आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA-TP No. 1755/Hyd/2019**
(निर्धारण वर्ष / Assessment Year: 2015-16)

iMedX Information Services Private Limited, Hyderabad [PAN No. AABCI3550P]	Vs.	Deputy Commissioner of Income Tax, Circle- 2(1), Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by: Shri H. Srinivasulu, AR
राजस्व द्वारा / Revenue by: Shri Rajendra Kumar, CIT-DR

सुनवाई की तारीख/Date of hearing: 26/04/2023
घोषणा की तारीख/Pronouncement on: 10/05/2023

आदेश / **ORDER**

PER K. NARASIMHA CHARY, JM:

Aggrieved by the final assessment order dated 31/10/2019 passed consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), in the case of M/s. iMedX Information Services Private Limited ("the assessee") for the assessment year 2015-16, under section 143(3) of the Income Tax Act, 1961 (for short "the Act") assessee filed this appeal.

2. Briefly stated relevant facts are that the assessee is engaged in the business of providing medical transcription services and allied software development and support services to its patent company, Imedex Inc. USA. It filed its return of income for the assessment year 2015-16 on 26/11/2015 declaring an income of Rs. 48,28,840/-. In form 3CEB, assessee reported international transactions in ITeS, software development services, issue of equity shares, trade receivables and advances, the aggregate value of which was to the tune of Rs. 49,21,74,214/-. Determination of Arm's Length Price (ALP) of such transaction was referred to the learned Transfer Pricing Officer (TPO). By order dated 30/10/2018, learned TPO suggested adjustment of Rs. 59,48,346/- in respect of provision of software development services, Rs. 9,95,79,153/- in respect of provision of ITeS and Rs. 15,15,450/- in respect of interest on receivables.

3. Draft assessment order dated 28/12/2018 was passed accordingly incorporating the adjustment suggested by learned TPO. Assessee preferred objections before the learned DRP and the learned DRP vide order dated 23/09/2019 issued certain directions by granting certain reliefs. Post learned DRP's directions, learned TPO computed the ALP in respect of provisions of software development services at Rs. 45,18,888/- provision of ITeS Rs. 7,27,06,438/- and Rs. 15,15,450/- in respect of interest on receivables. Learned Assessing Officer passed the final assessment order on 31/10/2019.

4. Aggrieved thereby, assessee preferred this appeal, challenging the final assessment order on various grounds. This Tribunal by order dated 24/11/2020, disposed-of the appeal but by inadvertence not adjudicated certain grounds. In Miscellaneous Application No. 05/Hyd/2021, by order dated 23/03/2021, the order dated 24/11/2020 was recalled for examination and adjudication of ground No. 6 to 8 and 18 to 21 that is how this appeal came for hearing before us.

5. Grounds No. 6 to 8 filed by the assessee, challenging the determination of ALP in respect of software development services, whereas grounds No. 18 to 21 relate to interest on receivables. We heard the counsel on either side.

6. Insofar as the software development services are concerned, assessee adopted Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) and by taking OP/OC profit level indicator, selected ten comparables, whose median came to 16.90%, whereas the TPO rejected certain filters adopted by the assessee and included some filters on his own and in that process, reached 16 comparable companies, whose median came to 27.37% and, therefore, made an adjustment of Rs. 59,48,346/-. Post learned DRP's directions in the search, learned TPO reached 19 comparables with a median of 24.21% and made an adjustment of Rs. 45,18,888/-.

7. Before us, the assessee is challenging the inclusion of nine comparables stating that such entities with huge turnover render themselves as unsuitable comparables to the assessee. Learned AR submitted such entities and their turnover here under:

S.No.	Company Name	Turnover (In Crs)
1.	Infosys Limited	47,300
2.	Thirdware Solutions Limited	225
3.	Persistent Systems Limited	1,235
4.	Tata Elxsi Limited	817
5.	Larsen and Toubro Infotech Limited	4,648
6.	Mindtree Limited	3,547
7.	Cybage Software Private Limited	622
8.	Infobeans Technologies Limited	34.96
9.	RS Software (India) Limited	3,455

8. By placing reliance on the decision in the case of Infor (India) Pvt. Ltd. in ITA No. 1689/Hyd/2019, AY. 2015-16, he seeks exclusion of some entities, namely, Infosys Ltd., Larsen & Toubro Infotech Ltd., Mindtree Ltd., Tata Elxsi Ltd., Thirdware Solutions Ltd., Persistent Systems Ltd., Cybage Software Private Ltd., He also placed reliance on the decision in the case of ADP Private Ltd., in ITA No. 1611/Hyd/2019, AY. 2015-16 to seek exclusion of some entities, namely, Infosys Ltd., Tata Elxsi Ltd., Thirdware Solutions Ltd., Persistent Systems Ltd., and Infobeans Technologies Ltd., The above entities were found to be excluded from the list of comparables on the ground of huge turnover.

