IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri George George K, JM & Shri B.R.Baskaran, AM

IT(TP)A No.1907/Bang/2017 : Asst.Year 2008-2009

M/s.Dell International Services India Private Limited (Formerly known as Dell Computers India Private Limited) No.12/1, 12/2A, 13/1A Divyashree Greens, Challaghatta Village, VArthur, Hobli Bangalore – 560 071. **PAN : AABCD1741M.**	v.	The Addl.Commissioner of Income-tax (LTU) Bangalore.
(Appellant)		(Respondent)

IT(TP)A No.1971/Bang/2017 : Asst.Year 2008-2009

The Addl.Commissioner of Income-tax (LTU) Bangalore.	v.	M/s.Dell International Services India Private Limited (Formerly known as Dell Computers India Private Limited) Bangalore – 560 071.
(Appellant)		(Respondent)

Revenue by : Sri.Muzaffar Hussain, CIT-DR
Assessee by : Sri.T.Surayanarayana, Advocate

Date of Hearing : 24.08.2021		**Date of Pronouncement : 25.08.2021**

O R D E R

Per George George K, JM

The above cross appeals were disposed of by the ITAT vide its order dated 23.10.2019. The assessee filed Miscellaneous Petition (MP No.64/Bang/2020 and MP No.65/Bang/2020) for non-adjudication of assessee's prayer, namely, exclusion of E-Zest Solutions Limited and Softsol India Limited from the final list of comparables. Further, as regards the corporate tax issue, it was stated in the MP that there is no adjudication of ground Nos.15 and 16 in

assessee's appeal. In grounds 15 and 16, the issue raised is that the assessee is entitled to benefit u/s 10A of the I.T.Act in respect of additions agreed under MAP. The assessee's further prayer as regards ground No.1 in Revenue's appeal is that though the issue has been discussed, since it is appearing in ground No.15 and 16 of the assessee's appeal, the conclusions of the ITAT in its order dated 23.10.2019 also needs to be modified.

2. The ITAT vide its order dated 14.08.2020 in MP No.64/ Bang/2020 and MP No.65/Bang/2020, recalled the ITAT's order dated 23.10.2019, for the limited purpose of adjudication of TP issue, namely, assessee's prayer that exclusion of E-Zest Solutions Limited and Softsol India Limited. As regards the corporate tax issues are concerned, the Tribunal also recalled the ITAT's order dated 23.10.2019 for the limited purpose of adjudicating Ground Nos.15 and 16 of assessee's appeal and ground No.1 in Revenue's appeal.

3. We shall adjudicate the above issues recalled by the ITAT as under:

TP Adjustment (Assessee's appeal in ITA No.1907/ Bang/2017)

E-Zest Solutions Limited

4. The assessee had sought for exclusion of the above company from the list of comparables in ground No.11. The assessee submits that the Bangalore Bench of the Tribunal on identical facts in the case of GXS India Technology Centre (P.) Ltd. v. ITO reported in 62 taxmann.com 276 had excluded E-

Zest Solutions Limited, since it is functionally different from the assessee-company.

4.1 The learned Departmental Representative was duly heard.

4.2 We have heard rival submissions and perused the material on record. The assessee is into software development services. E-Zest Solutions Limited has been held to be engaged in the business of consultancy services and technical services, which is categorized as KPO services. The above fact has been captured by the Bangalore Bench of the Tribunal in the case of GXS India Technology Centre (P.) Ltd. (supra). The Bangalore Bench of ITAT in case of GXS India Technology Centre (P.) Ltd. had held that E-Zest Solutions Limited is primarily in KPO services and cannot be functionally compared to software development services companies. The relevant finding of the Bangalore Bench of the Tribunal reads as follow:-

> *10. E-Zest Solutions Ltd. The learned AR of the assessee has pointed out that this company is engaged in the business of consultancy services and technical services which is categorized as KPO services hence, it is functionally not comparable to the assessee. Further, this company has not provided segmental data as part of its annual report and financial reports, therefore, this company cannot be considered as a good comparable of the assessee. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra).*
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> *10.1 On the other hand, learned AR relied upon the order of the authorities below and submitted that this company is mainly in the business of software development and therefore, it is functionally comparable.*
>
> *10.2 Having considered the rival submissions as well as relevant material on record, at the outset, we note that the functional comparability of this*

company has been examined by the co-ordinate bench of this Tribunal in case of 3DPLM Software Solutions Ltd (Supra) in para-14.4 as under;

> "14.4 We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the record that the TPO has included this .company in the list of comparables only on the basis of the statement made by the company in its reply to the notice under section 133 (6) of the Act. It appears that the TPO has not examined the services rendered by the company to give a finding whether the services performed by this company are similar to the software development services performed by the assessee. From the details on record, we find that while the assessee is into software development services, this company i. e. e-Zest Solutions Ltd., is rendering product development services and high end technical services which come under the category of KPO services. It has been held by the co-ordinate bench of this Tribunal in the case of Capital I-Q Information Systems (India) (P) Ltd. (supra) that KPO services are not comparable to software development services and are therefore not comparable. Following the aforesaid decision of the co-ordinate bench of the Hyderabad Tribunal in the aforesaid case, we hold that this company, i.e., e-Zest Solutions Ltd. be omitted from the set of comparables for the period under consideration in the case on hand. The AO/TPO is accordingly directed".

Following the order of the Co-ordinate Bench (supra), we direct the AO/TPO to exclude this company from the set of comparables."

4.3 In the light of above order of ITAT in the case of GXS India Technology Centre (P.) Ltd. (supra), since assessee in our case is into software development services, same cannot be functional compared with E-Zest Solutions Limited, which is into KPO services. Therefore, we direct the AO / TPO to exclude E-Zest Solutions Limited from the final list of comparables. It is ordered accordingly.

Softsol India Limited

5. The learned AR wants exclusion of the above company from the final list of comparables for the reason that Softsol India Limited was having related party transactions for the assessment year 2008-2009 more than 15%. For the exclusion of the same on account of RPT, being more than

15%, the assessee had relied on the order of the Bangalore Bench of the Tribunal in the case of GXS India Technology Centre (P.) Ltd. (supra).

5.1 The learned Departmental Representative supported the orders of the AO / TPO and the CIT(A).

5.2 We have heard rival submissions and perused the material on record. On identical facts, the Tribunal in the case of GXS India Technology Centre (P.) Ltd. (supra) had held that Softsol India Limited is to be excluded from the comparables list of companies on account of that it was having related party transactions in excess of 15%. In view of the above order of the Tribunal and also for the fact that assessment year being the same (A.Y.2008-2009), we direct the AO / TPO to exclude Softsol India Limited from the final list of comparable companies. It is ordered accordingly.

Corporate Tax Issue (Ground Nos.15 and 16 of assessee's appeal in ITA No.1907/Bang/2017)

6. In the above grounds, the assessee is seeking for the benefit of deduction u/s 10A of the I.T.Act in respect of additions agreed for the MAP proceedings. In this context, the learned AR relied on the ITAT's order in assessee's own case for assessment year 2007-2008 in the case of Dell International Services India Pvt. Ltd. v. DCIT in IT(TP)A No.879/Bang/2018 (order dated 24.06.2020).

6.1 We have heard rival submissions and perused the material on record. On identical facts, the Tribunal in assessee's own case had held that additions agreed under

MAP proceedings was entitled to the benefit of deduction u/s 10A of the I.T.Act. The relevant finding of the Tribunal in assessee's own case for assessment year 2007-2008 (supra) reads as follows:-

"31. We have given a very careful consideration to the rival submissions. As far as the provisions of the Act are concerned, the provisions of the section 92CA(4) reads as follows:-

> "(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :
>
> Provided that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :"

32. A reading of the first proviso to section 92C(4) of the Act would show that deduction 10A will not be allowed in respect of amount of income by which the total income of the assessee is enhanced after computation of income u/s. 92C(4) of the Act by the TPO which in turn is based on the Arm's Length Price computed by the Assessing Officer pursuant to order of TPO passed u/s.92CA(3) of the Act. Section 92CA(4) of the Act refers to the ALP determined by the AO. The first question that needs to be answered is as to, whether the price agreed under the MAP can be said to be the ALP determined by the AO. The MAP is a procedure agreed between the two countries under Double Taxation Avoidance Agreement (DTAA). Article 27 of the CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME reads as under:-

"ARTICLE 27
MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. This case must be presented within three years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the abovementioned bilateral actions and the implementation of the mutual agreement procedure."

