

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH, 'C' PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.15/PUN/2019
निर्धारण वर्ष / Assessment Year : 2014-15

Optiva India Technologies Private Limited, (Formerly known as Redknee (India) Technologies Private Limited), C/o. Awfis Space Solutions Pvt. Ltd., Ground Floor, Unit No.4, W-Wing, Business@Mantri, Nagar Road, Lohegaon, Viman Nagar, Pune 411 014 PAN : AACCR7002A	Vs.	DCIT, Circle-3, Pune
Appellant		Respondent

Assessee by Shri Darpan Kirpalani
Revenue by Shri Anurag Srivastava

Date of hearing 22-09-2021
Date of pronouncement 23-09-2021

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee is directed against the final assessment order dated 10-10-2018 passed u/s.143(3) r.w.s.144C(13) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2014-15.

2. The only issue raised in this appeal is against the transfer pricing addition of Rs.13,48,02,885/-.

3. Briefly stated, the facts of the case are that the assessee company is engaged in rendering software support services. A return

was filed declaring total income of Rs.32,84,75,510/-. Certain international transactions were reported in Form No. 3CEB. The Assessing Officer (AO) made a reference to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions. We are concerned only with the international transaction of "Provision of Software Research and Development and Technical Support services" with transacted value of Rs.94,89,36,023/-. The assessee applied the Transactional Net Margin Method (TNMM) for demonstrating the international transaction to be at ALP. Profit Level Indicator (PLI) of Operating Profit to Total Cost (OP/TC) was worked out at 13.39%. With the help of certain comparables, the assessee declared the international transaction to be at ALP. The TPO made certain alterations to the assessee's PLI and reworked out the ratio of OP to TC at 13.12%. The set of comparables chosen by the assessee also underwent change with their new average adjusted PLI at 24.39%. This led to recommending the transfer pricing adjustment of Rs.13,48,02,885/-. The assessee remained unsuccessful before the Dispute Resolution Panel (DRP). That is how, the assessee has come up in appeal before the Tribunal.

4. We have heard the rival submissions and gone through the relevant material on record. At the outset, it is made clear that there is no dispute on the application of the TNMM as the most appropriate method. Similarly, the assessee has also not challenged the alterations in its PLI made by the TPO from 13.39% to 13.12%. To be more precise, the assessee has assailed the inclusion of certain companies in the final set of comparables.

5. Before embarking upon the comparability or otherwise of the companies challenged in appeal, it would be befitting to first understand the nature of activity carried on by the assessee. The TPO has recorded that the assessee is engaged in the business of rendering Software support services. We have gone through the Agreement dated 01-04-2013 between the assessee and its Associated Enterprise (AE) namely, Redknee, Inc, (RI) Canada, whose copy has been provided at page 394 onwards of the paper book. The Agreement provides that the RI (i.e. the assessee's AE) is a global provider of OSS/BSS software products solutions and services to the telecommunication industry and is the owner of all applicable rights, titles and interest in the Technology (entire Technology platform owned by RI, as existing on the Effective Day, comprising of the Products and RI Intellectual Property). On the

other hand, the assessee is a Subsidiary and is in the business of performing, among other things, contract research and development (R&D) services. The term 'Services' has been defined in the Agreement under clause 1.10 to mean the R&D services performed by Subsidiary for and on behalf of RI and includes, but is not limited to, updates, process improvements, enhancements, modifications, and customizations. Clause 3 of the Agreement states that the AE granted licenses to the assessee to use the Technology for the sole purpose of performing the Service. There is a bar on the licensee to make available, transfer or otherwise disclose the Technology to third parties. Clause 4 of the Agreement deals with Ownership of the work done by the assessee in the course of providing the Services. It states that all the related information, including any derivative works, Improvements or Modifications created by Subsidiary in the course of providing the Services, is proprietary to RI (i.e. the AE) and that all rights thereto, including all Intellectual Property Rights will vest in RI. On going through the above clauses of the Agreement, it becomes clear that the nature of the international transaction is that of provision of contract research and development services to its AE, which are utilized by the latter in its business of software products and solutions. With the above backdrop of the nature of activity

carried on by the assessee, we now proceed to determine the comparability or otherwise of the companies challenged before us *ad seriatim*.

(1) PERSISTENT SYSTEMS LTD. :

6. The TPO included this company in the list of comparables. The assessee's objections about the functional dissimilarity did not weigh with the TPO. The assessee remained unsuccessful before the DRP as well.

7. Having heard both the sides and gone through the relevant material on record, we observe from the Annual report of this company, a copy of which has been placed at page 77 of the paper book, that it acquired a company called CloudSquads, Inc through stock acquisition in February, 2014. Without examining the functional similarity or dissimilarity of this company, we find that the extraordinary financial event of acquisition of another company taking place during the year under consideration has rendered it non-comparable.

8. The Hon'ble jurisdictional High Court in *Pr. CIT Vs. Aptara Technology Pvt. Ltd. (2019) 410 ITR 100 (Bom.)* has upheld the decision of the Tribunal in excluding an otherwise functionally comparable company due to extraordinary events like merger etc.

The Mumbai Bench of the Tribunal in *Petro Araldite P. Ltd. Vs. DCIT (2013) 154 TTJ 176 (Mum)* has also held that a company cannot be considered as comparable because of exceptional financial results due to merger/demerger etc. The Hon'ble Delhi High Court in *Ameriprise India Pvt Ltd [TS-875-HC-2016(DEL)-TP]* has dismissed the Revenue's appeal against the order passed by the Tribunal in which certain companies were excluded on account of extraordinary events. In view of the foregoing discussion, it is palpable that a company with extraordinary financial events of acquisition and merger/demerger occurring during the year, cannot be considered as comparable. Since Persistent Systems Ltd. underwent such extraordinary financial event during the year due to acquisition of CloudSquad Inc., we direct to exclude it from the list of comparables.

(2) THIRDWARE SOLUTIONS LTD. :

9. The TPO included this company in the list of comparable. The assessee objected to such inclusion on the basis of functional dissimilarity, which did not convince the TPO. No reprieve was allowed by the DRP.

10. After considering the rival submissions and going through the relevant material on record, we find from the Annual report of this

company, a copy of which has been placed in the paper book, that its revenue consists mainly of sale of user licenses. In the Profit and loss account, the main item is 'Revenue from sale of products' with the value of Rs.20,675.74 lakhs. In fact, 'Revenue from sale of Services' has been shown at Nil. This shows that the company is into the business of software products and not rendering the software services. This fact is further corroborated from the Note given under the head 'Revenue Recognition', that: *'. revenue from sale of user licenses for software applications is recognized on e-delivery of software license key to end user'*. In contrast, the assessee company is engaged only in providing software development services and is not having any software product business. In view of this startling functional non-matching, this company is directed to be excluded from the list of comparables.

(3) R.S. SOFTWARE LTD. :

11. This company was included by the assessee itself in the list of comparables. However, during the course of the proceedings before the authorities it was claimed that the company was not comparable.

Both the authorities jettisoned the assessee's contention.

12. As regards the preliminary objection of the ld. DR that the assessee cannot unchoose a company during the course of

proceedings which was *suo motu* chosen as comparable in its Transfer pricing study report, we find enough judicial precedents permitting an assessee to claim withdrawal of company from the list of comparables which was inadvertently included by it in the list of comparables. The Hon'ble jurisdictional High Court in *CIT Vs. Tata Power Solar Systems Ltd. (2017) 298 CTR 197 (Bom.)* has reiterated this view which was also taken by the Hon'ble Punjab & Haryana High Court in *CIT Vs. Quartz Systems India (P) Ltd. (2011) 244 CTR 542 (P&H)*. Thus, in principle, there can be no quarrel over the proposition that an assessee can claim removal of a non-comparable company from the list of comparables drawn by it which was wrongly included.

13. On merits, we find from the Annual report of this company, a copy of which has been placed at page 508 onwards of the paper book, that it is engaged in providing software solutions in various facets of industrial needs as under:

Switching and authorisation:

Solution: RS Software assists leading brands in the global payments business address the challenges of switching and authorization in a competitive 24x7 marketplace, improving availability, scalability and security. We have worked for more than 20 years to enable the speed of a transaction throughout to grow from 500 transactions as per second to more than 20,000 transactions per second today.

Clearing and settlement:

Solution: RS Software provides clearing and settlement solutions that handle large transactions in an environment marked by cross-border activity, regulatory changes and payment diversity.

Risk and fraud:

Solution: RS Software helps leading global payment brands integrate their fraud prevention and detection solutions into high-performance processing environments.

Dispute and chargeback:

Solution: RS Software has more than a decade of experience in providing proven dispute and chargeback solutions to customers all across the world. We have repeatedly delivered end-to-end solutions that include on-going testing, enhancements and support to keep our clients current with the dynamic landscape in the payments industry.

Merchant management:

Solution: RS Software provides acquirers with a comprehensive set of merchant management solutions that reduce complexity, minimise costs and deliver a competitive advantage. Today, we serve some of the best-known brands in the acquiring space with more than two decades of merchant management expertise.

Business analytics and tools:

Solution: RS Software supports the needs of its clients across four key areas (technology, governance, analytics and strategy). We offer a complete set of data analytic services that include assessment, consulting, establishing migration methodologies, implementing, testing and production support.

14. It is further borne out from the Annual report of the company that: “RS software is a Technology service provider with rich domain

experience in payments and a significant pedigree in dispute management. Our competence has been built around a comprehensive understanding of the dispute lifecycle from the perspective of the network, issuer and acquirer. RS Software uses a proprietary set of tools to accelerate development and integration of the dispute management system. This comprises of the following.

*A reference architecture created for dispute/chargeback processing.

*A requirements and features checklist for dispute/chargeback solutions.

*Business test cases for the comprehensive testing of a dispute/chargeback system.

*Industry-best practices for managing disputes/chargebacks.

.....”

15. When we compare the nature of work carried out by R.S. Software Ltd. with the contractual R&D of software activity carried on by the assessee, we find both to be poles apart. In view of such functional dissimilarity, we order to exclude this company from the list of comparables.

16. In view of the foregoing discussion, we set-aside the impugned order and remit the matter to the file of AO/TPO for determining the ALP of the international transaction of Provision of software support

services afresh in the light of our above directions/observations.

Needless to say, the assessee will be allowed a reasonable opportunity of hearing.

17. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 23rd September, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 23rd September, 2021
सतीश

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The DRP-3, Mumbai-1/ DRP-3, Mumbai-2/
DRP-3, Mumbai-3/
3. The CIT(IT & TP), Pune
4. DR, ITAT, 'C' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

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

		Date	
1.	Draft dictated on	22-09-2021	Sr.PS
2.	Draft placed before author	23-09-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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