IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.531/PUN/2016
निर्धारण वर्ष / Assessment Year: 2011-12

DCIT, Circle-1(1), Pune.	Vs.	BMC Software (India) Pvt. Ltd., Business Bay, Wing 1, Ninth Floor, Tower- B, Survey No.103, Hissa No.2, Airport Road, Yerwada, Pune- 411006. PAN : AABCB6110E
Appellant		Respondent

Revenue by	:	Shri Mohit Jain
Assessee by	:	Shri Madhur Agarwal
Date of hearing	:	19.04.2022
Date of pronouncement	:	12.05.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the Revenue directed against the final assessment order dated 27.01.2016 passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('the Act').

2. The Revenue raised the following grounds of appeal :-

"1. The DRP has erred on the facts and circumstances of the case and in law, in directing to include Maveric Systems Ltd, as a comparable, despite the fact that it is a loss making company and it also fails export filter.

2. The DRP has erred on the facts and circumstances of the case and in law, in directing to include Caliber Point Business Solutions Ltd *and BNR Udyog Ltd, as a comparable, despite the fact that it did not appear in the search process carried out by the assessee and by the TPO.*

3. The DRP has erred on the facts and circumstances of the case and in law, in ignoring the reliance of the TPO in the decision of the Hon'ble ITAT, Banglore, in the case of Kodiak Network (India) Pvt Ltd (ITA 1413/Bag/2010).

4. The DRP has erred on the facts and circumstances of the case and in law, in directing to include Caliber Point Business Solutions Ltd., as a comparable, despite the fact it is having a different financial year.

5. The DRP has erred on the facts and circumstances of the case and in law, in directing to include Caliber Point Business Solutions Ltd., as a comparable, despite the fact it is a loss making company.

6. The DRP has erred on the facts and circumstances of the case and in law, in directing to include KLAS Information Systems Ltd & Mindtree Ltd, as a comparable, despite the fact it did not appear in the search process carried out by the assessee and by the TPO.

7. The DRP has erred on the facts and circumstances of the case and in law, in directing to include R System International Ltd. as a comparable despite the fact that it is having a different financial year.

8. The DRP has erred on the facts and circumstances of the case and in law, in directing to include Silverline Technologies Pvt Ltd, as a comparable, despite the fact it is rejected by the assessee itself, in its T. P. Study Report, on the ground that it is functionally different company.

9. The DRP has erred on the facts and circumstances of the case and in law, in directing to include India Tourism Development Corporation Ltd., as a comparable, despite the fact it is a loss making company and it also fails export filter.

10. The appellant craves leave to add, alter or amend any or all the grounds of appeal."

3. Briefly, the facts of the case are as under :

The respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of providing software development services, IT enabled services and sales support services to overseas BMC group entities.

The return of income for the assessment year 2011-12 was filed on 27.11.2011 declaring total income of Rs.9,77,92,780/-. The respondent-assessee company also reported the following international transactions with its Associated Enterprises (AEs) within the meaning of section 92B of the Act :-

Sr. No.	*Nature of International Transaction*	*Amount (INR)*	*Method adopted for benchmarking*
1	*Provision of software development services*	*285,37,64,267*	*TNMM*
2	*Provision of IT enabled service*	*8,02,32,242*	*TNMM*
3	*Provision of sales support services*	*13,69,68,388*	*TNMM*
4	*Allocation of communication expenses by BMC US*	*3,80,98,791*	*Cost allocation arrangement*
5	*Recharge of costs by BMC US towards provision of Employees Stock Option (ESOP) benefit of employees of BMC India*	*10,40,85,568*	*Reimbursement of actual expenses*
6	*Recharge of costs by BMC US towards expatriate salary of BMC India*	*8,25,291*	
7	*Reimbursement of expenses by BMC India*	*62,63,416*	

4. The respondent-assessee company also submitted Transfer Pricing (TP) study report wherein, the respondent-assessee adopted the Transactional Net Margin Method (TNMM) as the most appropriate method for the purpose of benchmarking the above international transactions with Profit Level Indicator (PLI) of Operating Profit/Operating Cost (OP/OC). In the TP study report, the respondent-assessee company adopted 3 years weighted average arithmetic mean of the comparables for the purpose of benchmarking the international transactions, which reads as under :-

Nature of international transaction	*BMC India Margin*	*3 year weighted average arithmetic mean of the comparable companies*	*Finding*
Provision of software development services	*11.48%*	*12.59%*	*Within +/-5% range*
Provision of IT enabled services	*11.44%*	*12.84%*	*Within +/-5% range*
Provision of sales support services	*11.44%*	*2.67%*	*At ALP*

5. On noticing the above international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) u/s 92CA(1) for the purpose of benchmarking the above international transactions reported by the respondent-assessee company in Form No.3CEB. The TPO vide order dated 29.01.2015 passed u/s 92CA(3) of the Act suggested the TP adjustment of Rs.41,79,38,397/-. While doing so, the TPO had rejected the TP study report submitted by the respondent-assessee by using a single year data, modified certain filters, rejected certain comparable companies selected by the respondent-assessee company and accepted certain additional companies as comparables. Accordingly, the TPO computed the profit level margin of the comparables in respect of the international transactions of software development services at 26.23% as against 11.44% of the respondent-assessee company. As a result, the TPO suggested upward adjustment of Rs.37,77,97,287/- in respect of software

development services. The TPO also computed the margin of comparables in respect of IT enabled services at 25.59% as against 11.44% of respondent-assessee company and suggested an adjustment of Rs.1,01,83,479/-. The TPO also computed the margin of the comparables in respect of sale support services at 35.82% as against 11.44% and, accordingly, suggested an adjustment of Rs.2,99,57,631/-. Accordingly, the TPO suggested aggregate TP adjustment of Rs.41,79,38,397/-.

6. Pursuant to the TPO's order, a draft assessment order was passed by the Assessing Officer u/s 143(3) r.w.s. 144C(1) of the Act on 16.02.2015, wherein, the Assessing Officer was proposed disallowance in respect of TP adjustment of Rs.41,79,38,397/- as suggested by the TPO.

7. Being aggrieved by the above disallowance proposed by the Assessing Officer in the draft assessment order dated 16.02.2015, the respondent-assessee company filed objections before the ld. Dispute Resolution Panel (DRP) contesting the proposed disallowance on account of TP adjustments.

8. On due consideration of the submissions made on behalf of the respondent-assessee company, the ld. DRP had directed the Assessing Officer/TPO to exclude the companies having 25 times

turnover of respondent-assessee company and directed the Assessing Officer in respect of software development services segment to include the company Maveric System Ltd. as comparable in the list of the comparables by rejecting the observation of the TPO that this company was functionally different as it has work-in-progress indicating that it is into the product development. Similarly, the ld. DRP directed the Assessing Officer to include R. System International Ltd., KALS Information Systems & Mindtree Limited. In respect of IT enabled segment, the ld. DRP had directed the exclusion of Infosys Technologies Ltd., Eclerx Ltd. Caliber Point Business Solutions Limited, which is not challenge before us. In respect of sale support services, the ld. DRP had directed the inclusion of Maveric System Ltd. as comparable.

On receipt of directions from the ld. DRP, the Assessing Officer passed the final assessment order u/s 143(3) r.w.s. 144C(13) vide order dated 27.01.2016 after making addition on account of TP adjustments of 21,41,74,181/-.

9. Being aggrieved by the final assessment order, the Revenue is in appeal before us.

10. Ground of appeal no.1 to 8 challenges the decision of the ld. DRP in including the comparable Maveric System Ltd., Caliber

Point Business Solutions Ltd. & BNR Udyog Ltd., KALS Information Systems Ltd. & Mindtree Ltd., R. System International Ltd. and Silverline Technologies Pvt. Ltd..

11. Now, we shall take up the ground of appeal no.1 challenging the direction of the ld. DRP in directing the Assessing Officer/TPO to include Maveric System Ltd. in the software segment as it is a loss making company and failed to export filter. We do not find merit in this contention raised on behalf of the Revenue i.e. the company is a loss making company for the last 3 years. We find at page no.542 of the Paper Book (financial performance of the this company for the previous years), wherein, it is clearly shown that even in the financial year 2009-10, the company made profit of Rs.609.53 lakhs, which is extracted as under :-

(Amount in Rupees Lakhs)

	2010-11	*2009-2010*
Income From Operations	*(497.66)*	*717.68*
Profit Before Depreciation	*(587.41)*	*659.81*
Less: Depreciation	*117.61*	*50.28*
Profit Before Tax	*(705.02)*	*609.53*
Less: Provision for Tax & Prior Period adjustments	*49.17*	*103.67*
Profit after Tax	*(754.19)*	*505.86*
Balance of Profit for the earlier years	*1524.29*	*1099.22*
Transfer to Reserve, Dividend and Tax on Dividend	*3.05*	*80.79*
Balance carried to Balance Sheet	*767.03*	*1524.29*

Earnings Per Share – Face value of Rs.5 (Basic and Diluted)	*(51.42)*	*34.49*

12. From the above chart, it is clear that this company is profit making company for the financial year 2009-10, therefore, it cannot be said that this company is loss making company in the last 3 preceding financial years. Accordingly, the contention raised on behalf of the Revenue that it is continuous loss making company for last 3 financial years cannot be accepted.

As regards to the another contention of the Revenue that the said company failed to meet the filter of 75% export to the total turnover, it is clear that from the financial results shown in the Schedule 10 to the Balance Sheet at page no.564 of the Paper Book, the total turnover of the company is Rs.56,90,13,529/- out of which the domestic turnover is only Rs.13,73,08,982/- and export turnover is Rs.43,17,04,547/- which constitutes 76.78% of the total turnover clearly meets the filter of 75% of export to total sales. In view of this fact, we do not find any merit in the grounds of appeal no.1 raised by the Revenue. Accordingly, the ground of appeal no.1 stands dismissed.

13. It is agreed by both that once the ground of appeal no.1 is dismissed, it is unnecessary to adjudicate the ground of appeal nos.2 to 8 as the consideration received is still be within the arm's length

price. Accordingly, ground of appeal nos.2 to 8 stands dismissed as withdrawn/not pressed.

14. Ground of appeal no.9 challenges the direction of the ld. DRP to include the India Tourism Development Corporation Ltd. as comparable in the business support services segment. The Revenue is seeking exclusion of this company on the ground that it is loss making company and also failed to meet export filter. This company was rejected by the TPO from the set of comparables on the ground of functionality differences. However, the ld. DRP had directed the inclusion of this company accepting the contention of the respondent-assessee company that one of the segment of company known as Ashok Reservation & Marketing Services Division is engaged in providing group marketing services. Thus, this segment results is comparable with the assessee company in respect of business support services segment.

Now, the Revenue is seeking exclusion of this company on the grounds mentioned above. Admittedly, this is a Government of India company and this company is not comparable with that of the respondent-assessee company which is a pure private company as Govt. company is not driven by profit motive alone, but other consideration also weigh in such as discharge of social obligation etc. as held by the Hon'ble Bombay High Court in the case of CIT vs. Thyssen Krupp Industries India (P.) Ltd., 385 ITR 612 (Bom.). Thus, it is not a comparable. In the circumstances, it is not necessary for us to advert to other contentions raised seeking exclusion of this company by the Revenue. Accordingly, we direct the Assessing Officer/TPO to exclude this company from the list of comparables in respect of business support services segment. Accordingly, this ground of appeal no.9 stands allowed.

15. In the result, the appeal filed by the Revenue stands partly allowed.

Order pronounced on this 12th day of May, 2022.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 12th May, 2022.

Sujeet

<u>आदेश की प्रतिलिपि अग्रेषित **/ Copy of the Order forwarded to :**</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
4. The DRP-3, Mumbai.
3. The DIT (TP)-1(1), Pune.
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
5. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.