IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA no.393/Mum./2014
(Assessment Year : 2009–10)

Income Tax Officer
Ward–8(1)(4), Mumbai ……………. Appellant

v/s

Golden Source India Pvt. Ltd.
1st Floor, 13–A, Paper Box Estate
Mahakali Caves Road, Andheri (E)
Mumbai 400 096 PAN – AAACF8190M ……………. Respondent

ITA no.667/Mum./2014
(Assessment Year : 2009–10)

Golden Source India Pvt. Ltd.
1st Floor, 13–A, Paper Box Estate
Mahakali Caves Road, Andheri (E)
Mumbai 400 096 PAN – AAACF8190M ……………. Appellant

v/s

Income Tax Officer
Ward–8(1)(4), Mumbai ……………. Respondent

Revenue by : Shri Jeevan Lal Lavidiya
Assessee by : Shri Ajit Kumar Jain a/w
Shri Siddhesh Chaugule

Date of Hearing – 19.02.2019	Date of Order – 10.05.2019

O R D E R

PER SAKTIJIT DEY. J.M.

Aforesaid cross appeals arise out of the final assessment order dated 26th December 2013, passed under section 143(3) r/w section 144C(13) of the Income-tax Act, 1961 (for short *"the Act"*) for the assessment year 2009–10, in pursuance to the directions of the Dispute Resolution Panel–I (DRP), Mumbai.

ITA no.393/Mum./2014
Revenue's Appeal

2. In this appeal, the Revenue has challenged the decision of learned DRP in excluding Genesys International Corporation Ltd. and Infinite Data Systems Ltd., from the list of comparables selected by the Transfer Pricing Officer.

3. Brief facts are, the assessee, an Indian company, is a wholly owned subsidiary of Golden Source Corporation, USA. As stated by the Transfer Pricing Officer, the assessee is involved in providing software service including coding, integration and testing, etc., to its Associated Enterprise (AE) only. In other words, the assessee is a captive service provider. In the previous year relevant to the assessment year under dispute, the assessee provided services to its overseas AE and earned revenue of ₹ 20,42,05,216. In the transfer pricing study report, the

assessee benchmarked the international transaction with the AEs by applying Transactional Net Margin Method (TNMM) as the most appropriate method with net cost plus margin (operating profit / total cost ratio) as the Profit Level Indicator (PLI). For the purpose of benchmarking the arm's length price, the assessee selected 10 companies as comparable with arithmetic mean of 14.93% before working capital adjustment. Since the margin shown by the assessee at 12.03% before working capital adjustment was within ±5% range of the arithmetic mean of the comparables, the assessee claimed the price charged to the AEs for provision of software service to be at arm's length. The Assessing Officer, however, did not accept the transfer pricing study report and the comparables selected by the assessee. Out of the 10 comparables selected, the Transfer Pricing Officer accepted seven while rejecting three comparables. Further, the Transfer Pricing Officer, on his own, selected new comparables and the final set of comparables selected by the Transfer Pricing Officer comprised of 11 companies with arithmetic mean of 26.95%. Applying the arithmetic mean of selected comparables, the Transfer Pricing Officer ultimately determined the arm's length price of the software service provided to the AEs at ₹ 23,13,96,112, resulting in an upward adjustment of ₹ 2,71,90,896 to the arm's length price shown by the assessee. The adjustment proposed by the Transfer Pricing Officer was added back in the draft assessment order. Against the draft assessment order assessee raised objections before learned DRP.

4. The major ground of challenged before learned DRP was with regard to selection / rejection of comparables and non consideration of assessee's claim for working capital adjustment. Learned DRP after considering the submissions of the assessee in the context of facts and material on record, granted partial relief to the assessee by excluding two of the comparables selected by the Transfer Pricing Officer viz. Genesys International Corporation Ltd. and Infinite Data Systems Ltd.

5. The learned Departmental Representative submitted, Genesys International Corporation Ltd., is in the same line of business as the assessee. Drawing our attention to the functional profile of this company as described in the annual report, a copy of which is placed in the paper book, learned Departmental Representative submitted that this company is also providing software service. Though, it may be involved in software development in different areas. Thus, he submitted, the company being functionally similar to the assessee should have been retained as a comparable. Insofar as Infinite Data Systems Ltd. is concerned, learned Departmental Representative submitted, it is a cost plus entity like the assessee and is also involved in design and development of software. In this context, he drew our attention to the annual report of the company placed in the paper

book. Thus, he submitted, the company being functionally similar to the assessee has to be retained as comparable.

6. The learned Authorised Representative submitted, Genesys International Corporation Ltd. cannot be treated as a comparable since it is into diversified activities, such as, providing Geographic Information Service (GIS) comprising of photogrammetry, remote sensing, cartography, data conversion and other computer based related service. In this regard, he drew our attention to the functional profile of the company as described in the annual report. Further, drawing our attention to the financial statements of the company, learned Authorised Representative submitted, segmental data relating to various segments are not available. Thus, he submitted, the company cannot be treated as comparable. In support of his contention, the learned Authorised Representative relied upon the decision of the Tribunal, Mumbai Bench, in Lion Bridge Technologies Pvt. Ltd. v/s ITO, ITA no.668/Mum./2014 & Ors., dated 18th November 2015. As regards comparability of Infinite Data Systems Ltd. is concerned, learned Authorised Representative submitted, this company is not functionally comparable to the assessee, as, it is engaged in diversified activities including providing solutions encompassing technical, consulting, design and development of software, maintenance, system integration, implementing, testing and

infrastructure management service. In this context, he drew our attention to the functional profile of the company as described in the annual report placed in the paper book. Further, he submitted, the company earns revenue from technical support and infrastructure management service. However, segmental break−up are not available. In this context, he drew our attention to the audited financial statement of the company. Thus, he submitted, the company cannot be treated as a comparable.

7. We have considered rival submissions and perused the material on record. As regards the comparability of Genesis International Corporation Ltd. is concerned, on a perusal of the functional profile of the company described in the annual report, it is noticed that the company is engaged in diversified activities including Geospatial service and content provider. It is also involved in 3D mapping, GIS, consultancy, photogrammetry and remote sensing service, image processing, utility services, telecommunication and various other activities. The financial statement of the company also reveals that segmental data relating to various segments are not available. Looking at the aforesaid factual position, learned DRP has held that this company cannot be treated as a comparable to the assessee due to functional difference. Notably, the Mumbai Bench in Lion Bridge Technologies Pvt. Ltd. (supra) while examining the comparability of

this company to a software service provider in the very same assessment year, has held that due to its functional profile arising out of diversified activities carried on by it, it cannot be treated as a comparable. Respectfully following the aforesaid decision of the Co–ordinate Bench, we uphold the decision of learned DRP in excluding Genesys International Corporation Ltd. from the list of comparables.

8. Insofar as Infinite Data Systems Ltd. is concerned, on a careful analysis of its functional profile as described in the annual report, it is noticed that the activities carried on by this company is completely different from the assessee. Though, the company in course of its business activities may be providing some services in the category of software service, however, in the absence of segmental break–up, the margin relating to such segment cannot be ascertained with reasonable accuracy. That being the case, we agree with learned DRP that this company cannot be treated as a comparable to the assessee. Grounds raised are dismissed.

9. In the result, Revenue's appeal is dismissed.

ITA no.667/Mum./2014
Assessee's Appeal

10. At the outset, learned Authorised Representative, on the instructions of the assessee, submitted that he does not want to press

grounds no.1, 5 and 6. Accordingly, these grounds are dismissed as not pressed.

11. Grounds no.7 and 8, being general in nature do not require adjudication.

12. At the time of hearing, learned Authorised Representative submitted, if ground no.4 relating to assessee's claim of working capital adjustment is decided in favour, grounds no.2 and 3 relating to objections raised against selection of three comparables would become academic, since, assessee's margin would be within ±5% range of the arithmetic mean of the rest of the comparables. In view of the aforesaid submission of the learned Authorised Representative and with the consent of the learned Departmental Representative, we proceed to dispose of ground no.4 at the very outset.

13. Brief facts are, as discussed earlier in the transfer pricing study report, the assessee while benchmarking the international transaction with AE had applied TNMM as the most appropriate method and had selected 10 companies as comparables with arithmetic mean of 14.93%. Further, the assessee had made an adjustment of 3.93% to the arithmetic mean of the comparables on account of working capital difference. Thus, after working capital adjustment, the average margin of the comparables was computed at 11%. The Transfer Pricing Officer

while computing the margin of the final set of comparables did not consider assessee's claim of working capital adjustment. As could be seen, in its objections before the DRP the assessee specifically raised the issue of non-consideration of its claim of working capital adjustment in ground no.1.10. Learned DRP while considering the aforesaid claim of the assessee observed in the following manner:-

> *"4.7 Insofar as the various risk adjustments are concerned, we find that the TPO has accepted the assessee's adjusted operating cost and adjusted operating profit of assessee's comparables. Consequently disallowing similar adjustments on other comparables without providing any reason is not acceptable. TPO is therefore directed to recalculate PLI after providing similar adjustments in the case of all comparables."*

14. However, ultimately, the Assessing Officer did not allow working capital adjustment to the assessee in the final Assessment Order.

15. Drawing our attention to the transfer pricing study report, learned Authorised Representative submitted, adjustment on account of working capital difference has to be allowed since the average investment in working capital of the comparable companies is much more than the assessee. He submitted, in assessee's case investment in working capital as a ration on sales comes to a negative figure of 0.81%. He submitted, the Prime Lending Rate of SBI during the financial year 2008-09 was 12.94%. He submitted, applying the said interest rate to the differential working capital investment results in a working capital adjustment of 9.38%. He submitted, if working capital

adjustment is allowed, the average margin of the rest of the comparables would be 10.49% as against the margin shown by the assessee at 12.03%. Hence, no further adjustment to the arm's length price would be required. In this context, he drew our attention to the computation of margin of final set of comparables as per the directions of learned DRP after providing working capital adjustment, as placed at Page–82 of the paper book.

16. Learned Departmental Representative relied upon the observations of the Assessing Officer and the DRP.

17. We have considered rival submissions and perused the material on record. It is noticed, in the transfer pricing study report itself the assessee while computing the margin of the comparables had made an adjustment on account of working capital, since, it is very less as compared to wo king capital investment of the comparables as a ratio of sales. Now, it is fairly well settled that adjustment on account of working capital difference has to be allowed while computing the margin of the comparables, since, it is a relevant factor which influences the price and profitability. The Transfer Pricing Officer while computing the margin of the comparables has completely ignored the aforesaid aspect. As could be seen, learned DRP while considering the objections of the assessee in this regard has directed the Assessing Officer to allow assessee's claim of working capital adjustment though

they have wrongly mentioned it as risk adjustment. In our view, assessee's claim of adjustment on account of working capital difference is admissible. Therefore, we direct the Assessing Officer to verify the workings furnished by the assessee computing the average margin of the comparables after working capital adjustment and compute the margin of the comparables accordingly. This ground is allowed.

18. In view of the submissions of learned Authorised Representative that after working capital adjustment, the average net cost plus margin of the comparables would be within ±5% range of assessee's margin, grounds no.2 and 3 raised by the assessee challenging selection of three comparables have become academic, hence, do not require adjudication. However, the issues raised in these grounds are left open for adjudcation if they arise in any other appeal of the assessee in future.

19. Besides the main grounds, the assessee has raised two additional grounds being grounds no.9 and 10. However, at the time of hearing, the learned Authorised Representative, on the instructions of the assessee, did not press these grounds. Accordingly, they are dismissed as not pressed.

20. In the result, assessee's appeal is partly allowed.

21. To sum up, Revenue's appeal is dismissed and assessee's appeal is partly allowed.

Order pronounced in the open Court on 10.05.2019

Sd/-	**Sd/-**
M. BALAGANESH	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 10.05.2019

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai