

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 16TH DAY OF AUGUST 2018

PRESENT

THE HON'BLE DR.JUSTICE VINEET KOTHARI

AND

THE HON'BLE MRS.JUSTICE S.SUJATHA

I.T.A. No.399/2017

BETWEEN:

1. THE PR. COMMISSIONER OF INCOME TAX
5TH FLOOR, BMTC BUILDING,
80 FEET ROAD,
KORAMANGALA,
BENGALURU – 560 095.
2. THE DEPUTY COMMISSIONER OF INCOME-TAX
CIRCLE-11(2), PRESENT ADDRESS,
CIRCLE – 2 (1) (1),
2ND FLOOR, BMTC BUILDING,
80 FEET ROAD,
KORAMANGALA,
BENGALURU – 560 095. ... APPELLANTS

(BY SRI.ARAVIND K V, ADV.)

AND:

M/S CYPRESS SEMICONDUCTORS
TECHNOLOGY INDIA PVT. LTD.,
65/2, LAUREL C BLOCK,
BAGMANE TECH PARK,
C.V. RAMAN NAGAR,
BENGALURU – 560 093.
PAN:AABCC 2470Q. ... RESPONDENT

THIS INCOME TAX APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:04.11.2016 PASSED IN C.O.N.166/BANG/2015, FOR THE ASSESSMENT YEAR-2005-2006 VIDE ANNEXURE -E, PRAYING TO: I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. II. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE INCOME-TAX APPELLATE TRIBUNAL, BENGALURU IN C.O.NO.166/BANG/2015 DATED:04.11.2016 VIDE ANNEXURE -E CONFIRMING THE ORDER OF THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE-2(12)(1), BENGALURU.

THIS APPEAL COMING ON FOR ADMISSION, THIS DAY, **S. SUJATHA, J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

Mr. K.V.Aravind, Adv. for Appellants – Revenue.

This Appeal is filed by the Revenue purportedly raising substantial questions of law arising from the Order of the Income Tax Appellate Tribunal, ‘A’ Bench, Bangalore, in **C.O.No.166/Bang/2015** dated **04.11.2016** relating to the Assessment Year **2005-06**.

2. The substantial questions of law framed by the Revenue in the Memorandum of Appeal are as under:

“1. Whether on the facts and circumstances of the case, the Tribunal is correct in directing the assessing officer to exclude expenses incurred in foreign currency and other expenses that has been excluded from ETO, from the total turnover also and accordingly recomputed the deduction under section 10A without appreciating the fact that there is no provision in sec. 10A that such expenses should be reduced from the total turnover also as clause (iv) of the Explanation 2 to Sec. 10A provides that such expenses are to be reduced only from the export turnover?

2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in excluding certain comparables on the ground of functional dissimilarity even when Transfer Pricing Officer has rightly chosen the same considering its functions which are similar to assessee's and has satisfied all the required tests and without doing an FAR analysis of the taxpayer with those other cases?

3. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in excluding certain comparable Kodiak Networks India Ltd, M/s.Sysarris Software P. Ltd., Novell

Software India Pvt. Ltd, M/s.Net Devices India Pvt. Ltd and another decision of Delhi Tribunal in case of M/s.Qualcomm India Pvt. Ltd, earlier order in case of assessee itself for period 2004-05 even when the said decisions have not reached finality and TPO has chosen the comparable after applying all the required tests?

4. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in excluding certain comparable which are having filter of less than 25% by following its earlier order which has not reached finality”

Regarding Substantial Question No.1:

3. The issue is covered by the decision of the Hon’ble Supreme Court in the case of **Commissioner of Income-tax, Central – III vs. HCL Technologies Ltd., [2018] 93 Taxmann.com 33(SC).**

The relevant portion of the judgment of the Hon’ble Supreme Court in the case of **HCL Technologies Ltd. (supra)**, is quoted below for ready reference:-

*“17. The similar nature of controversy, akin this case, arose before the Karnataka High Court in **CIT v. Tata Elxsi Ltd.** [2012] 204 Taxman 321/17/taxman.com 100/349 ITR 98. The issue before the Karnataka High Court was whether the Tribunal was correct in holding that while computing relief under Section 10A of the IT Act, the amount of communication expenses should be excluded from the total turnover if the same are reduced from the export turnover? While giving the answer to the issue, the High Court, inter-alia, held that when a particular word is not defined by the legislature and an ordinary meaning is to be attributed to it, the said ordinary meaning is to be in conformity with the context in which it is used. Hence, what is excluded from ‘export turnover’ must also be excluded from ‘total turnover’, since one of the components of ‘total turnover’ is export turnover. Any other interpretation would run counter to the legislative intent and would be impermissible.*

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19. In the instant case, if the deductions on freight, telecommunication and insurance attributable to the delivery of computer software under Section 10A of the IT Act are allowed only

in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the Respondent which could have never been the intention of the legislature.

20. Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well”.

4. The learned Tribunal, after discussing the rival contentions of both the Appellant-Revenue and Respondent-Assessee, has returned the findings as under:

Regarding Substantial Question of Law Nos. 2 to 4.

“12. With respect of Bodhtree Consulting Ltd., the ld. counsel for the assessee has contended that this company's function is different as it is

engaged in product development and ITeS. This company was examined by the Tribunal in the case of Syassaris Software P. Ltd. v. DCIT in IT(TP)A No.1360/Bang/2011 for the AY 2005-06 by the Tribunal and the Tribunal has directed the exclusion of this company from the list of comparables, following the order of Tribunal in the case of Kodiak Networks India Pvt. Ltd. [IT(TP)A No.532/Bang/2015 & CO 119/Bang/2015]. A copy of order of Kodiak Networks India Pvt. Ltd. is placed on record. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:-

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13. Since the Tribunal has examined the profile and datas of Bodhtree Consulting Ltd. and has come to the conclusion that this company cannot be taken as good comparable for computing the ALP, we find no justification in re-examining the issue again. Accordingly, following the aforesaid order of Tribunal, we uphold the exclusion of Bodhtree Consulting Ltd. from the list of comparables.

16. With respect to Sankhya Infotech Ltd., the ld. counsel for the assessee further contended that

this comparable was also examined by the Tribunal in the case of Syassaris Software P. Ltd. (supra) in paras 22 to 24 at pages 16 to 19.

17. Having carefully examined the contentions of the assessee, we find that undisputedly, Sankhya Infotech Ltd. was examined by the Tribunal and the Tribunal following the view taken in the case of Kodiak Network India Ltd. (supra) has directed the TPO to exclude this company from the list of comparables. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:-

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18. Since this comparable was examined by the Tribunal in the aforesaid case, we find no justification in re-examining the case. Accordingly, we exclude Sankhya Infotech Ltd. from the list of comparables.”

5. For the similar reasons, the learned Tribunal has excluded other comparables also.

6. However, this Court in a recent judgment in **I.T.A. Nos.536/2015 c/w 537/2015** delivered on **25.06.2018 (Prl. Commissioner of Income Tax & Anr. -v- M/s Softbrands India Pvt. Ltd.,)** has held that in these type of cases, unless an ex-facie perversity in the findings of the learned Income Tax Appellate Tribunal is established by the appellant, the appeal at the instance of an assessee or the Revenue under Section 260-A of the Act is not maintainable.

The relevant portion of the said judgment is quoted below for ready reference:

“Conclusion:

55. A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the

*Treaties over the Domestic Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could be raised before the High Court under **Section 260-A** of the Act, the Courts could have embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.*

56. *We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law do not meet the requirements of **Section 260-A** of the Act and thus the appeals filed by the Revenue are*

found to be devoid of merit and the same are liable to be dismissed.

57. We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assesseees, because, there may be cases where the Tribunal giving its own reasons and findings has found certain comparables to be good comparables to arrive at an **'Arm's Length Price'** in the case of the assesseees with which the assesseees may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not at all a sufficient reason to invoke **Section 260-A** of the Act before this Court.

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs."

7. Having heard the learned counsel appearing for the Appellants-Revenue, we are therefore of the opinion

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that no substantial question of law arises in the present case also. The Appeal filed by the Appellants-Revenue is liable to be dismissed and it is dismissed accordingly.

No costs.

Copy of this order be sent to the respondent-Assessee, forthwith.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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