officer' or 'MY)/ the Additional Commissioner of Income-tax (Transfer Pricing — 1(3)), Bangalore ('Transfer Pricing Officer' or 'TPO') and the learned Dispute Resolution Panel (the 'Panel' to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.
2. That the learned AO and the learned Panel erred in upholding the rejection of Transfer Pricing ('TP') documentation by the learned TPO and in upholding the adjustment to the transfer price of the Appellant in respect of its Software development services.
3. That on the facts and circumstances of the case, the learned AO and the learned Panel erred in;
4. Upholding the rejection of comparability analysis of the Appellant in the TP documentation and accepting the comparability analysis performed by the learned TPO in the TP Order;
5. Upholding rejection of comparable companies selected by the Appellant from the search process provided by the learned TPO as part of show cause notice which passes the TPO's test of comparability;
6. Inclusion of companies (M/s **Persistent Systems Limited** & M/s **Sasken Communication Technologies Limited**) that are functionally different from Appellant and otherwise fails the test of comparability;
7. Disregarding the application of multiple year/prior year data as used by the Appellant in the TP documentation and holding the current year (i.e., Financial Year 2010-11) data for companies should be considered for comparability;
8. Upholding the learned TPO's approach of using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining arm's length price;
9. Treating loss arising on foreign exchange fluctuations as operating cost while computing the operating profit mark-up of the Appellant as well as the comparable companies on the premise that these are the routine operating costs; and
10. Not providing any adjustment towards the difference in risk profile between the Appellant and the entrepreneur companies selected as comparable while determining the arm's length price.

Other than Transfer Pricing Related

11. Consequently, the learned AO erred in charging interest under section 234B of the Income-tax Act, 1961.

II. The following grounds correspond to the additional grounds of appeal filed by the Assessee.

1. The learned AO/ TPO/ Panel erred in law and on facts in considering E-zest Solutions Limited as comparable company that does not pass the test of functional comparability vis-a-vis the functions performed by the Appellant.
2. The learned AO/ TPO/ Panel erred in law and on facts in not including L G S Global Limited as comparable company even though it passes the test of functional comparability vis-a-vis the functions performed by the Appellant.
3. The learned AO/ TPO/ Panel erred in law and on facts in not including Akshay Software Technologies Limited as comparable company even though it passes the test of functional comparability vis-a-vis the functions performed by the Appellant.
4. The learned AO and the learned TPO in pursuance of the DRP directions erred in law and on facts in not considering Evoke Technologies Private Limited as comparable company that passes all the test of functional comparability vis-a-vis the functions performed by the Appellant without giving the opportunity of being heard.
5. The learned AO and the learned TPO in pursuance of the DRP directions erred in law and on facts in not considering R.S. Software (India) Limited as comparable company that passes all the test of functional comparability vis-a-vis the functions performed by the Appellant without giving the opportunity of being heard.
6. The learned AO and the learned TPO in pursuance of the DRP directions erred in law and on facts in not considering Mindtree Limited as comparable company that passes all the test of functional comparability vis-a-vis the functions performed by the Appellant."

3. At the time of hearing, the learned Authorised Representative has not pressed Ground Nos.1, 2 to 5, 7 to 10 of main grounds. The learned Authorised Representative also not pressed the additional Ground Nos.3, 5 & 6.

3.1 Regarding the admission of additional ground, the learned Authorised Representative submitted that admission of these additional grounds does not require any investigation of fresh facts and which may be admitted in view of the judgement of Hon'ble Supreme Court in the case of NTPC Ltd. Vs. CIT 229 ITR

383 (SC) and also placed reliance on the decision of Special Bench of Chandigarh in the case of DCIT Vs. Quark Systems Pvt. Ltd. 38 SOT 307 wherein it was held that one of the independent comparable which has been included by the assessee as also by the TPO while computing the ALP has been wrongly included in the comparables admitted by the Tribunal; the tax payer is not estopped from pointing out mistake in the assessment though such mistake is the result of evidence adduced by the tax payer. On the other hand, the learned Departmental Representative strictly opposed the admission of additional grounds and submitted that there is no reasonable cause for not raising these grounds on earlier occasion and same to be rejected.

4. We have heard both the parties and perused the material on record. As held by the Special Bench of Chandigarh ITAT in the case of DCIT Vs. Quark Systems Pvt. Ltd., we are inclined to admit the additional grounds as argued by the learned Authorised Representative. Accordingly, the additional grounds are admitted for adjudication.

5. Ground No.6 – With regard to exclusion of comparables -

(i) Persistent Systems Limited and

(ii) Sasken Communication Technologies Limited.

5.1 (i) Persistent Systems Limited - The DRP observed that this company is a global company specializing in the software product development services. For

more than two decades, Persistent Systems Limited has partnered closely with the world's largest technology brands, innovative enterprises and pioneering start-ups to provide end to end product development services. It has primarily fixed on providing end to end product development services to IT products. The company has 297 customers with whom the company has long term contract for software development. The company is engaged in Software Development only. Hence it was included in the list of comparables.

5.2 Now the contention of the AR is that Persistent Systems Limited which was engaged in diversified activities with no segmental break up. He relied on the order of the co-ordinate bench of this Tribunal in the case of LG Software India Pvt. Ltd. in IT(TP)A No.52/Bang/2016 dt.5.8.2020 wherein it was excluded from the list of comparables. The ld. DR submitted that the segmental details could be collected from the said company by issue of notice u/s. 133(6) of the Act and it may be remitted to the Assessing Officer for fresh consideration.

5.3 We have heard the rival contentions, perused and carefully considered the material on record. The company Persistent Systems Limited was considered in the case of LG Software India Pvt. Ltd. cited (supra) by the co-ordinate Bench and it was excluded. Following the judicial precedence, we are of the opinion that the segmental details were not available and it cannot be included in the list of

comparables. Accordingly, we direct the TPO/Assessing Officer to exclude the company from the list of comparables.

5.4 (ii) Sasken Communication Technologies Limited - The Id. AR submitted that this company has income from the sale of products only 9.4% of the total revenue in the assessment year under consideration and it has to be excluded as comparable. On the other hand, the Id. DR submitted that its revenue is 75% from software services as per the Annual Report and it has to be included in the list of comparables.

5.5 We have heard the rival contentions, perused and carefully considered the material on record. It was considered as not comparable in the case of LG Software India Pvt. Ltd. (supra) in the Assessment Year 2011-12 on the reason that the company is functionally distinguishable to the assessee's company since Sasken Communication Technologies is dealing with the Media Products and R&D activities with no break up of segmental information. Accordingly, we direct the TPO/Assessing Officer to exclude this company from the list of comparables.

6. The additional ground Nos.1, 2 & 4 are for exclusion and inclusion of the following companies –

(i) E-Zest Solutions Limited (for exclusion)

(ii) LGS Global Limited (for inclusion)

(iii) Evoke Technologies Pvt. Ltd. (for inclusion)

6.1 (i) E-Zest Solutions Limited - The learned Authorised Representative submitted that this company has to be excluded because it is engaged in Knowledge Process Outsourcing (KPO) and cannot be regarded as software development company. The ld. DR objected the same and supported the order of authorities below.

6.2 We have heard the rival contentions, perused and carefully considered the material on record. In our opinion, the assessee has raised this ground as additional ground and it is appropriate to remit the issue to the file of Assessing Officer / TPO to examine the functional dissimilarities and decide accordingly.

6.3 (ii) Regarding LGS Global Limited, it was submitted that in the case of LSI India Research Pvt. Ltd. in IT(TP)A No.96/Bang/2016 dt.16.06.2017, the Tribunal held in para 12 as under :

