

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.314/Bang/2016
Assessment Year: 2011-12

M/s. Meritor CVS India (P) Ltd. Tower 1, IT Sector SEZ, Mylasandra, Kengeri Hobli, RVCE Post Bangalore-560 059 PAN NO : AAFCM7571E	Vs.	ITO Ward-4(1)(3) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri C. Ramesh, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	05.01.2021
Date of Pronouncement	:	05.01.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 23.12.2015 passed by the A.O. u/s 143(3) r.w.s 144C of the Income-tax Act,1961 [‘the Act’ for short] for assessment year 2011-12 in pursuance of directions given by Ld. Dispute Resolution Panel (DRP).

2. At the time of hearing, the Ld A.R advanced his arguments only in respect of Ground No.2 relating to Transfer Pricing adjustment made by the AO/TPO. In this ground, the assessee has sought exclusion of four comparable companies and inclusion of two

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comparable companies. However, at the time of hearing, the Ld A.R submitted that he is not pressing for exclusion of E-zest Solutions Ltd and also not pressing for inclusion of Thinksoft Global Services Ltd. Accordingly, the grounds relating to above said two companies are dismissed as not pressed. Consequently, the assessee is seeking exclusion of three comparable companies and inclusion of one comparable company. The details of the same are discussed in the later part of this order.

3. The facts relating to the case are stated in brief. The assessee herein is a subsidiary of M/s. Meritor Inc., USA., which is engaged in the manufacture of automotive components and systems. The assessee is engaged in the business of developing software titled as “computer radiated designing and development of commercial vehicle systems”. The assessee is developing specific software for its Associated Enterprises, i.e., it is captive software developer. Since the assessee had entered into international transactions with its Associated Enterprises (AEs), the AO referred the matter of determination of Arms Length Price (ALP) of the international transaction to the Transfer Pricing Officer (TPO).

4. The transfer pricing adjustment made by the TPO/AO relates to the Software development services of the assessee. The turnover of the assessee for the assessment year under consideration is Rs.19.71 crores. The assessee followed TNM method as most appropriate method and profit level indicator (PLI) was taken as Operating profit/Operating cost. The assessee declared margin of 11.21%. According to the Transfer pricing study conducted by the assessee, its international transactions in respect of Software development segment were at arms length.

5. The TPO rejected transfer pricing study conducted by the assessee and selected following 13 companies:

Sl. No.	Name	Sales	Cost	PLI
1	Acropetal Technologies Ltd. (seg)	81,40,16,893	61,67,54,876	31.98%
2	e-zest solutions (from Capitaline)	11,28,66,098	9,32,55,341	21.03%
3	E-Infochips Ltd.	26,03,84,251	167,64,47,527	56.44%
4	Evoke (from Capitaline)	14,48,69,912	13,39,96,568	8.11%
5	ICRA Techno Analytics Ltd. (in 000)	15,84,01,000	12,68,94,000	24.83%
6	Infosys Ltd	253850000000	177,030,000,000	43.39%
7	Larsen & Toubro Infotech Ltd.	23318122096	19,764, 861,289	19.83%
8	Mindtree Ltd. (seg)	8,783,000,000	7,937,143,242	10.66%
9	Persistent Systems& Solutions Ltd.	189,490,457	155,172,089	22.12%
10	Persistent Systems Ltd.	6,101,270,000	4,971,860,000	22.84%
11	R S Software (India) Ltd.	1,882,638,471	1,617,804,170	16.37%
12	Sasken Communication Technologies Ltd.	3,941,962,000	3,175,616,000	24.13%
13	Tata Elxsi Ltd. (seg)	3,581,985,000	2,962,533,352	20.91%
	AVERAGE MARGIN			24.82%

The average margin of the above said 13 comparable companies was 24.82%. After allowing working capital adjustment of 1.48%, the TPO arrived at adjusted margin of 23.34%. Accordingly, the A.O. proposed adjustment of Rs.2,14,99,676/-. The AO passed draft assessment order making the addition cited above towards Transfer pricing adjustment.

6. The assessee filed its objections before Ld. DRP, which rejected following 6 companies by applying turnover filter.

1. Infosys Ltd.
2. L&T Infotech Ltd.
3. MindTree Ltd.
4. Persistent Systems Ltd.
5. Sasken Communication Technologies Ltd.
6. Tata Elxsi Ltd.

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Accordingly, the Ld DRP confirmed selection of remaining seven comparable companies. As a result of direction so given by DRP, the TP adjustment came to be reduced to Rs.1,56,84,934/-. The A.O. added the above said amount to the total income of the assessee in the final assessment order passed by him.

7. We shall first take up the grounds relating to the plea of exclusion of comparable companies, which were retained by Ld DRP. The Ld. A.R. submitted that the assessee seeks exclusion of following 3 comparable companies also from the list of comparable companies confirmed by Ld DRP:-

1. Acropetal Technologies Ltd. (seg)
2. E-Info Chips Ltd.
3. Persistent Systems & Solutions Ltd.

The Ld. A.R. submitted that all the above said three companies have been held to be not good comparable companies for Software Development segment by various decisions of the Tribunal. The Ld A.R furnished copies of various case laws relied upon by him.

8. On the contrary, the Ld. D.R. submitted that all the above said companies should be examined independently by the Tribunal without having recourse to the past decisions rendered by the Tribunal. He supported the order passed by Ld DRP.

9. We heard the parties on this issue. The Ld A.R submitted that M/s. Acropetal Technologies Ltd, E-zest Solutions, E-infochips Ltd and ICRA Techno Analytics Ltd have been excluded by the co-ordinate bench in the case of in the case of M/s Applied Materials India P Ltd (IT(TP)A No.17 & 39/Bang/2016 dated 21.9.2016.

(A) Acropetal Technologies Ltd:-

9.1 We heard rival contentions on this comparable company and perused the record. We notice that the co-ordinate bench has excluded this company in the case of M/s Applied Materials India P Ltd (supra) with the following observations:-

“15. The revenue is also seeking inclusion of some of the companies in the list of comparables which were reflected by the DRP. We will deal with the issues one by one as under :

(i) Acropetal Technologies Ltd.(Seg.)

16.1 The DRP rejected this company on the ground of employee cost filter. The ld. DR has submitted that the TPO has applied the employee cost filter and this company satisfies the same.

16.2 On the other hand, the learned Authorised Representative of the assessee has submitted that the total employee cost of this company is 11.51% of the total operating revenue therefore it fails the employee cost filter of 25%. Further he has pointed out that this company also fails the software development services revenue filter of 75%. He has referred the details at page Nos.39 and 53 of the Annual Report and submitted that the income from software development is Rs.81.40 Crores out of total revenue of Rs.141 Crores. Therefore this company fails this filter.

16.3 In a rejoinder the ld. DR has submitted that the TPO has considered only Information Technology transactions segment and therefore it satisfies software development services income filter as well as employee cost filter.

16.4 We have considered the rival submissions as well as the relevant material on record. As per the segmental reporting at page 53 of the Annual Report the income from Information Technology Services is Rs.81.40 Crores

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out of the total income of Rs.141 Crores. Therefore the revenue from Information Technology transactions services is less than 75% and consequently this company does not satisfy the filter of information technology revenue applied by the TPO itself. Accordingly, we do not find any reason to interfere with the order of the DRP for this issue.”

Accordingly, following the above said decision, we direct exclusion of M/s Acropetal Technologies Ltd.

(b) E-infochips Ltd:-

9.2 We heard the parties on this comparable company. We notice that the Delhi bench of Tribunal in the case of Saxo India P Ltd (ITA No.6148/Del/2015 dated 05-02-2016) has excluded this company with the following observations:-

“(i) E-Infochips Limited:

10.1. The Transfer Pricing Officer included this company in the list of comparables. On being called upon to explain as to why it should not be considered as a comparable, the assessee contended that there was functional dissimilarity inasmuch as this company was engaged in software development and IT enabled services and also Products. The Transfer Pricing Officer observed that the revenues of this company from Products was only 15% of total revenue and hence the same qualified to be eligible for comparison. The DRP did not allow any relief.

10.2. After considering the rival submissions and perusing the relevant material on record, we find that the Annual report of this company is available in the paper book with its Profit and loss account at page 1025. Schedule of Income indicates its operating revenue from software development, hardware maintenance, information technology, consultancy etc. Revenue from hardware maintenance stands at Rs. 3.92 crore, which has

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been considered by the Transfer Pricing Officer himself as sale of products. Such sale of products constitutes 15% of total revenue. There is no segmental information available as regards the revenue from sale of products and revenue from software development segment. As the assessee is simply engaged in rendering software development services and there is no sale of any software products, this company, in our considered opinion, ceases to be comparable. It is obvious that from the common pool of income from both the streams of software products and software services, one cannot deduce the revenue from software services and no one knows the impact of revenue from Products on the overall kitty of profit, which may be significant. Since no segmental data of this company is available indicating operating profit from software development services, we order to exclude this company from the list of comparables.”

Following the decision rendered in the case of Saxo India P Ltd (supra), we direct exclusion of the above said comparable company.

(c) Persistent Systems and Solutions Ltd:-

9.3 We heard the parties on this comparable company. We notice that this company has been excluded by the co-ordinate bench in the case of DCIT vs. Electronics for Imaging India P Ltd (IT(TP)A Nos. 227 & 285/Del/2013). For the sake of convenience, we extract below the observations made by the Tribunal in respect of this comparable company:-

“Persistent Systems & Solutions Ltd.

60. The assessee has the grievance against rejection of this company by the DRP. The ld. AR has submitted that assessee did not raise any objection against this company, however, the DRP has rejected the said company. Therefore, the said company should be retained in the list of comparables.

61. Having considered the rival submissions as well as relevant material on record, at the outset, we note that the DRP has examined the functional

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comparability of this company by considering the relevant details as given in the annual report of this company. The DRP has given the finding that the entire revenue has been earned by this company from the sale of software services and products and in the absence of segmental details, it cannot be considered as comparable with software services segment. We find that this company has shown the income from sale of software services and products to the tune of Rs.6.67 crores. We further note that as per Schedule 11, the entire revenue has been shown under one segment i.e., sale of software services and products. Therefore, no separate segment has been given in respect of software services. Accordingly, the composite data of revenue as well as margins of this company pertaining to the sale of software services and products cannot be considered as comparable with the software development services segment of the assessee. In view of the above facts and circumstances, we do not find any error or illegality in the directions of the DRP in excluding this company from the list of comparables. This ground of CO is dismissed.”

We notice that the co-ordinate bench has excluded this company in the case of Applied Materials India Private Limited (supra) by following the decision rendered in the case of Electronics for Imaging India P Ltd (supra). Consistent with the view taken in the above said cases, we direct exclusion of this comparable company.

10. The assessee also seeks inclusion of one company, named **M/s CG Vak Software & Exports Ltd.** The Ld A.R submitted that this company has been held to be a good comparable in the case of Aspect Technology Centre India P Ltd (IT(TP)A 187/Bang/2016 dated 30-07-2020).

10.1 We heard Ld D.R and perused the record. We notice that the Bangalore bench of Tribunal has directed for inclusion of M/s CG Vak Software & Exports Ltd, in the case of Aspect Technology Centre

India P Ltd for assessment year 2011-12. The relevant observations made by the Tribunal are extracted below:-

“31. In Ground No. 4(d) the Assessee inclusion of CG Vak Software and Export Ltd. ('CG Vak' for short), which was part of its TP study, in the final list of comparables as the company is functionally comparable to the assessee. The TPO rejected the company on the ground that it fails the employee cost filter. The DRP then proceeded to uphold its rejection on the IT(TP)A Nos.187 & 175/Bang/2016 ground that it was not possible to ascertain whether the company passes the employee cost filter in the absence of details regarding the same being made available, and also for the reason that in the absence of details regarding the expenses 'cost to services' being made available, it was not possible to ascertain if the company was engaged in sub-contracting its software development services. After hearing the rival submissions we find that this company is engaged in the provision of routine software development services, and therefore, the major portion of expenses under the head 'cost of services' could only relate to employee cost. The ratio of cost of services to total sales amounts to 77.65% and therefore it could be held that the company passes the employee cost filter. Detailed submissions in this regard are made at pages 231-233 of the paperbook. This company has been consistently included in the final list of comparables in case of assessees placed similarly that of the Assessee herein. Further, the DRP's observation that the company could be engaged in sub-contracting of services for the reason that expenses have been debited under the head 'cost to services' is without any basis more so, when there is no filter regarding sub-contracting of services applied by the TPO or the DRP. We also find that in the decision of this Tribunal in the cases of Cisco Systems (India) (P.) [Ltd. v. DCIT](#) ([2014] 50 taxmann.com 280 (Bangalore- Trib.) at para 27.8 page 1795; and [DCIT v. Ivy Comptech Pvt. Ltd.](#) (common order passed in ITA No. 222/Hyd/2015 and ITA No. 334/Hyd/2015) in paras 21 to 21.3 at pages 1837-1838, this company has been directed to be included in the list of

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comparable companies. We therefore direct that this company be included in the final list of comparable companies.”

10.2 Following the above said decision, we direct the AO to include M/s CG VAK Software and Export Ltd as a comparable company.

11. In view of the foregoing discussions, the ALP of the transactions relating to Software segment requires to be re-determined. Accordingly, we restore this issue to the file of AO/TPO with the direction to re-compute the ALP of Software development Services segment in the light of discussions made supra.

12. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 5th Jan, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 5th Jan, 2021.
VG/SPS

Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore.