

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6692/Del/2018
(Assessment Year: 2014-15)

Open Solutions Software Services Pvt. Ltd, 30, Annexe Building, First Floor, Nizamuddin East, New Delhi PAN: AAACO7542G	Vs.	Addl. CIT, Special Range-7, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Sachit Jolly, Adv Shri Aayush Nagpal, Adv
Revenue by:	Sri HK Choudhury CIT DR
Date of Hearing	07/08/2020
Date of pronouncement	29/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the assessee against the order of The Additional Commissioner Of Income Tax, Special Range – 7, New Delhi (the ld AO) u/s 143(3)/ 92CA (3) and 144C (1) of The Income Tax Act (The Act) dated 30.08.2018 for AY 2014-15 determining total income of the assessee at Rs. 1416117999/- against the return of income filed by the assessee on 30.11.2014 at Rs. 113503990/-.
2. The only issue is the addition made by the ld AO on account of arm's length price of the international transaction of Rs. 32614009/-. The assessee has raised the following grounds of appeal contesting the above transfer pricing adjustment:-
 - “1. That on facts and circumstances of the case and in law, the Assessing Officer ("AO") erred in assessing the total income of the Appellant at Rs. 14,61,18,000/-(rounded off) as against income of Rs. 11,35,03,990/- returned by the Appellant after making transfer pricing addition of Rs. 3,26,14,009/- in respect of international transaction of software development services rendered by the Appellant to its parent company, viz., Open Solutions Inc., USA.

2. *That on facts and in circumstances of the case and in law, the AO erred in making a reference to the Transfer Pricing Officer ("TPO") under Section 92CA of the Income tax Act, 1961 (the "Act") without recording reasons on the basis which the AO considered it "necessary or expedient" to refer the international transaction entered into by the Appellant with its associated enterprise ("AE").*
3. *That the DRP erred in confirming the action of the TPO in segregating the international transaction entered into by the Appellant with its AE, into IT segment and ITeS segment, without appreciating that there were no separate segments into which the international transactions could be segregated.*
4. *That on facts and in circumstances of the case and in law, the AO and DRP erred in partly confirming the action of the TPO in making an addition to the income of the Appellant without appreciating that the Appellant had computed arm's length price in respect of international transaction entered into by the Appellant with its AE using the most appropriate method (i.e. the Transactional Net Margin Method), maintained all the information and documentation required under section 92D of the Act, used information/ data available in the database (Prowess database and Capitaline database) at the time of filing the income tax return on a bonafide belief that the data in the database is reliable and correct and had furnished the Transfer Pricing Study ("TP Study").*
5. *That the AO and DRP erred in confirming the action of the TPO in rejecting the Transfer Pricing Study of the Appellant and in conducting a fresh benchmarking analysis on the basis of conjectures and surmises.*
6. *That the Ld. AO and DRP erred in confirming the order passed by the TPO without appreciating that the TPO erred in rejecting the functional filters applied by the Appellant in its TP Study.*
7. *That on facts and circumstances of the case and in law, the AO and DRP erred in confirming the action of the TPO in applying the following filters:*
 - a) *Use of only current year (i.e. financial year 2013-14) data for comparability despite the fact that at the time of comparison done by the Appellant, the complete data for the FY 2013-14 was not available in the public domain;*
 - b) *Rejecting companies with different financial year ending without appreciating that the said filter could not be applied in a blanket manner.*
 - c) *Rejecting companies with employee cost of less than 25% of total cost for the period under consideration, without appreciating that in the Appellant's own case for AY 2012-13, filter of 50% employee cost has been upheld by the DRP.*
 - d) *Rejecting companies whose ratio of service income to total income is less than 75%;*

