

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

ITA No.619/H/2016		
Assessment Year:2010-11		
Vitech Systems Asia Pvt Ltd., Hyderabad. PAN: AADCP 0816 H	Vs.	Income Tax Officer, Ward-3(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Sri C.P. Ramaswamy	
Revenue by:	Sri Sunil Kumar Pandey, DR	
Date of hearing:	02/03/2020	
Date of pronouncement:	15/07/2020	

ORDER

PER A. MOHAN ALANKAMONY, AM.:

This appeal is filed by the assessee against the order of the Ld. CIT (A)-5, Hyderabad in appeal No. 0469/2014-15/CIT(A)-5, dated 28/01/2016 passed U/s. 143(3) r.w.s 250(6) of the Act for the AY 2010-11.

2. The assessee has raised the following grounds in its appeal:-

- "1. *The impugned order of the learned Commissioner Appeals filed at Hyderabad dated 28/01/2016 is against law, weight of evidence and probabilities of the case.*
2. *The Learned CIT (Appeals) erred in confirming the action of the AO rejecting the transfer pricing documentation filed by appellant.*

3. *The Learned CIT (Appeals) erred in upholding the rejection of filters applied by the appellant for benchmarking. He failed to appreciate the logic and reasoning demonstrated by the appellant.*
- 4a. *The Learned CIT (Appeals) erred in treating the exchange loss as part of the operating margin since he fails to appreciate that the appellant has been consistently declaring profit/loss due to exchange fluctuation in its profit & loss account.*
- 4b. *The Learned CIT (Appeals) failed to appreciate that exchange rate fluctuation cannot be considered as part of operating cost because the factors determining such fluctuation are affected by global ups and downs in the financial sector. Consequently he erred in treating the exchange loss as part of the operating margin.*
5. *The Learned CIT (Appeals) erred in considering companies with functional differences as comparables as he failed to appreciate that outsourcing companies in IT Sector cannot be equated with the appellant company which develops products onsite and consequently erred in upholding the adjusted arms length price as determined by the AO.*
6. *The Learned CIT (Appeals) erred in treating M/s. CAT Technologies ltd. As comparable despite the fact that the Appellant company does not incur any significant expenditure in advertisement and marketing in contrast to M/ s. CAT technologies laying out a large sum on that aspect. Consequently he erred in confirming the ALP.*
7. *The appellant prays that the ALP as declared by the Appellant be upheld because both the Appellant and the AO have adopted TNMM as most appropriate method and the difference in ALP is arrived at by AO by choosing incomparable companies as comparables.*
8. *The appellant prays to add, alter, amend, explain and modify the ground /s as the occasion may demand.”*

3. The brief facts of the case are that the assessee is a private Limited Company engaged in the business of software development filed its return of income for the AY 2010-11 on 9/10/2010 declaring NIL income. Initially the return was processed U/s. 143(1) of the Act and thereafter the case was taken up for scrutiny and finally the assessment was completed on 26/3/2013 wherein the Ld. AO made several additions including upward adjustment U/s. 92C(3) of the Act for Rs.

73,44,622/-. Aggrieved by the order of the Ld.AO, the assessee carried the matter before the Ld. CIT (A) who in turn confirmed the order of the Ld. AO. Aggrieved by the order of the Ld. CIT (A) the assessee is now on appeal before us.

4. At the outset, the Ld. AR submitted before us that the ld. Revenue Authorities had erroneously included M/s. Kals Information Systems Ltd., Accelya-Kale Solutions Ltd and Infinite Data Systems Pvt Ltd., while computing the Arithmetic mean because these three companies are functionally dissimilar. Instantly, the Bench opined that the Revenue has taken into consideration of several companies which cannot be considered as comparable Companies with the assessee company as the OP / OC those Companies varies from -0.29% to 72.65% while as the assessee's OP / OC is 7.12%. The Ld. AR concurred with the view of the Bench and agreed that the matter may be remitted back to the file of Ld. AO for fresh consideration. It is obvious that a company whose OP / OC is -0.29%, -3.02%, -18.72%, 72.65% etc., cannot be reasonably compared with a company whose OP / OC is 7.12% unless there is substantial evidence to establish that they are functionally same in all the features. Therefore, in the interest of justice, we hereby remit the entire matter back to the file of the Ld. AO for de novo consideration.

5. Needless to mention that the issue with respect to foreign exchange gain or loss has been already decided by the Bangalore Bench of the Tribunal in the cases, Sap Labs Ltd, Triology E-business software Ltd and by the Hyderabad Bench in the case of Foursoft limited wherein it was held that the Foreign Exchange loss on account of exchange rate fluctuations arises in the normal course of business transaction, therefore, while computing the margin for determining the ALP, the foreign exchange loss has to be taken as part of the Operating Margin. Hence, we do not find it necessary to interfere with the order of the Ld. CIT (A) on this issue because the Ld.CIT(A) has only followed the decision of the Hyderabad and Bangalore benches while deciding the case of the assessee.

6. Before parting, it is worthwhile to mention that this order is pronounced after 90 days of hearing the appeal, which is though against the usual norms, we find it appropriate, taking into consideration of the extra-ordinary situation in the light of the lock-down due to Covid-19 pandemic. While doing so, we have relied in the decision of Mumbai Bench of the Tribunal in the case of DCIT vs. JSW Ltd. In ITA No.6264/M/2018 and 6103/M/2018 for AY 2013-14 order dated 14th May 2020.

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

Pronounced in the open Court on 15th July, 2020.

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(A. MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Hyderabad, Dated: 15th July, 2020.

OKK

Copy to:-

- 1) M/s. Vitech Systems Asia Private Limited, Mindspace Cyberabad Project, Survey No. 64 (part), 13th Floor, Unit 1301, Building No. 12B, Madhapur, Hyderabad – 500 081.
- 2) Income Tax Officer, Ward-3(2), Hyderabad.
- 3) The CIT (A)-05, Hyderabad.
- 4) The Pr. CIT-5, Hyderabad.
- 5) The DR, ITAT, Hyderabad
- 6) Guard File

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8	Date on which file goes to the Head Clerk			
9	Date of Dispatch of order			