“ 12. Now, we are left with two companies for which the assessee is seeking inclusion being LGS Global Ltd. and Akshay Software Technologie Ltd. As per the Tribunal order rendered in the case of Applied Material India Pvt. Ltd. Vs. ACIT (supra), it was held that Akshay Software Technologies Ltd. is not a good comparable. For the second company is LGS Global Ltd., we find that in the case of M/s. Applied Materials India Pvt. Ltd. (supra), it was held by the Tribunal regarding LGS Global Ltd. that the cost of employees is not separately reported by this company and this is also not clear as to whether the goodwill is self generated or it acquired as an intangible asset and therefore, the issue regarding this company was set aside to the record of TPO/Assessing Officer to verify the relevant facts to ascertain the employee cost and then decide the functional comparability. It was also held that information u/s. 133(6) may be obtained from that company for the purpose of ascertaining the annual employee cost of this company. As per the above discussion, we hold that the issue regarding inclusion or exclusion of LGS Global Ltd. (supra) is restored back to the file of the A.O/TPO for fresh decision and the claim of the assessee for inclusion of Akshay Software is

rejected. So the TPO/A.O should first decide about inclusion/exclusion of LGS Global Ltd. and if it is found that this company is to be included, then the ALP should be worked out on the basis of 5 comparables i.e. 1) Evoke Technologies Pvt. Ltd. 2) Mindtree Ltd. (Seg) 3) R S Software (India) Ltd. 4) Larsen & Toubro Infotech Ltd. and 5) LGS Global Ltd. but if it is held that LGS Global is not a good comparable, then the ALP should be worked out on the basis of 4 comparables i.e. 1) Evoke Technologies Pvt. Ltd. 2) Mindtree Ltd. (Seg) 3) R S Software (India) Ltd. and 4) Larsen & Toubro Infotech Ltd. In this manner the TPO/A.O should decide the issue regarding TP Adjustment as per law.”

Accordingly in view of the above order of the Tribunal, we remit the issue to the file of Assessing Officer / TPO with similar directions indicated in E-Zest Solutions Limited above.

6.4 (iii) Regarding Evoke Technologies Limited, this company was selected by the TPO, however, excluded by the DRP suo moto. It was submitted by the Id. AR that because of the margins are low, it cannot be excluded from the list of comparables. For this purpose, he relied on the order of Bangalore Bench of Tribunal in the case of Sterling Commerce Solutions India Pvt. Ltd. Vs. DCIT (IT(TP)A No.1410/Bang/2015 Dt.26.02.2020).

6.5 We have heard the rival contentions, perused and carefully considered the material on record. We find merit in the argument of Id. AR. In view of the order of the co-ordinate Bench of this Tribunal in the case of Sterling Commerce Solutions India Pvt. Ltd. Vs. DCIT (supra) in paras 7 & 8 held as under :

“ 7. As far as the appeal of the Assessee is concerned, on the issue with regard to inclusion of Evoke Technologies Pvt.Ltd., as comparable company, the admitted factual position is that both the Assessee and the Revenue want its inclusion. The Assessee had chosen this company as comparable company in its TP study and the TPO accepted this company as comparable company. The DRP suo motto excluded

this company from the list of comparable companies. The reasons assigned by the DRP for excluding this company was (i) that the margin of this company was abnormally low as compared to other comparable companies and (ii) Expenses on consultancy charges increased by 1,118% which indicated that the low margins during the relevant period was due to peculiar circumstances. It is the plea of the Assessee before us that this company is functionally comparable as it was also a SWD service provider and that low margins cannot be the basis to exclude this company. It was submitted that the DRP has not spelt out as to how increase in consultancy charges resulted in peculiar circumstances prevailing in the case of this company. Our attention was drawn to a decision of the ITAT Bangalore in the case of M/S.Applied Materials India Pvt. Ltd. IT(TP) A.No.17/Bang/2016 & IT(TP)A.No.39/Bang/2016 order dated 21.9.2016 for AY 2011-12 wherein this company was regarded as comparable and include as comparable. The learned DR relied on the order of the DRP.

8. We are of the view that the reasons for exclusion of this company are not sound. When both the Assessee and the revenue seek inclusion of this company, there was no valid basis for the DRP to suo motto exclude this company from the list of comparable companies. In the decision cited by the learned counsel for the Assessee in the case of a SWD service provider such as the Assessee, this company was held to be a valid comparable company and included in the list of comparable companies. We therefore direct inclusion of this company in the list of comparable companies.”

In view of the above decision of Tribunal, we allow the ground taken by the assessee. We direct the Assessing Officer/TPO to include this company in the list of comparables.

7. No other grounds are argued before us.

8. In the result, the appeal of the assessee is partly allowed for statistical purposes.

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

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Sd/-

(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