

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

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

IT(TP)A No.1592/Bang/2014
Assessment year : 2009-10

M/s. Ariba Technologies India Pvt. Ltd., RMZ Icon, # 51, Palace Road, Bangalore – 560 052. PAN: AADCA 0918P	Vs.	The Income Tax Officer, Ward 11(1), Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.1540/Bang/2014
Assessment year : 2009-10

The Income Tax Officer, Ward 11(1), Bangalore.	Vs.	M/s. Ariba Technologies India Pvt. Ltd., Bangalore – 560 052. PAN: AADCA 0918P
APPELLANT		RESPONDENT

Appellant by	:	S/Shri P.K. Prasad & Shri Umashankar Gautam, Advocates
Respondent by	:	Smt. H.L Sowmya, Addl. CIT(DR) ITAT, Bengaluru

Date of hearing	:	19.09.2017
Date of Pronouncement	:	11.10.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

These cross appeals are preferred by the revenue as well as the assessee against the order of CIT(Appeals). Since these appeals were

heard together, these are being disposed of through this consolidated order.

IT(TP)A 1540/Bang/2014

2. This appeal is preferred by the revenue against the order of CIT(Appeals) on a solitary ground that the CIT(Appeals) has erred in directing the AO to follow the ratio laid down by the Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd., 349 ITR 98* and exclude the internet expenses and expenses incurred in foreign currency on travel from the total turnover also while computing the deduction u/s. 10A of the Act, without appreciating the fact that there is no provision in section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the Explanation to section 10A provides that such expenses are to be reduced only from the export turnover, without realizing that the judgment of Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd. (supra)* has not been accepted by the department and a SLP has been filed before the Hon'ble Supreme Court.

3. The Id. DR in support of the ground raised has submitted that since the SLP has been filed in the Hon'ble Supreme Court, the judgment of the Hon'ble jurisdictional High Court should not be followed. The Id. counsel for the assessee, on the other hand, has contended that the operation of the judgment of the Hon'ble jurisdictional High Court has not been stayed

by the Hon'ble Supreme Court, therefore, the Tribunal is supposed to follow the judgment of Hon'ble jurisdictional High Court.

4. Having carefully examined the orders of the lower authorities, we find that so long as the judgment of Hon'ble jurisdictional High Court holds the field, all subordinate authorities are supposed to follow the same. Therefore, we find no infirmity in the order of CIT(Appeals), who has adjudicated the issue following the judgment of the Hon'ble jurisdictional High Court in the case of *Tata Elxsi Ltd. (supra)*. We accordingly confirm his order.

ITA 1592/Bang/2014

5. This appeal is filed by the assessee against the order of the CIT(Appeals) on various grounds and during the course of pendency of the appeal, the assessee has filed revised and concise grounds of appeal with a request that the same may be taken in place of the original grounds raised along with the appeal. Accordingly, the revised grounds filed on 23.06.2017 are taken on record and it replaces the original grounds filed along with the appeal memo. The revised grounds which are required to be adjudicated are extracted hereunder:-

1. That the order passed by the learned Commissioner of Income Tax (Appeals) - IV, Bangalore ("CIT(Appeals)") to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.

2. That the learned CIT (Appeals) erred in upholding the rejection of Transfer Pricing ("TP") documentation by the learned Transfer Pricing Officer ("TPO")/ Assessing Officer ("AO").
3. That on the facts and in the circumstances of the case, the learned CIT (Appeals) erred in making an adjustment to the transfer price of the Appellant in respect of its software development services rendered to associated enterprises amounting to INR 33,015,336 and in doing so grossly erred in:
 - (a) Upholding the rejection of comparability analysis of the Appellant in the Transfer Pricing ("TP") documentation and accepting the comparability analysis performed by the learned TPO in the Transfer Pricing Order.
 - (b) Disregarding application of multiple year/prior year data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year 2008-09) data should be used for comparability.
 - (c) Upholding the action of the TPO of performing his own comparability analysis by modifying certain filters applied by the Appellant and applying diminishing revenue filter and thereby rejecting SIP Technologies and Export Limited that otherwise satisfy the test of functional comparability.
 - (d) Accepting the contention of the TPO in rejecting Computech International Ltd. as comparables whose employee cost was less than 25 percent of the sales and thereby being inconsistent with, the position adopted in, the Appellant's own appeal proceedings before the CIT(A) for Assessment Year 2008-09.
 - (e) Inclusion of Bodhtree Limited in the set of comparable companies that otherwise fails the test of comparability.
 - (f) Upholding the erroneous working capital adjustment computed by the TPO by applying an upper limit on the quantum of working capital adjustment to be provided, thus not granting the correct working capital adjustment to the Appellant.

- (g) Upholding the approach of the TPO of rejecting FCS Software Solutions Ltd. & Thinksoft Global Services Ltd. only on the basis that such companies had a significant bearing on the computation of working capital adjustment of the Appellant.
- (h) Not providing any adjustment towards the difference in the risk profile between the Appellant and the entrepreneurial companies selected as comparables while determining the arm's length price.

That the Appellant craves leave to add to and / or alter, amend, rescind or modify the grounds taken hereinabove before or at the time of hearing of this appeal.

6. The facts in brief borne out from the record are that assessee is a subsidiary of Ariba Technologies Netherlands BV. The assessee is engaged in the business of provision of software consulting and programming services and back office support services to its AE. The assessee is compensating on cost plus mark-up basis for the provision of offshore services. The assessee has been selected as a tested party as it has least complex operations and it bears lesser share of risks. TNMM is considered as most appropriate method for determining the arms' length price (ALP). The assessee was in receipt of a sum of Rs.39.93 crores on account of providing software development charges to its AE and the same was subjected to ALP adjustment by the TPO. TNMM methodology is not in dispute. The TPO has selected 11 comparables for determining the ALP. The assessee has preferred appeal before the CIT(Appeals), but did not find favour with him with respect to exclusion of certain comparables.

7. Now the assessee is in appeal before the Tribunal and during the course of hearing, it has sought exclusion of only on comparable i.e., Bodhtree Consulting Ltd. in support of which it was contended that exclusion of this company was examined by the Tribunal in the case of *Infinera India Pvt. Ltd. in IT(TP)A No.1008/Bang/2014 for the AY 2009-10*, in which one of the Members of this Bench was a party to the order. In that case, the Tribunal has examined the profile of Bodhtree Consulting Ltd. and came to the conclusion that Bodhtree Consulting Ltd. is functionally different, following the order of the Tribunal in the case of M/s. CISCO Systems India Pvt. Ltd. in IT(TP)A No.271/Bang/2014. With regard to the remaining comparables, the assessee has no objection.

8. The Id. counsel for the assessee further sought the inclusion of the following two comparables viz., (1) FCS Software Solutions Ltd. (2) Thinksoft Global Services Ltd. The TPO has rejected these comparables having held that these comparables have significant bearing on the computation of working capital adjustment of the appellant. It was further contended that these comparables are functionally similar and working capital impact does not affect the functional comparability. The Id. counsel for the assessee further contended that these comparables were examined by the Tribunal in the case of Huawei Technologies India Pvt. Ltd. in IT(TP)A No.265/Bang/2014 for the AY 2009-10. Copy of the order of the Tribunal is placed on record.

9. On the other hand, the Id. DR placed reliance upon the order of the CIT(Appeals).

10. Having carefully examined the orders of lower authorities in the light of rival submissions, we find that the factor of working capital adjustment should be taken into account while determining the ALP. If benefit of capital adjustment can be given to assessee, the same should also be taken into account while determining the profit margin in the case of comparables. Therefore, the impact of capital adjustment is always there, whether it may be a case of tested party or the comparables. Therefore, we restore the issue of inclusion of these two comparables to the TPO, to examine the same and allow the working capital adjustment in the case of the comparables and the same be taken in the list of comparables for determining the ALP. The inclusion of other comparable viz., SIP Technologies & Export Ltd. was not pressed by the assessee, therefore, the request for inclusion of the same is rejected.

11. As far as exclusion of Bodhtree Consulting Ltd. is concerned, we find that this issue was examined by the Tribunal in the case of *M/s. Infinera India Pvt. Ltd. (supra)*, wherein the Tribunal following the order of the Tribunal in the case of *Cisco Systems India Pvt. Ltd. (supra)* has directed the exclusion of Bodhtree Consulting Ltd. from the list of comparables. The relevant observations of the Tribunal are extracted hereunder:-

“2) M/s. Bodhtree Consulting Ltd. For exclusion of this company also, reliance has been placed on the same Tribunal order rendered in the case of *Cisco Systems India Pvt. Ltd. (supra)* and in particular, our attention was drawn to para 26.1 available on page no. 98 to 99 of Case Law Compendium. In this case, it is noted by the Tribunal that this company is in the business of software product and was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and therefore, the same cannot be considered as a comparable in the case of companies rendering software development services, as in the present case. Therefore, by respectfully following this Tribunal order, we hold that this company is also excluded from the list of final comparables.”

12. Accordingly, following the order of the Tribunal in the case of *Infinera India Pvt. Ltd. (supra)*, we direct that Bodhtree Consulting Ltd. be excluded from the list of comparables.

13. In the result, the appeal of the assessee stands partly allowed for statistical purposes and the appeal of the revenue stands dismissed.

Pronounced in the open court on this 11th day of October, 2017.

Sd/-

(A.K. GARODIA)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 11th October, 2017.

/ Desai Smurthy /

Copy to:

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

By order

Senior Private Secretary
ITAT, Bangalore.