9. In support of his contentions, he also placed reliance on the decisions of Avaya India P. Ltd. [2019] 416 ITR 638 (Del), Pentair Water India (P) Ltd. 381 ITR 216 (Bom), Agnity India Technologies (P) Ltd. 36 Taxmann.com 289, Evalueserve SEZ (Gurgaon)(P) Ltd. 416 ITR 51 (Del), Soft Brands India (P) Ltd. 406 ITR 513 (Kar), Quicklogic Software India (P) Ltd. in IT(TP)A No. 181/Bang/2022, AY. 2017-18, Samsung R&D Institute Bangalore (P) Ltd 431 ITR 615 (Kar), Eurofins IT Solutions India (P) Ltd. in IT(TP)A No. 186/Bang/2022, AY. 2017-18, Infor India (P) Ltd. in ITA No. 1689/Hyd/2019, AY. 2015-16 and ADP Private Ltd. in ITA No. 1611/Hyd/2019, AY. 2015-16.

10. Per contra, it is the submission of the learned DR on behalf of the Revenue that when once a company is found functionally comparable merely because of the turnover difference, the same cannot be excluded from the list of comparables. Learned DR placed reliance on the decision of the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P) Ltd., vs. DCIT [2015] 56 taxmann.com 417 followed by the decision of the Tribunal in the case of Tata McGraw Hill Education (P) Ltd. vs. ACIT [2016] 69 taxmann.com 418 (Delhi Trib).

11. On a careful consideration of the matter, we find that in the case of CIT vs. Pentair Water India (P) Ltd. [2016] 69 taxmann.com 180, the

Hon'ble Bombay High Court while placing reliance on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Agnity India Technologies (P) Ltd. [2013] 36 taxmann.com 289 held that turnover is obviously a relevant factor to be considered for comparability and the large and bigger company in the area of development of software cannot be benchmarked or equated with little size companies; whereas the Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors (India) (P) Ltd. (supra) held that turnover filter is an inappropriate filter and when once the company is found functionally comparable, it cannot be rejected from the set of comparables on the ground of the turnover.

12. In this situation, the Co-ordinate Bench of this Tribunal took a view in the case of M/s. Galax E Solutions India Pvt. Ltd. vs. ACIT, (2022) 192 ITD 326 (Bang.)(Trib.) took a view that where two views are available on an issue, the issue favourable to the assessee has to be adopted and, therefore, followed the decisions of the Hon'ble High Court.

13. Even the ICAI TP guidance note on transfer pricing clearly lays down that a transaction entered into by a Rs. 1,000 crore company cannot be compared with the transaction entered into by a Rs. 10 crore company and two most obvious reasons are the size of the two companies and the relative economies of scale under which they operate. Under these circumstances, while respectfully following the decision of the Hon'ble Bombay High Court, we hold that for a proper TP analysis, we need to apply the turnover filter. Now the question arises as to what should be the appropriate turnover filter. This question also has come up for a consideration of Co-ordinate Benches of this Tribunal earlier. In the case of M/s Genisys Integrating Systems (India) Pvt. Ltd, vs. DCIT in ITA No. 1231/Bang/2010, dated 05/08/2011 an argument was advanced basing on the Dun and Bradstreet's analysis which has classified the software companies into categories like large size firms of Rs. 2,000 crores, medium size firms of Rs. 200 and 2000 crores and little size firms below Rs. 200 crores. The bench find it to be a reasonable classification

and taking the Indian scenario into consideration, it was found that the classification made by Dun and Bradstreet's analysis was more suitable and reasonable. With that view of the matter, it was held that the turnover filter is very important and companies having turnover of Rs. 1 crore to Rs. 200 crores have to be taken as a particular range.

14. This turnover filter of the company between Rs. 1 crore to Rs. 200 crores is followed in some cases, but in the case of ITO vs. M/s. Maxim India Integrated Circuit Design Pvt. Ltd. in IT(TP)A No. 28/Bang/2012, dated 31/03/2016 while considering this aspect it was found that this approach has an inherent difficulty in applying such a turnover slab of Rs. 1 crore to Rs. 200 crore and the observations of the Bench are that,-

> *"12. It is pertinent to note that the CIT(A) has applied turnover slab of Rs.1 crore to Rs.200 crores for excluding these companies, whereas there is an inherent difficulty in applying such a turnover slab of Rs.1 crore to Rs.200 crores because the said classification on the basis of slab of the turnover gives unrealistic results, as an entity having Rs.1 crore turnover can be compared with any entity having Rs.200 crores turnover, but at the same time an entity having Rs.200 crores turnover cannot be compared with an entity having Rs.201 crores turnover. Thus, as it is clear from the above illustration that it gives ambiguous result as two entities having difference of Rs.1 crore cannot be considered as comparable, whereas on the other hand difference of Rs.199 crores can be considered as comparable company. Therefore, such classification of comparables on the basis of companies selected on turnover basis is not appropriate and acceptable. The turnover, no doubt, is a relevant factor to be taken into account, but there should be some proper and reasonable parameter to apply the difference of turnover between the assessee and the comparable which may be a multiple in the range of 2 times, 3 times, X times or any other number of times which should be applied to all the comparable companies, instead of taking a slab from Rs.1 crore to Rs.200 crores…."*

15. With this premise, the Co-ordinate Bench of this Tribunal in the case of M/s. Maxim India Integrated Circuit Design Pvt. Ltd. (supra) held that the turnover filter upto ten times can be applied.

16. Hon'ble Karnataka High Court in the case of Acusis Software India (P) Ltd. vs. ITO [2018] 98 taxmann.com 183 (Karnataka) approved the approach of the Tribunal in applying tolerance range of turnover of ten times on both sides of the turnover of the assessee to fix the turnover filter. In the case on hand, it could be seen from the order of the learned TPO that the learned TPO accepted the turnover filter selected by the assessee with companies, whose net sales are more than Rs. 1 crore, but failed to notice that without fixing the upper limit of such filter, it would lead to the insertion of certain entities, who operate on different scales and economies and render themselves as unsuitable for comparison. Though we agree with the counsel that certain comparables have to be deleted for their operation in relation with the assessee's operation is huge in scale and economies. We, therefore, find it desirable on this aspect to restore the issue to the file of the learned Assessing Officer/learned TPO to take the range of turnover at ten times at both the ends and to conduct survey afresh. It is clear that since the assessee's turnover is Rs. 5.17 crore in the software development services, the range could be Rs. 52 lakhs to Rs. 52 crores, which will satisfy the test approved and referred to by the Tribunal in the case of M/s. Maxim India Integrated Circuit Design Pvt. Ltd. (supra) and also in the case of Acusis Software India (P) Ltd. (supra). As a matter of fact, the view taken by the Tribunal in the case of Acusis Software India (P) Ltd. (supra) is approved by the Hon'ble Karnataka High Court.

17. We accordingly set aside the findings of the authorities and direct the learned Assessing Officer/learned TPO to take the range of turnover filter at ten times on both the ends and conduct search afresh to take a plausible view. These grounds are accordingly treated as allowed for statistical purposes.

18. Now coming to the ALP adjustment in respect of the interest on trade receivables, it is argued by the learned AR that the outstanding receivables are not separate international transaction and, therefore,

interest thereon does not require a separate benchmarking. It is further submitted that the authorities below erred in treating the SBI's term deposit rates as appropriate CUP to benchmark the value of such service. Learned AR further argued at length stating that this particulars transaction is not covered in the definition of international transaction as defined under section 92B of the Act; that the receivables are consequential/closely linked to the principal transaction of provision of services and hence has been aggregated for determination of ALP under Transactional Net Margin Method (TNMM); that the re-characterising the outstanding receivables as unsecured loan extended by the assessee to its AEs is improper; that the assessee is fully funded by its AEs and does not bear any working capital risks; that the assessee does not chargeable interest on outstanding receivables from third party customers as well; and that the assessee has outstanding payables due to AEs on which no interest has been levied by the AEs as well.

19. Learned AR in the alternative submitted that in the case of Afton Chemical India Private Limited vs. ITO in ITA No. 1467/Hyd/2019, by order dated 05/09/2022 had taken a view that in these sorts of cases, the ends of justice would be met by accepting the interest rate on similar foreign currency receivables/advances as LIBOR+200 points, and if the Bench comes to the conclusion that the assessee is liable on this aspect, the same view may be adopted in this case also.

20. Learned DR submitted that this aspect does not leave any scope for any discussion in view of the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Patni Computer Systems (2013) 215 Taxmann 108 (Bom), wherein the amendment to Section 92B of the Act by Finance Act, 2012 with retrospective effect from 01/04/2002 was considered. Basing on the view taken in a number of decisions of the Tribunal of various Benches, learned TPO held that it is incumbent upon the taxpayer to separately benchmark the arm's length price of the international transaction relating to interest on overdue receivables from the AE by

way of analysis of functions, assets and risks. While following the view taken by the Tribunal in the case of M/s. Logix Microsystems Ltd. Vs. ACIT in I.T.A No.423/Bang/2009, dated 07/10/2010, learned TPO thought it proper to consider the SBI short term deposit rate as appropriate CUP to determine the ALP of the interest on outstanding receivables.

21. We have considered the submissions on either side. In view of the view taken by the Hon'ble Bombay High Court in Patni Computer Systems (supra), on the amendment to Section 92B of the Act by way of Finance Act, 2012 with retrospective effect from 01/04/2002, it is not open for the assessee to agitate the question as to whether or not the interest on outstanding receivables is an international transaction requiring separate benchmarking. Only issue remains to be considered is in respect of the rate of interest. While placing reliance on the decisions reported in Tecnimont ICB House Vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.), Hon'ble Bombay High Court in PCIT Vs. Tecnimont (P) Ltd., (supra) and CIT Vs. CottonNaturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi), assessee prayed that LIBOR+200 basis points may be adopted. This aspect is no longer res integra and dealt with by the Mumbai Bench of the Tribunal in the case of Tecnimont ICB House (supra) and confirmed by the Hon'ble Bombay High Court. CottonNaturals (I) (P.) Ltd. (supra) is also on the same aspect.

22. Insofar as the interest on receivable is concerned, Munbai Bench of the Tribunal, vs. DCIT [2015] 60 taxmann.com 143 (Mumbai - Trib.) considered the view taken in Everst Kanto Cylinder Ltd. v. Asstt. CIT (LTU) [2014] 52 taxmann.com 395 (Mum.); PMP Auto Components (P.) Ltd. v. [IT Appeal No. 1484 (Mum.) of 2014, dated 22-8-2014]; Hinduja Global Solutions Ltd. v. Addl. CIT [2013] 145 ITD 361/35 taxmann.com 348 (Mum.); Tata Autocomp Systems Ltd. v. Asstt. CIT [2012] 52 SOT 48/21 taxmann.com 6 (Mum.); CIT v. Tata Autocomp Systems Ltd. [2015] 56 taxmann.com 206 (Bom.); Four Soft Ltd. v. Dy. CIT [2011] 142 TTJ 358 (Hyd.); and Everst Kanto Cylinder Ltd. v. Asstt. CIT (LTU) [2015] 56

taxmann.com 361 (Mum.) wherein the Hon'ble Tribunals has upheld use of LIBOR for the purpose of benchmarking loan/advance given to foreign AE's, and held that the notional interest has to be worked out for so called amount receivable from AE, by applying LIBOR interest rate for the purpose of computation of transfer pricing adjustment, if any. This view is affirmed by the Hon'ble Bombay High Court [2018] 96 taxmann.com 223 (Bombay) observing that in cases where any business enterprise is required to pay interest on delayed payment, it would examine the cost of interest and if the same is higher then the amount of interest payable on funds obtained locally, it would take a loan from local sources and pay the amounts payable for exports and expenses within time. Therefore, extending of credit beyond the normal period of sixty days is in substance a granting of loan to an AE so as to enjoy the funds, which the AE would otherwise have to repay within the period of sixty days. On this premise the Hon'ble High Court upheld the Tribunal computing interest at LIBOR rates as the rate prevailing in country where the loan is received/consumed by the AE by observing that the same cannot be faulted.

23. In the case of CIT Vs. CottonNaturals (I) (P.) Ltd. [2015] 55 taxmann.com 523 (Delhi) the Hon'ble Delhi High Court considered the question - whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, observed that such a question must be answered by adopting and applying a commonsensical and pragmatic reasoning and held that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid; that the interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. It is further observed that the interest rates applicable to loans and deposits in the

national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters; that the interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable; that the currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. While referring to the Klaus Vogel on Double Taxation Conventions (Third Edition) under Article 11 in paragraph 115, the Hon'ble High Court held that the PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate and the PLR rates are not applicable to loans to be re-paid in foreign currency. Hon'ble Court accordingly held that whatever the principle that is applicable to the case of outbound loans, would be equally applicable to inbound loans given to Indian subsidiaries of foreign AEs, that the parameters cannot be different for outbound and inbound loans, and a similar reasoning applies to both inbound and outbound loans.

24. Respectfully following the judicial opinion stated supra, we are of the considered opinion that the ends of justice would be met by accepting the interest rate on similar foreign currency receivables/advances as LIBOR+200 points. We direct the learned Assessing Officer/learned TPO to adopt the same. Grounds are partly allowed accordingly.

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

Order pronounced in the open court on this the 10th day of May, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 10/05/2023

TNMM

Copy forwarded to:

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2. Deputy Commissioner of Income Tax, Circle-2(1), Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
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