- e) *Rejecting companies whose export revenues are less than 75% of the operating revenues without appreciating that the said filter has no effect on comparability analysis;*
 - f) *Rejecting companies where related party transactions exceeds 25% of sales without appreciating that companies with any related party transactions should have been excluded or else companies with RPT of more than 10-15% to sales should have been excluded;*
 - g) *Rejecting companies with diminishing revenue/ persistent losses in complete contradiction of the filter of single year data applied by the TPO himself;*
8. *That the Ld. AO and DRP erred in confirming the incorrect computation of margins of the comparable companies selected by the TPO.*
 9. *That the Ld. AO and DRP erred in confirming the action of the TPO in rejecting the comparable companies selected by the Appellant without providing any cogent and sufficient reasoning.*
 10. *That the Ld. AO and DRP erred in confirming the action of the TPO in selecting the following companies which were not functionally comparable to the Appellant for the purposes of benchmarking the international transaction entered into by the Appellant:*
 - a) *Cybercom Datamatics Information Solutions Ltd.*
 - b) *Persistent Systems Ltd.*
 - c) *Mindtree Ltd.*
 - d) *Larsen & Toubro Infotech Ltd.*
 - e) *Cigniti Technologies Ltd.*
 - f) *Sasken Communication Technologies Ltd.*
 11. *That the DRP erred in upholding the action of the TPO in cherry picking Cybercom Datamatics Information Solutions Ltd. as a comparable, solely on the ground of high profit margin, even though the said comparable never featured in the search conducted by the TPO nor was part of the SCN issued by the TPO.*
 12. *That the AO and DRP erred in confirming the action of the TPO in not allowing working capital adjustment and risk adjustment claimed by Appellant in terms of Rule 10B(l)(e) read with Rule 10B(3) of the Income tax Rules, 1962.*
 13. *The Ld. AO erred on facts and circumstances of the case and in law in charging interest under Sections 234B and 234C of the Act.*
 14. *That the Ld. AO erred on facts and in law in mechanically initiating penalty proceeding under Section 271(l)(c) of the Act without recording any adequate satisfaction for such initiation.”*
3. The assessee has raised in all 12 grounds of appeal on transfer pricing issues. Out of which, ground No. 1 is general in nature. Ground Nos. 13-14 are with respect to chargeability of interest u/s 234B and 234C and

initiation of penalty u/s 271(1)(c) of the Act. Accordingly, ground No. 1, 13 and 14 do not have any merit for consideration as well as no specific arguments were referred hence, they are dismissed. Therefore, we are left with ground number 2 – 12 of the grounds of appeal, which are relating to the transfer pricing adjustment.

4. The brief facts of the case show that assessee is a private ltd company; it is engaged in providing software development research and related services. It is a technology provider to banks, thrifts and credit unions. It provides solutions for core banking platform built for global collaboration. It is used in banks and financial services firms in North America and around the globe. It provides solutions for core banking, full-service channels, self-service channels, channel optimization, financial solutions, integration and collaboration, document management, commercial services, payments, lending and corporate services. It is engaged in providing software development research and ITes related services to its associated enterprise and is compensated on total cost +15%.
5. The assessee entered into 7 types of international transaction during the year. The assessee has entered into provision of software development and research related services along with other receipts and payment adopted Transactional Net Margin Method as the most appropriate method, selected 12 comparables was 7.05%, therefore, the assessee as per TP documentation held same to be at arm's length. The
6. The ld TPO recomputed the PLI of the assessee and held that same is at 15.72% and also decided the 12 comparables. He carried out the fresh search and after discussion selected 16 compares shows PLI margin determined at 30.30%. He applied the same to the operating cost of the assessee of Rs. 280016195/- and found that the arms length price of the assessee should be Rs. 365029112/-. The price charged by the assessee was Rs. 324042619/- and therefore, proposed an adjustment Rs. 40986493/- with respect to the IT Services. In ITES services he also proposed an adjustment of Rs. 15082666/-.
7. On the basis of draft assessment order on which objections were filed by the assessee, the ld DRP-2, New Delhi after considering the objections of the assessee the ld TPO passed an order on 29.08.2018, wherein in IT sector 12

comparables were retained whose PLI is 27.37% and adjustment was reduced to Rs. 32614009/- against the original adjustment proposed at Rs. 40986493/-. The addition on account of ITES segment was Nil against proposed adjustment of Rs. 15082666/-. The ld AO passed a final assessment order on 30.08.2018 of Rs. 32614009/- which is contested by the assessee.

8. To contest the above assessment the ld AR submitted that the assessee is contesting for deletion of the comparables namely:-
 - a. Persistent Systems Ltd
 - b. Larsen and Toubro Infotech Ltd
 - c. Sasken Technology Ltd
 - d. Cybercom Datamatic Information Solutions Ltd.
9. He also pressed for working capital adjustment.
10. The ld AR submitted that Persistent Systems Ltd was also a comparable analysis in case of assessee for AY 2010-11. The matter reached the coordinate bench in that particular year and coordinate bench has deleted the above comparable in that year. He referred to page No. 955 to 957 of the Paper Book. He further submitted that there is no change in the fact and circumstances of the case and therefore, same should be excluded for this year too.
11. The ld CIT DR submitted that ld TPO has correctly held that same to be includible.
12. We have carefully considered the rival contentions with respect to the above comparable and find that the orders of the coordinate bench in ITA No. 7078/Del/2014 for AY 2010-11 vide para No. 8 has excluded the Persistent Systems Pvt. Ltd from the comparable analysis. In that order it was held that Persistent Systems as software services and products in its income segment, however, there is no segmental information available. The ld DR could not show us any reason that FAR of the assessee for AY 2010-11 is different in this year. Therefore, respectfully following the decision of the coordinate bench in assessee's own case we direct the ld TPO/ AO to exclude the Persistent Systems Ltd from the comparable analysis.

- “8. Before us the Ld. Counsel submitted that Persistent Systems Ltd. (PSL) is functionally dissimilar from the assessee, because this company is not only into software development services but also into software products like, Wave Relay(R), Android Kit, Integration Board Gen4, Quad Radio Router, Tracking Antenna System, Management Tools, Cloud Relay, Firefighting Kit etc. Moreover no segmental details are available in the annual report of the said company for both the activities. Apart from that the ITA 7078/Del/2014 A.Y. 2010-11 M/s Open Solutions Services Pvt.Ltd. domestic sales of this company is Rs. 30.4 crores as compared to 'nil' of the assessee and commission paid to agents on sales is at Rs. 3.31 crores, which indicates or demonstrate that, this company has substantial income from sales. Further in the case of group company of the assessee which is in the same line of business, i.e., Fiserve India in ITA 6737/Del/2014 the Tribunal has excluded this comparable and such an order of the Tribunal has now been confirmed by the Hon'ble Delhi High Court vide judgment dated 7.10.2016 in ITA 602/2016. Further in another group company's case, i.e. Cash Edge India Pvt.Ltd. (order dt. 23.9.2015 in ITA 64/Del/15) for the A.Y. 2010-11 again this company was held to be incomparable. This judgement of the Tribunal too has been confirmed by Hon'ble High Court vide order in ITA 279/2015.
- 8.1 On the other hand the Ld.D.R. drew our attention to functional analysis of PSL pointing out that in the course of its software development functions it gets into product development segment also. Here in case of assessee also once the concept of the product is determined, then A.E. contracts with the assessee to execute the design and software development products on a module/part of the final product. Thus, to say that during the course of its providing software development services there is no element of product would not be a correct statement. The overall functions performed by the PSL is exactly the same and there is no trading by the said company. This company is also into outsource software product development. Hence, this comparable company has rightly been included by the TPO.”

13. The ld AR submitted before us that the identical facts extend in this year also. He referred to page No. 636 of the Paper Book which shows that the Persistent Systems Ltd has a product; he also referred to page No. 644 of the Paper Book which is report of the directors wherein, the business profile showed that company is specialized in building computer software products. He further referred to page No. 704 of the paper book which is the business responsibility report of Persistent Systems Ltd. At Sl No. 8 he submitted that the company is engaged in outsourced software product development and IT Products. Therefore, he submitted that this issue is squarely covered in favour of the assessee.
14. The learned departmental representative vehemently supported the order of the learned TPO and direction of the learned dispute resolution panel with respect to this comparable.
15. We have carefully considered the rival contentions and found that Page No. 636, 646 and 704 referred to by the ld AR are belonging to the consolidated financial statement of Persistent Systems Ltd which has not at all were used by the ld TPO for comparable analysis. In fact the TPO has used Persistent Systems Ltd on standalone basis as comparable. It clearly shows that the revenue from operation at page No. 778 and further corresponding note NO. 21 at page No. 798 clearly show that revenue is only derived from sale of software services. Therefore, it is apparent that there is no sale of any product in this year. Therefore, the finding of the coordinate bench in assessment year 2010-11 that income stream of the company is software services and product is not applicable in the current year. As there is no product sale but only services there is only one segment hence, there is no requirement of any segmental information, as held by the coordinate bench for that year. Further, with respect to the commission paid which is also referred to page No. 799 under Note No. 24 read with Note No. 30 clearly shows that it is also paid to a related party and with respect to sales only. Therefore, there is no reference to any commission on sale of product. The reference made by the ld AR at page No. 636 of Accelerite Products with related to Santa Clara, California relates to US subsidiary Persistent Systems incorporated. Page No. 644 is an overview business of the Persistent Systems Ltd including its subsidiary and not of Persistent

Systems only. Page NO. 704 is also related to the consolidated financial statements. Hence, these are not related to the comparability analysis hence rejected. Therefore, for this year we are not inclined to note that persistent Systems Ltd is functionally not comparable to the assessee. Therefore, the coordinate bench in assessee's own case for assessment year 2010 – 11 excluded this company on altogether different facts, for this year we have noted the facts on the standalone financial statements of persistent Systems Ltd which does not support its exclusion.

16. Ld DRP has considered this issue at page No. 5 and 6 of its direction. The finding of the ld DRP is as under:-

<p>Persistent Systems Ltd</p>	<p>The assessee has contended that company is also engaged in software products. On the basis of discussion made above regarding application of TNMM the functionality of company is broadly similar to the assessee. Hence, the contention of assessee is rejected.</p>	<p>Functionally not comparable: Persistent is engaged in diversified business operations, which include sale of software products, services and technology innovation. Persistent offers complete product life cycle services, as against the assessee which is engaged in rendering routine software development, research and related services. T s also engaged in product development such as SCOMOS, SanGeniX, PEAS, PeBAL, and eMee. Segmental information not available: Its business operations include sale of software products services and technology innovations. Segmental breakup for software service segment is not available. Intangible and Investment in Intellectual property: It owns intangible amounting to INR 162.85 millions which consists of software and contractual rights. Significant R&D Expenditure: Persistent is engaged in R&d activities within its in house scientific and industrial</p>	<p>The company is into software development. The assessee too in into this field. The P&L account shows it has only one stream of revenue i.e. sale of software services. It means it is not into product development. There is no stock in trade in the P&L account. As per the balance sheet it has total intangible assets of Rs. 70 crores (which includes contractual rights b/f of 54 Cr.) against total assets of Rs. 280 Cr. Which is not very</p>
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		research. It has incurred INR 39.61 million on account of expenditure on R&D. R&D expenditure incurred by Persistent on various projects is recognized as an intangible asset.	significant. Thus, the FAR is similar to that of the assessee. It should be retained.
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17. The learned dispute resolution panel has clearly given the reasons why it is held that the above comparable is a good comparable. None of the arguments were advanced before us to show that the finding of the learned dispute resolution panel in its direction is incorrect/erroneous.
18. Assessee has also relied upon the decision of the honourable coordinate bench in case of Saxo India private limited in ITA number 6148/del/2015 for assessment year 2011 – 12 dated 5 February 2016 wherein the persistent Systems Ltd is dealt with at para number 14 and it has been directed to be excluded from the comparability analysis in case of that company. The order of the coordinate bench when challenged by the revenue has been upheld before the honourable High Court as per order dated 28 September 2016 in ITA number 682/2016. No doubt, for the comparability analysis in case of that assessee, persistent Systems Ltd was held to be not a good comparable and therefore same was excluded.
19. On comparing the functions of the assessee in that case we note that it was engaged in the business of design and development of customized software application and was also providing technical support services. The assessee is engaged in providing software development research and related services to its associated enterprises. From the above observation of the coordinate bench in that case as well as the functional profile of the assessee available before us, we do not find any similarity. Further the issue was decided in ITA number 6148/del/2015 for assessment year 2011 – 12, we do not have any financial statements are available of assessee in that case or of persistent Systems Ltd for that financial year i.e. 2010 – 11.
20. Further, the comparability analysis is always required to be decided on the basis of the functions performed by the assessee, assets employed by the assessee to perform those functions and risk assumed by the assessee for those functions which is resulted into the revenue/profitability of the

appellant. To test such revenue/profitability of the assessee, the comparability has to be tested of another entity that entered into uncontrolled transaction performing similar functions, employing similar assets and also assuming similar risk. Therefore, irrespective of the judicial precedent which is held that comparable X is not comparable with Y assessee, is not at all comparable with all other assessees for the reason that it was held to be not comparable with assessee Y. If that is presumed to be the law, then all the requirement of maintaining information and documents to be kept in maintain u/s 92D with respect to the international transaction is futile. Then for the comparability analysis, only the judicial precedents where the comparable having the higher margin is excluded is required to be maintained for its exclusion. That is not the mandate of the law. The mandate of the law clearly provides that FAR should be compared for this reason also we reject the reliance placed by the assessee on other judicial precedents, as there was no comparability made of the functional profiles of the assessee with the assessee in whose case such comparables are held to be excluded or included.

21. In view of the above facts, we do not find any infirmity in the order of the learned transfer pricing officer as well as the direction of the learned that DRP in holding that persistent Systems Ltd is a good comparable. Therefore, we reject the argument for its exclusion.
22. Second comparable contested by the assessee i.e. L&T Infotech Ltd. The assessee submitted that it filed an objection before the ld DRP as per para No. 4.5.2 however same has not been considered by the DRP. Therefore, we set aside this comparable before the learned dispute resolution panel to decide on the objections of the assessee.
23. The third comparables is with respect to Sasken Communication Technology Ltd. the learned authorised representative referred to para No. 7 of the order of the ld TPO stating that the Sasken Communication and Technology Ltd was taken as comparable by the ld TPO further the margin of the same were 7.28%. He submitted that however when the IT segment services were computed at Sl NO. 11 at Page NO. 52 the margin of this company taken at 33.20%. He further submitted that in the decision of coordinate bench in case of another assessee Saxo India, the coordinate

bench has deleted, excluded the above comparable company and therefore it should also be excluded in case of the assessee.

24. The learned DR submitted that assessee has not objected this comparable company before the learned DRP and therefore there is no direction of the learned dispute resolution panel with respect to above comparable.
25. We have carefully considered the rival contention and find that only objection of the assessee is that above comparable company has different margin shown in the show cause notice and order of the TPO. In the show cause notice at page number four of the order the margins of this comparable was shown to be 7.28% whereas in the TP order as well as the effect order passed by the TPO on direction of the learned dispute resolution panel the margin of this comparable were taken at 33.2%. There is no justification or reasons were found in the TP order for change in the margins and the basis of such changes. Therefore, we set aside this comparable to the file of the learned transfer pricing officer to show assessee how he has changed the above margin and on what basis the margins have gone up to 33.2% from 7.28%.
26. The fourth comparable challenged before us is cybercom Datamatics information solutions Ltd which is challenged by the assessee stating that it was never part of the show cause notice issued by the learned transfer pricing officer but featured in the final order of the learned transfer pricing officer. We have carefully gone through the showcause notice issued by the learned transfer pricing officer dated 18 August 2017 and find that in para number seven this comparable company was not at all considered in the show cause notice but was taken into the order u/s 92CA (3) of the act straight. In view of this, we direct the learned transfer pricing officer to exclude the above comparable company from the comparability analysis as no proper opportunity was given to the assessee to contest the same before the learned transfer pricing officer.
27. Thus ground number 2 – 11 are allowed as above.
28. The ground number 12 is with respect to the adjustment of the margins with respect to the working capital and risk adjustment. No specific arguments were raised before us with respect to this claim. The learned transfer pricing officer with respect to risk adjustment at para number 18 at

page number 42 – 51 has dealt with all the aspects of the issue. There were no arguments raised before the learned transfer pricing officer also with respect to the adjustment of margin on account of working capital differences. On careful perusal is of the objections raised before the learned dispute resolution panel, where six objections were raised, we do not find any objection with respect to granting of the working capital adjustment and other risk adjustment. Even before us, no working of the working capital adjustment or other risk adjustment is provided. Therefore, in absence of any working, provided by assessee before us or before the lower authorities or even raising this claim before the lower authorities we do not find any merit in this ground. Hence dismissed.

29. Accordingly, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29/09/2020.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 29/09/2020
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	28.09.2020
Date on which the typed draft is placed before the dictating member	28.09.2020
Date on which the typed draft is placed before the other member	29.09.2020
Date on which the approved draft comes to the Sr. PS/ PS	29.09.2020
Date on which the fair order is placed before the dictating member for pronouncement	29.09.2020
Date on which the fair order comes back to the Sr. PS/ PS	29.09.2020
Date on which the final order is uploaded on the website of ITAT	29.09.2020
date on which the file goes to the Bench Clerk	29.09.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	