33. The provisions of Rule 44H of the Income Tax Rules, 1962 (Rules) provides the manner in which resolution of disputes under mutual agreement procedure are to be given effect to and it reads thus:

> "44H. Action by the Competent Authority of India and procedure for giving effect to the decision under the agreement.—(1) Where a reference has been received from the competent authority of a country outside India under any agreement with that country with regard to any action taken by any income-tax authority in India, the Competent Authority in India shall call for and examine the relevant records with a view to give his response to the competent authority of the country outside India.
>
> (2) The Competent Authority in India shall endeavour to arrive at a resolution of the case in accordance with such agreement.
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> (3) The resolution arrived at under mutual agreement procedure, in consultation with the competent authority of the country outside India, shall be communicated, wherever necessary, to the Chief Commissioner or the Director-General of Income-tax, as the case may be, in writing.
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> (4) The effect to the resolution arrived at under mutual agreement procedure shall be given by the Assessing Officer within ninety days of receipt of the same by the Chief Commissioner or the Director-General of Income-tax, if the assessee,—

(i) gives his acceptance to the resolution taken under mutual agreement procedure; and

(ii) withdraws his appeal, if any, pending on the issue which was the subject matter for adjudication under mutual agreement procedure.

(5) The amount of tax, interest or penalty already determined shall be adjusted after incorporating the decision taken under mutual agreement procedure in the manner provided under the Income-tax Act, 1961 (43 of 1961), or the rules made thereunder to the extent that they are not contrary to the resolution arrived at.

Explanation.— For the purposes of rules 44G and 44H, "Competent Authority of India" shall mean an officer authorised by the Central Government for the purposes of discharging the functions as such."

34. The purpose for which the first proviso of section 92CA(4) of the Act was enacted is given in the CBDT Circular No.14/2001 dated 09.11.2001 as follows:-

> "55.12 The first proviso to section 92C(4) recognizes the commercial reality that even when a transfer pricing adjustment is made under that sub-section, the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country. Therefore, it has been provided that no deductions u/s 10A or 10B or under Chapter VI-A shall be allowed in respect of the amount of adjustment."

33. In the present case the conditions under which the dispute was resolved under MAP, was that the Assessee had to increase its taxable income and the sum agreed was to be subsequently invoiced and realized and thereby there was inflow of foreign exchange in India. Such features do not exist when the adjustment to ALP is suggested by a TPO which is subsequently incorporated in an order of assessment by the AO.

34. The Pune Bench of the ITAT had an occasion to deal with an identical question in the context of determination of ALP under the Advance Pricing Arrangement [APA] in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra) and took the view that deduction u/s. 10A of the Act on additional income offered as per APA would be eligible to claim deduction u/s. 10AA.

35. As rightly pointed out by the learned counsel for the Assessee in the course of his argument, the addition on account of determination of ALP can be in a different manner

(i) suo motu by the assessee in his return of income;

> (ii) by the Assessing Officer has been accepted by the assessee or to the extent confirmed by the appellate forums under the Act;
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> (iii) determined by an advance pricing agreement
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> (iv) is made as per the safe harbour rules framed under section 92CB; or
>
> (v) is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or section 90A for avoidance of double taxation,
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> *36. The proviso to section 92CA(4) of the Act will apply only to adjustment to transfer pricing made by the AO which is enumerated in Sl.No.(ii) above and not to any other modes of determination of ALP. The decision of the Pune Bench of ITAT in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra) will be clearly applicable to the facts of the present case."*

Ground No.1
(Revenue's appeal in ITA No.1971/Bang/2017)

7. In the above ground, the Revenue contents that the CIT(A) has erred in directing the AO to calculate deduction u/s 10A of the I.T.Act by excluding the expenditure deducted from the export turnover also to be reduced from the total turnover.

7.1 After hearing rival submissions, we are of the view that the above issue raised by the Revenue is no more *res integra*. The Hon'ble Supreme Court in the case of *CIT v. HCL Technologies Ltd. reported in 404 ITR 719* had held that when expenditure are reduced from the export turnover, the same need to be reduced also from the total turnover while calculating deduction u/s 10A of the I.T.Act. In view of the dictum laid down by the Hon'ble Apex Court, ground No.1 raised in Revenue's appeal is rejected.

8. In the result, the appeal filed by the Revenue and assessee stands partly allowed.

Order pronounced on this 25th day of August, 2021.

Sd/-	**Sd/-**
(B.R.Baskaran)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 25th August, 2021.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-14, Bengaluru
4. The Pr.CIT (LTU), Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore