

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "I-2" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.7043/Del./2014  
Assessment Year 2008-2009

DCIT, Circle-3(1)(2) Room No.418, 4 <sup>th</sup> Floor, E-2 Block, Dr. S.P. Mukherjee Civic Centre, New Delhi 11002.	VS	M/s. Virage Logic International India Branch Office, A-75, Sector-57, Noida, U.P. PAN AABCV8275E
(Appellant)		(Respondent)

For Revenue :	Shri Sanjay Kumar Yadav, D.R.
For Assessee :	Shri Anubhav Rastogi, Advocate

Date of Hearing :	22.02.2018
Date of Pronouncement :	03.2018

**ORDER**

**PER BHAVNESH SAINI, J.M.**

This appeal by Revenue has been directed against the order of the Ld. CIT(A)-XXIX, New Delhi, dated 21<sup>st</sup> October, 2014, for the A.Y. 2008-2009.

2. We have heard the learned Representatives of both the parties and perused the material on record.

3. On Ground No.1, the Revenue challenged the order of Ld. CIT(A) in holding that assessee is entitled to deduction under section 10A of the I.T. Act in respect of export of software.

3.1. Brief facts on the issue are that the assessee is a Company incorporated in USA and is a 100% subsidiary of Virage Logic Corporation. It is a market leader in providing advanced embedded memory intellectual property (IP) for the design of complex integrated circuits. The assessee had a branch office in India, engaged in the business of development of computer software. As per judgment of Hon'ble Karnataka High Court in the case of Indian Branch of Virage Logic Corporation got merged with Synopsys (India) Private Limited. The Branch office was set-up in India after obtaining necessary approval from the Reserve Bank of India (RBI) with the sole object of development and export of software. The branch office set-up a Software Technology Park unit under the Software Technology Parks Scheme of Government of India for establishing the unit therein per approval dated 23<sup>rd</sup>

September, 1999. Since the date the branch was established and also during the instant year, the business of the branch office was to develop and export of computer software to its head office in USA. Products delivered by Virage group consist of various software tools along with supporting files that contain design data for creating the requisite silicon IP. Since inception of Indian Branch Office in May, 1999, engineering site at India has been working on various activities related to IP products and platforms offered as mentioned in the impugned order. All the files are developed on UNIX Operating Systems on Sun platforms or in the Windows NT environment. The created files are shipped overseas electronically via internet. The Branch Office filed its return of income declaring income of Rs.47,11,359/- and claimed refund of Rs.6,29,460/-. The case of the assessee was selected for scrutiny and the A.O. denied deduction under section 10A of the I.T. Act. It was submitted that the issue of deduction under section 10A is squarely covered by the decision of the ITAT in assessee's own case for A.Ys. 2001-2002 to 2007-2008. The order of the Tribunal is

reproduced in the appellate order and the Ld. CIT(A) following the order of the Tribunal, allowed the claim of assessee for deduction under section 10A of the I.T. Act.

2.2. Learned Counsel for the Assessee at the out set submitted that the Departmental Appeal have been dismissed by the Hon'ble jurisdictional Delhi High Court in the case of Dy. Director of Income Tax vs. Virage Logic International reported in (2016) 389 ITR 142 (Del.) confirming the order of the Tribunal in allowing deduction under section 10A of the I.T. Act.

3. The Ld. D.R. did not dispute this proposition.

4. In view of the above, it is clear the Tribunal has already decided the issue of deduction under section 10A of the I.T. Act in favour of the assessee in preceding assessment years. The appeal of the Department have been dismissed by the Hon'ble jurisdictional Delhi High Court. The issue is, therefore, covered in favour of the assessee by order of the Tribunal as well as Hon'ble jurisdictional Delhi High Court. Ground No.1 of appeal of Revenue is dismissed.

5. On ground No.2, Revenue challenged the order of the Ld. CIT(A) in directing the A.O./TPO to exclude M/s. Infosys Technologies Ltd., from the list of comparables for the purpose of benchmarking the international transaction and computing the ALP in relation to software development services. The TPO/A.O. have considered the issue of ALP under section 92CA(3) of the I.T. Act and made adjustment amounting to Rs.2,07,75,061/-. The assessee challenged the orders of the authorities below before Ld. CIT(A). The assessee submitted before Ld. CIT(A) that in its T.P. study it has used TNMM method as the most appropriate method and Operating Profit/Total Cost ('OP/TC') as the Profit Level Indicator (PLI). The benchmarking analysis conducted by the assessee in its T.P. documentation using multiple year data shows assessee's OP/TC at 6.95% but average comparables OP/TC is 4.07%. The assessee produced complete data before TPO. The TPO asked assessee to file fresh search for identify comparable and assessee filed, out of which, TPO accepted 05 out of 07 comparables from the fresh search analysis submitted by

assessee. The TPO denied the working capital adjustment to the margin of the comparables on the ground that assessee did not demonstrate that the working capital deployed affected the margin earned by the assessee and the comparables. The TPO, therefore, passed order under section 92CA(3) of the Act, computed an addition of Rs.2,07,75,061/- to the taxable income of the assessee.

5.1. The assessee submitted before Ld. CIT(A) that assessee is entitled for tax holiday under section 10A of the I.T. Act on its profit. Therefore, there would not have any untoward motive of deriving a tax advantage by manipulating transfer prices of its international transaction. It was, therefore, submitted that since the assessee enjoyed tax holiday under section 10A of the I.T. Act, hence, does not have any motive to shift profit out of India to manipulate transfer price. The assessee submitted that comparables' search process undertaken by the assessee in its T.P. study was an extremely comprehensive and detailed exercise and involved application

of various quantitative filters, followed by a detailed qualitative analysis involving selecting/rejecting companies on the basis of their business descriptions/activities and also existence of controlled/related party transactions, which may significantly affect their profitability. The action of the TPO in rejecting comparables in its T.P documentation is completely erroneous. The detailed submissions of the assessee is reproduced in the appellate order. The FAR analysis of each of the comparables selected by TPO have been discussed in the appellate order and as regards the sole issue relating to M/s. Infosys Technology Ltd., the analysis of the assessee that it is in no way comparable with assessee's functions of I.T. Services, is reproduced in the impugned order which reads as under :

*“6. Infosys Technologies Limited (“Infosys”)*

*High Turnover : Company has a turnover of Rs.15,648 crores which is 866 times that of Appellant's turnover of 18.06 crores.*

*Intangibles : The Company has substantial intangible assets valued at INR 130,684 crores comprising brand*

*value itself at INR 31,863 crores (as on March 31, 2008) as provided in the annual report for FY 2008. On the other hand, the Appellant being a captive service provider, rendering services to its overseas affiliate within a risk insulated scenario is not required to create brand awareness and thereby have premium pricing*

*Further the Appellant would like to highlight the following differences between Infosys and the appellant :*

- Infosys is a giant in the software development space, while Appellant is a captive unit of its parent.*
- Infosys assumes all risk while Appellant assumes limited risks.*
- Also Infosys develops/owns proprietary products, and has significant intangibles assets.*
- Almost half of the software development services rendered by Infosys are onsite (typically, onsite services command higher billable rates), whereas taxpayer provides only offshore services.*

*Infosys has been rejected in the recent rulings in case of :*



- *Delhi High Court in the ruling of Agnity India Technologies Pvt. Ltd., ITA.No.1204/2011*
- *Toluna India Private Limited*
- *Agnity India Technologies Pvt. Ltd., (ITA.No.3856(Del./2010), ITAT, Delhi.*
- *Telcordia Technologies India P. Ltd.,*
- *Sonata Software Ltd., ITA.No.3514/Mum/2010, ITAT, Mumbai.*
- *Meritor LVS India (P) Ltd., ITA.No.405 & 523/B/11, (TS-681-ITAT-2012(Bang)-TP), ITAT, Bangalore.*
- *Bearing Point Business Consulting Private Ltd.,*
- *Trilogy E-Business Software India Pvt. Limited*
- *Adoptec India Private Limited.”*

5.2. The Ld. CIT(A) in his findings recorded M/s. Infosys Technology Ltd., after examining the details on record found that the main argument of the assessee is that this company being a giant industry cannot be compared with the assessee. The Ld. CIT(A) followed the decision of Hon’ble jurisdictional Delhi High Court in the case of CIT vs. Agnity India Technologies Pvt. Ltd., 262 CTR 391 and directed the A.O. to drop this company as comparable.

6. The Revenue is in appeal against the direction of the Ld. CIT(A) in directing to drop this company as comparable on ground No.2.

7. The Ld. D.R. relied upon the order of the TPO/A.O. and submitted that the Ld. CIT(A) has erred in excluding M/s. Infosys Technology Ltd., from the list of comparables solely on the basis of high turnover which is unsustainable in law, considering the settled position to the effect that high or low turnover by itself cannot be a ground for excluding an entity as comparable. He has submitted that Ld. CIT(A) has not examined this issue in proper perspective and decision of M/s. Aginity India Technologies Pvt. Ltd., is distinguishable on facts.

8. On the other hand, Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted that both the companies are independent and functions are not comparable and an identical issue have been decided in favour of the assessee by the Hon'ble jurisdictional Delhi High Court in the case of CIT vs. Aginity India

Technologies Pvt. Ltd., (supra). He has submitted that ITAT, Delhi Bench in several decisions on the same reason, directed to exclude M/s. Infosys Technology Ltd., from the final set of comparables and filed copies of the following orders, in which M/s. Infosys Technology Ltd., have been excluded from the comparables.

- “1. Decision of the ITAT, Delhi Bench in the case of Siemens Product Lifecycle Management Software (India) (P.) Ltd., vs. ACIT (2018) 90 taxmann.com 165 (Del.) (Tribu.)*
- 2. Decision of the ITAT, Delhi Bench in the case of Sun Life India Service Centre (P.) Ltd., vs. ACIT (2015) 63 taxmann.com 167 (Del.) (Tribu.)*
- 3. Decision of the ITAT, Delhi Bench in the case of Global Logic India (P.) Ltd., vs. DCIT (2015) 41 ITR (T) 622 (Del.) (Tribu.)*
- 4. Decision of the ITAT, Delhi Bench in the case of Aircom International India (P.) Ltd., vs. DCIT (2017) 189 TTJ 682 (Del.) (Tribu.)*
- 5. Decision of the ITAT, Delhi Bench in the case of Converse Network Systems India (P.) Ltd., vs. ACIT (2017) 54 ITR (T) 158 (Del.) (Tribu.)”*

8. We have considered the rival contentions and perused the material available on record. The assessee-

company has filed its submissions and its analysis with regard to M/s. Infosys Technology Ltd. It has been pointed-out that this company has huge turnover which is 866 times to that of the assessee's turnover. It was also explained that this company has substantial tangible assets. On the other hand, assessee, being a captive service provider, rendering services to its overseas affiliate within a risk insulated scenario is not required to create brand awareness and thereby, have premium pricing. The assessee also explained that M/s. Infosys Technology Ltd., is a giant in software development while assessee is a captive unit of its parent. M/s. Infosys Technology Ltd., assumes all risks while assessee assumes limited risk. Almost half of the software development services rendered by M/s. Infosys Technology Ltd., are onsite, whereas, assessee provides only off-shore services. The contention of assessee has been accepted by Ld. CIT(A) after examining the issue. The Hon'ble jurisdictional Delhi High Court in the case of Aginity India Technologies Pvt. Ltd., (supra), considered the identical issue and as regards M/s. Infosys Technology Ltd., held in para-6 as under :

*“6. Learned counsel for the Revenue has submitted that the Tribunal after recording the aforesaid table has not affirmed or given any finding on the differences. This is partly correct as the Tribunal has stated that Infosys Technologies Ltd. should be excluded from the list of comparables for the reason latter was a giant company in the area of development of software and it assumed all risks leading to higher profits, whereas the respondent-assessee was a captive unit of the parent company and assumed only a limited risk. It has also stated that Infosys Technologies Ltd. cannot be compared with the respondent-assessee as seen from the financial data etc. to the two companies mentioned earlier in the order i.e. the chart. In the grounds of appeal the Revenue has not been able to controvert or deny the data and differences mentioned in the tabulated form. The chart has not been controverted.”*

8.1. The Hon’ble jurisdictional Delhi High Court dismissed the appeal of the Revenue. Learned Counsel for the

Assessee also filed copies of various decisions of ITAT, Delhi Bench referred to above, in which, also the Tribunal has excluded M/s. Infosys Technology Ltd., from comparables. Considering the above discussion in the light of explanation and analysis provided by the assessee, which have not been controverted by the Revenue, we do not find any infirmity in the order of the Ld. CIT(A), in directing to exclude M/s. Infosys Technology Ltd., from comparables. There is no merit in the Departmental Appeal on Ground No.2. The same is accordingly dismissed.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court.

**Sd/-**  
**(L.P. SAHU)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(BHAVNESH SAINI)**  
**JUDICIAL MEMBER**

Delhi, Dated 01<sup>st</sup> March, 2018

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT '1-2' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :  
Delhi.