IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES " **A** " BENCH: BANGALORE

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

IT(TP)A No.376/Bang/2016
(Assessment Year: 2011-12)

M/s. Mobily Infotech India Pvt. Ltd.,
1st Floor, RMZ Nxt, Campus 2A, Whitefield Road,
Whitefield, Bangalore-560 066 ….Appellant
PAN AAFCM0601F

Vs.

Dy. Commissioner of Income Tax,
Circle 4(1)(4), Bangalore. ……Respondent.

Assessee By:	Shri Padamchand Khincha, C.A.
Revenue By:	Ms. Neeral Malhotra, CIT (D.R.)

Date of Hearing :	04.03.2020
Date of Pronouncement :	17.03.2020

O R D E R

PER SHRI PAVAN KUMAR GADALE, JM :

The assessee has filed an appeal against the order passed u/s. 143(3) r.w.s. 144C(13) in pursuance to the directions of Dispute Resolution Panel (DRP) order dt.14.12.2015.

2. At the time of hearing, the learned Authorized Representative has filed the revised grounds of appeal, chart and prayed for exclusion of comparables only.

3. The Brief facts of the case are that the assessee is engaged in software development services and IT Consultancy.The assessee has filed the Return of Income for the Asst. Year 2011-12 with total income of Rs.8,45,553/- after claiming deduction under Section 10A of the Act. Subsequently the case was selected for scrutiny and Notice under Section 143(2) and 142(1) of the Act were issued. The Assessing Officer found that there are international transactions exceeding the limit and the matter was referred to the Transfer Pricing Officer for determination of ALP with prior approval of the Commissioner of Income Tax, Bangalore-3. The TPO has considered the financial results as per the profit and loss account and PLI worked out on OP/OC at 14.80% and the assessee has applied the TNMM as Most Appropriate Method. The TPO has issued Notice to submit the documents as per Section 92D along with the financial statements, Annual Report and copies of agreements. As per the TP study, the assessee has chosen five comparables in respect of software development activity and applied filters. Whereas the TPO has rejected the TP Study and finally selected the comparables at page 15 para 9 of the order as under :

Sl.No	Name	Sales	Cost	PLI
1	Acropetal Technologies Ltd.(seg)	814,016,893	616,754,876	31.98%
2	e zest solutions (from Capitaline)	112866098	93255341	21.03%
3	E-infochips Ltd	260384251	166447527	56.44%
4	Evoke (from Capitaline)	144869912	133996568	8.11%
5	I C R A Techno Analytics Ltd. (in 000)	158401000	126894000	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%

4. The TPO granted Working Capital and Risk Adjustment. And finally computed the Arm's Length Price (ALP) in software development segment referred at page 19 para 12.4 as under :

SOFTWARE DEVELOPMENT SERVICES

Arm's Length Mean Margin on cost	24.82%
Less: Working Capital Adjustment (As per Annex. C)	1.18%
Adjusted margin	23.64%
Operating Cost	397,166,586
Arms Length Price(ALP) 123.64% of Operating Cost)	491,056,767
Price Received	455,947,329
Shortfall being adjustment u/s 92CA:	**35,109,438**

5. The TPO has passed the order under Section 92CA of the Act dt.1.1.2014.Subsequently draft assessment order was passed with Transfer Pricing Adjustment and disallowance of adjustments in the export turnover in respect of claim under Section 10A of the Act of Rs.23,63,383/- and assessed the total income of Rs.3,83,18,380/- and passed the order under Section 144C of the Act dt.19.03.2015.Aggrieved by the draft assessment order, the assessee has filed objections in Form No.35A with the DRP. Whereas DRP, considering the submissions of the assessee, has granted relief in respect of claim of deduction under Section 10A of the Act and certain comparables were excluded. Subsequently, the Assessing Officer has passed order under Section 143(3) r.w.s. 144C(13) of the Act with Transfer Pricing Adjustment and claim under Section 10A of the Act and passed the order under Section 143(3) r.w.s144C(13) of the Act dt.13.12.2015. Aggrieved by the order, the assessee has filed an appeal with the Tribunal.

6. At the time of hearing the learned Authorized Representative argued only for exclusion of comparables and filed a Chart and paper book and prayed for allowing the appeal. Contra, the learned Departmental Representative has objected for exclusion of comparables and filed written submissions and supported with Tribunal orders.

7. We heard the rival submissions and perused the material on record. The learned Authorized Representative made submissions for exclusion of comparables

i) Acropetal Technologies Ltd. - Where the turnover is Rs.81.40 Crores. The comparable is functionally different and fails the employee cost filter. The comparable has abnormal high profit margin and fails the employee cost filter. The learned Authorised Representative relied on the decision of Commonscope Networks India Pvt. Ltd. Vs. ITO [IT(TP)A No.166/Bang/2016 Dt.22.02.2017 A.Y. 2011-12].

ii) E-Zest Solutions - The comparable has turnover of Rs.11.29 Crores and the company is functionally different. The learned Authorized Representative relied on the decision of Common scope Networks India Pvt. Ltd. Vs. ITO (supra) and the employee earnings is only 73% and fails export turnover filter.

iii) E-Infochips Limited - This comparable has turnover of Rs.26.04 Crores and has abnormal high margin of 56.44% and revenue from software development services segment is 73.77% and fails the revenue filter of 75% and functionally different. The learned Authorized Representative relied on chart and the comparable was excluded in the case of Commonscope Networks India Pvt. Ltd. Vs. ITO (supra).

iv) ICRA Techno Analytics Limited – where the turnover is Rs.15.84 Crores and RPT of 23.28%,the company is functionally different as it is engaged in the business of IT Products, Engineering and KPO Services, Segmental results of software development are not available. It fails the RPT filter and functionally not comparable. The ld.AR relied on the decision of Applied Materials India Pvt. Ltd. Vs. ACIT [IT(TP)A No.17/Bang/2016 Dt.21.09.2016 for A.Y. 2011-12] at pages 32 to 34 para 17.1 & 17.2 as under :

" (ii) Icra Techno Analytic Ltd.

17.1 We have heard the learned D.R. as well as learned A.R. and considered the relevant material on record. The DRP has rejected this company by recording the fact as under :

" We examined the annual report from which it is evident that the entire revenue has been shown under service segment which indicates that the revenue from software development, consultancy, licensing and sub-licensing, annual maintenance charges for software support. WEB development and hosting has been reported in one segment, thus in absence of segmental information, we concur with the view of the DRP in preceding year and accordingly direct the Assessing Officer to exclude this company from comparables."

17.2 We further note that the Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra) has considered the comparability of this company in paras 14 to 16 as under :

" (1) ICRA Techno Analytics Ltd. (seg)

14. At the outset, we note that apart from having the related party revenue at 20.94% of the total revenue, this company was also found to be functionally not comparable with software development services segment of the assessee. The DRP has given its finding at pages 13 to 14 as under:-

> *"Having heard the contention, on perusal of the annual report, it is noticed by us that the segmental information is available for two segments i.e., services and sales. However, it is evident from the annual report that the service segment comprises of software development, software consultancy, engineering services, web development, web hosting, etc. for which no segmental information is available and therefore, the objection of the assessee is found acceptable. Accordingly, Assessing Officer is directed to exclude the above company from the comparables."*

15. We find that the facts recorded by the DRP in respect of business activity of this company are not in dispute. Therefore, when this company is engaged in diversified activities of software development and consultancy, engineering services, web development & hosting and substantially diversified itself into domain of business analysis and business process outsourcing, then the same cannot be regarded as functionally comparable with that of the assessee who is rendering software development services to its AE.

16. In view of the above facts, we do not find any error or illegality in the findings of the DRP that this company is functionally not comparable with that of a pure software development service provider."

Nothing has been brought before us to show that the facts recorded by the DRP as well as by the co-ordinate bench of this Tribunal are not correct. Accordingly, in view of the decision of the co-ordinate bench of this Tribunal in the case of DCIT Vs. Electronics for Imaging India Pvt. Ltd. (supra), we do not find any error or illegality in the order of the DRP on this issue."

8. We found the comparables(i) Acropetal Technologies Ltd(ii)E-Zest Solutions Ltd (iii)E-Infochips Ltd. have been considered in the case of Common scope Networks India Pvt. Ltd. Vs. ITO (supra) at paras 8 & 9 as under :

8. We decide the issue of various exclusions and inclusions in these cross appeals. Regarding inclusion of 3 comparables out of 9 comparables excluded by DRP, we find that when both sides are seeking inclusion of these 3 comparables being 1) Evoke Technologies Pvt. Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd. and their inclusion is proper as per the tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT as reported in TS – 815 – ITAT – 2016, we reverse the order of DRP about exclusion of these 3 comparables and direct the AO/TPO to include these three in final list of comparables.

9. Now we decide about the remaining 6 comparables excluded by DRP and 4 comparables retained by DRP but for which the assessee is seeking exclusion. Out of these 6 comparables excluded by DRP, one comparable ICRA Techno Analytics Ltd. is having RPT in excess of 15% and therefore, for this reason alone, this comparable has to be excluded although DRP has excluded it for a different reason that it is having various activities and segmental data are not available. We uphold its exclusion on account of RPT filter. Exclusion of Acropetal Technologies Ltd. (Seg) is covered in favour of the assessee by the same tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT (Supra). Respectfully

following the same, we uphold its exclusion. Exclusion of 1) e – Zest Solutions Ltd., 2) Infosys Ltd., 3) Larsen & Toubro Infotech Ltd., 4) Persistent Systems & Solutions Ltd., 5) Persistent Systems Ltd., 6) Sasken Communication Technologies Ltd. and 7) Tata Elxsi Ltd. are also covered in favour of the assessee by the same tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT (Supra). Respectfully following the same, we uphold the exclusion of these Seven comparables also. Exclusion of E – Infochips Ltd. is covered in favour of the assessee by the tribunal order rendered in the case of Saxo India Pvt. Ltd. vs. ACIT in ITA No. 6148/Del/2015 dated 05.02.2016 Para 10.1 & 10.2 available at pages 221 to 223. Respectfully following the same, we uphold its exclusion. In this manner, we uphold the exclusion of six comparables excluded by DRP out of 9 comparables excluded by DRP and exclude 4 comparables retained by DRP and we have already held that out of 9 comparables excluded by DRP, 3 have to come back being 1) Evoke Technologies Pvt. Ltd., 2) Mindtree Ltd. (Seg) and 3) R S Software (India) Ltd. Now, we decide about LGS Global Ltd. As per the tribunal order rendered in the case of Applied materials India Pvt. Ltd. vs. ACIT (Supra), this is a good comparable and therefore, we direct the A.O. and TPO to include this comparable. So, there should be 4 comparables in the final list of comparable and on the basis of that, the AO/TPO should work out the ALP.

9. The learned Departmental Representative has filed written submissions and relied on the decision in the case of M/s.Telsima Communications Pvt. Ltd. Vs. DCIT [IT(TP)A No.304/Bang/2016 Dt.22.02.2019 Asst Year 2011-12 at page 15 para 7.3.2 as under in respect of Acropetal technologies ltd.

> “ 7.3.2 From the above, it is seen that the assessee had objected to the inclusion of ‘Acropetal’ on different issues before different authorities. The TPO and DRP have not addressed the issues raised before them. Before us, the assessee has objected to the inclusion of this company on various issues, listed above; some of which are being raised for the first time. In the judicial decision cited by the assessee, ‘Acropetal’ has been excluded from the set of comparables by the co-ordinate bench of this Tribunal on the ground that the service revenue from software development services is less than 75% of the operating revenue; which ground was never taken by the assessee before the authorities and has been raised by the assessee for the first time before us.
>
> 7.3.2 Taking into account the facts and circumstances as narrated above and considering that the assessee has raised certain grounds before us for the first time and also the fact that the DRP has not rendered a finding on the issues raised by the assessee before it, we deem it necessary to remand the issue of comparability of this company back to the file of the TPO, for examining the issue afresh and adjudication on all the issues raised by the assessee in respect of the comparability of this company, Acropetal Technologies Ltd. Needless to add, the TPO is directed to afford the assessee adequate opportunity of being heard and to file details/submissions required, which shall be considered before deciding on the comparability of this company. We hold and direct accordingly.”

10. Similarly E-Zest Solutions Limited at para 8.3 and E-Infochips Limited at paras 9 to 9.32 and ICRA Techno Analytics Ltd. at page 20 para 10 a sunder :

9. E-infochips Ltd., (‘E-infochips’)

9.1 The assessee contends that this company, ‘E-infochips’, needs to be excluded as it is engaged in the business of software development and maintenance services, ITES and sale of products, but that segmental details are not available. It is also submitted that this company is engaged in engineering development services, manufactures printed circuit boards; incurs expenditure on R & D and holds inventories. In support of the assessee's plea for exclusion of this company from the set of comparables, reliance was placed on the decision of the Co-ordinate Bench in the case of

(i) Finastra Software Solutions (I) Ltd., (supra) and

(ii) Electronics for Imaging India Pvt. Ltd., (supra).

9.2 Per contra, the learned DR supported the orders of the authorities below.

9.3.1 We have considered the rival contentions / submissions and perused the material on record. We find from an appraisal of the record before us, that the assessee has raised the objection before the TPO that this company 'E-infochips', is functionally dissimilar to the assessee and that the revenue from software development services is less than 75%. The TPO, however, rejected the assessee's contention on the ground that the revenue from software development services is 88% and hence it satisfies the filter. However, the TPO has not rendered any finding on the issue of functional dissimilarity of 'E-infochips' vis-à-vis the assessee in the case on hand. It is also seen that before the DRP, the assessee has raised objections on the inclusion of this company as a comparable on various issues, but the DRP has not rendered any findings on the same.

9.3.2 We find tha thte Co-ordinate Bench of this Tribunal in the decision of Finastra Software Solutions (I) Ltd., (supra) cited by the assessee (supra) has excluded this company 'E-infochips' from the set of comparables by relying on the decision in the case of Applied Materials (P) Ltd., (IT(TP)A No.17 and 39/Bang/2016 dated 21.09.2016). However, the issue on which this company has been excluded from the set of comparables is not clear from the judicial pronouncement cited by the assessee. Since the assessee has raised certain issues for exclusion of this company from the list of comparables for the first time before us, and the authorities below have not rendered any finding on the functional comparability of this company 'Einfochips' vis-à-vis the assessee in the case on hand, we deem it appropriate to remand the issue of comparability of this company, Einfochips Ltd., back to the file of the TPO, for examination / verification of the facts and adjudication on the issues raised by the assessee. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details / submissions in this regard, which shall be considered before deciding the matter. It is accordingly ordered.

10. ICRA Technologies Ltd., ('ICRA')

10.1 The learned AR submits that this company, 'ICRA', is functionally dissimilar to the assessee in the case on hand, since it is engaged in the purchase and sale of software and also has income from business intelligence and analytics. It is also submitted that 'ICRA' has income from licensing and sub-licensing and owns IPRs and that were peculiar economic circumstances due to business restructuring which is an extraordinary activity. It was also submitted that the segmental details are not provided. In support of its contentions for exclusion of this company, the assessee has placed reliance on the decisions of the Co-ordinate Bench of this Tribunal in the case of Finastra Software Solutions (I) Ltd., (supra) and in the case of Electronics for Imaging India Pvt. Ltd., (supra).

10.2 Per contra, the learned DR supported the orders of the authorities below.

10.3 We have considered the rival contentions / submissions and perused the material on record. We find that the assessee had objected to inclusion of this company, 'ICRA' as a comparable, contending that it is functionally dissimilar to the assessee in the case on hand and that segmental details are not available. The TPO, however, rejected the assessee's contentions and included ICRA as a comparable. Before the DRP, the assessee raised objections to inclusion of this company on grounds of functional difference and that segmental details are not available, but we observe that the DRP has not rendered any findings on the same. We find that the Co-ordinate Bench of this Tribunal in the case of Finastra Software Solutions (India) Pvt. Ltd., (supra), cited by the assessee, in its order, has excluded 'ICRA' from the set of comparables by relying on the decision of another Co-ordinate Bench in the case of Applied Materials (P) Ltd., (IT(TP)A No.17 and 39/Bang/2016 dated 29.09.2016). However, the issue on which this company 'ICRA' has been excluded from the set of comparables is not clear from the judicial pronouncement cited by the assessee. Since the assessee has raised certain issues for seeking exclusion of this company for the first time before us, we deem it appropriate to remand the issue of comparability of 'ICRA' back to the file of the TPO for examination and verification of facts of the matter and adjudication on the issues raised by the assessee. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details / submissions in this regard, which shall be considered before deciding this matter."

We found that the decision relied by the learned Departmental Representative is a recent decision of year 2019 pertaining to assessment year 2011-12 and facts are dealt, and the comparables were restored with directions to the file of transfer pricing office(TPO) for examination and verification, though the ld. AR relied on the decision of Common scope Networks India Pvt. Ltd. Vs. ITO (supra) in the year 2017.we consider it appropriate to restore the comparables(i) Acropetal Technologies Ltd(ii)E-Zest Solutions Ltd (iii)E-InfochipsLtd and (iv)ICRA TechnoAnalytics Ltd to the file of TPO to verify and examine on the functionalities and allow the grounds of appeal of the assessee for statistical purposes. The learned Authorized Representative has restricted his submissions to the extent of exclusion of comparables supported by chart and paper book. Hence other grounds of appeal are dismissed.

11. In the result, the assessee's appeal is partly allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(A.K. GARODIA)	**(PAVAN KUMAR GADALE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 17.03.2020.

*Reddy GP

Copy to

1. The Appellant
2. The Respondent
3. CIT (Appeals)
4. Prin. CIT
5. DR, ITAT
6. Guard File.

By order
Assistant Registrar
Income-tax Appellate Tribunal
Bangalore