

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I', NEW DELHI
BEFORE
SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No.869/Del/2016
(Assessment Year 2011-12)

Orange Business Services India Solutions Pvt .Ltd., Tower B, 8 th Floor, DLF Infinity Tower, Phase II, Sector 25, Gurgaon GIR / PAN : AABCE4540P	Vs.	DCIT, Circle 3, Gurgaon
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(Appellant)

(Respondent)

Appellant by : Shri Kanchan Kaushal, CA
Shri Rohit Tiwari, CA
Ms. Shruti Knimta, Adv.

Respondent by : Shri Amrendra Kumar, CIT DR

Date of hearing: 03.05.2016

Date of Pronouncement: 31/05/2016

ORDER

PER BEENA A. PILLAI, JM:

The present appeal has been filed by the assessee against the final order of DCIT Circle 3, Gurgaon for the Assessment Year 2011-12 on the following grounds of appeal:

“That on the facts and circumstances of the case, and in law;

1. *The Learned Assessing Officer ('Ld. AO)/ Learned Transfer Pricing Officer ('Ld. TPO') (following the directions of the Learned Dispute Resolution Panel ('Ld. DRP')) erred on facts and in law in enhancing the income of the Appellant by Rs. 13,34,87,027 without appreciating the factual positions/ submissions of the Appellant.*

2. *The Ld. AO/ Ld. TPO (following the directions of the Ld. DRP) erred in enhancing the income of the Appellant by Rs. 13,34,87,027 holding that the international transactions of the Appellant pertaining to provision of information technology ('IT /CSD') and information technology enabled services ('ITeS') do not satisfy the arm's length principle envisaged under the Act and in doing so, have grossly erred in:*

2.1. *not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*

2.2. *disregarding the Arm's Length Price (ALP) as determined by the Appellant in the Transfer Pricing (TP) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules') as well as fresh search; and in particular modifying/ rejecting the filters applied by the Appellant;*

2.3. *rejecting comparability analysis undertaken by the Appellant in the TP documentation/ fresh search and conducting a fresh comparability analysis based on application of additional revised filters, or disregarding Appellant's filters in determining the ALP for the international transactions;*

2.4. *disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. Financial Year ('FY') 2010-11) data for comparable companies should be used;*

2.5. including companies having high margin / volatile operating profit margins in the final comparables' set for benchmarking a low risk captive unit such as the Appellant;

2.6. including certain companies in the final set of comparables that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

2.7. resorting to arbitrary rejection of low-profit / loss making companies and companies with diminished revenues based on erroneous and inconsistent reasons;

2.8. excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

2.9. by committing factual/computational errors in selection/ rejection of proposed comparables and/ or in the operating profit mark-ups of the comparables;

2.10 ignoring the business/ commercial reality that the Appellant undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact; and

2.11. disregarding judicial pronouncements in India in undertaking the TP adjustment.

3. The Ld. DRP erred in disregarding the detailed arguments/ submissions put forth by the Appellant during the course of the D RP / assessment proceedings while passing its direction under section 144C of the Act;

4. The Ld. AO has grossly erred by proposing to compute interest under section 234B of the Act;

5. The Ld. AO has grossly erred in initiating penalty under section 271(1)(c) of the Act mechanically and without recording any satisfaction for its initiation.

The above grounds are without prejudice to each other.”

3. The main issue raised by the assessee is against selection of comparables by the TPO and upheld by the DRP. At the time of hearing, Ld. A.R. submitted that the issue stands covered by the decision of this Tribunal in assessee's own case for the Assessment Year 2010-11 in I.T.A.No. 1202/Del/2015.

3.1 Facts apropos are that, the assessee, erstwhile known as Equant Solutions India Private Limited, is a subsidiary of EGN BV, Netherlands. The assessee is engaged in providing information technology enables network management and other back office support services to its group companies. It also undertakes software development services for developing software applications, which are used within the Group companies. The IT enabled network management and other back office support services performed by assessee, primarily include remote monitoring and maintenance of Equant global network platforms and services, coordination, remote configuration, and implementation of quality customer networking solutions. Further under the

category of software development services assessee is engaged in the providing routine contract software development services relating to the development and maintenance of application companies like HR and accounting.

3.2 Reference u/s 92CA was made for determination of arms length pricing in case of following international transaction entered into by assessee:

S. No	Transaction	Value of Transaction	Amount Of Adjustment	Tax Demand on the adjustment	Interest u/s 234B	Total Tax demand
1	ITeS Segment	1,75,65,56,731	11,34,42,279			
2	Contract software development services Segment	25,14,75,552	2,00,44,748	88,72,802	51,46,224	1,40,19,030
3	Purchase of networking equipment	9,94,180	Accepted			
4	Interest on loan	93,38,148	Accepted			

3.3. In its TP study report, assessee separately benchmarked the international transaction with respect to contract Computer software development i.e. IT(CSD) and ITES using multiple year data, selecting TNMM as the Most Appropriate method (MAM) and using Operating profit/total cost (OP/TC) as profit level indicator (PLI) for determining arms' length price(ALP) of its transactions. In its TP study report, assessee has benchmarked the above transaction. As per

TPO's order dated December, 2014, he has benchmarked the international transaction by taking some of the comparables which is tabulated as under:-

A. ITES segment:

S.No.	Name of the company	OP/OC
1	Accentia Technologies Ltd.	29.18%
2	Acropetal Technologies Ltd. (segment)	14.36%
3	e4e Healthcare Business Services P. Ltd.	9.77%
4	eClerx Services Ltd.	56.82%
5	ICRA Techno Analytics Ltd. (Segment)	25.24%
6	Infosys BPO Ltd.	17.86%
7	Jindal Intellicom Ltd.	13.70%
8	Microland Ltd. (ITES segment)	8.5%
9	TSCS E-serve Limited	69/31%
		27.19%

B. Software Development Services:

S.No.	Company Long name	OP/OC
1	Acropetal Technologies Ltd. (Segment)	36.69%
2	Akshay Software Technologies Ltd.	0.16%
3	E-infochips Limited	56.44%
4	iGate Global Solutions Ltd.	23.71%
5	Infosys Ltd.	43.54%
6	Larsen & Toubro Infotech Ltd.	18.40%
7	Mindtree Limited (Segment)	10.74%
8	Persistent Systems & Solutions Ltd. (Merged)	22.12%
9	Persistent Systems Ltd.	23.08%
10	R.S. Software (India) Ltd	16.20%
11	Sankhya Infotech Ltd.	26.20%
12	Sasken Communication Technologies Ltd.	24.36%
13	Tata Elxsi Ltd.(Segment)	13/00%
14	Wipro Technologies Ltd	54.42%
15	Zylog Systems Ltd.	28.74%
	Average	26.52%

3.4. Based on the above, TPO proposed the adjustment of Rs.25,116,626/- towards software and ITeS services. On an objection before DRP, vide direction dated 10.12.2015/22.12.2015, the DRP upheld the draft order

of the Ld.TPO. Pursuant to the directions of DRP the DY CIT circle 3, accordingly passed an order making the adjustment as under:

S.No.	Description	Amount
1	Software development service	2,17,49,949
2	IT Enabled Service	18,56,70,724
	Total	20,74,20,673

3.5 Aggrieved by the order of Assessing Officer, assessee is now in appeal before us.

4. Ld. A.R. has submitted that assessee has selected TNMM for its TP study, which is not disputed. The only issue for our consideration is in respect of certain comparables which the assessee claims to be covered by the order of this Tribunal in assessee's own case for the Assessment Year 2010-11 in I.T.A.No. 1202/Del/2015 vide order dated 21.01.2016. We shall first take up ITeS Segment of comparables:

4.1 Before us, Ld. A.R. addressed a limited argument for excluding the following comparables in bench-marking PLI of ITeS which are as under:

- i. Accentia Technology Ltd.
- ii) Infosys BPO Ltd.
- iii) TCS E-Serve Ltd.

i. Accentia Technology Ltd:-

Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2010-11 (supra), rejected the inclusion of this company as comparable on the ground that it is a KPO. The coordinate bench of this

Tribunal has rejected this comparable by holding as under:

“As pointed out by the learned counsel for the assessee, there was amalgamation of a company during the relevant year, and the said company, therefore, cannot be considered as comparable due to this extraordinary event which occurred in the relevant year as rightly held by the Tribunal inter alia in the case of Excellence Data Research P. Ltd. (supra). We, therefore, follow the decision of the coordinate bench of this Tribunal in the case of Excellence Data Research Services Pvt. Ltd. (supra) and direct the AO/TPO to exclude the Accentia Technologies Limited from the list of comparables on this ground. Further, this company also provides KPO services, LPO and OPO besides offering software services. Therefore as this enrolled in knowledge processing outsourcing it is functionally dissimilar to the assessee. Further, it does not contain segment wise functional results and in absence of such segmental information, it cannot be used for comparing the PLI of also noted that it is also having significant amount of brands, intellectual property rights and goodwill as compared to the assessee. Therefore, in view of the above reasons this company is required to be excluded. Further relying on the decision of Jurisdictional high court in case of Rampgreen Solutions Pvt Ltd (TS-387-HC-201S(DEL)-TP) where in it is held that KPO are ITeS where the service providers have to employ advanced level of skills and knowledge. This is absent in this case of assessee which is low end ITES service provider such as which enables network management and other back office support services performed by assessee which primarily include remote monitoring

global network platforms and services, coordination, remote configuration, and implementation of quality customer networking solutions. Therefore this comparable is ordered for its exclusion accordingly.”

4.2 On the contrary, the Ld. D.R. supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

4.3 We have perused the orders of the authorities below and the submissions made by both the parties. We have perused the order of this tribunal for assessment year 2010-11(supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been excluded from the list of comparables by this Tribunal for assessment year 2010-11 for the reasons reproduced hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11(supra), we are inclined to exclude this company from the final list of comparable.

ii. Infosys BPO Ltd:-

4.4 Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2010-11 (supra) has rejected the inclusion of this company as comparable on the ground that it is engaged in high-end integrated

services. The coordinate bench of this Tribunal has rejected this comparable by holding as under:

“We have considered the rival contention regarding exclusion of Infosys BPO Ltd. It is engaged in high end integrated services and therefore it is functionally dissimilar. The Infosys brand is indisputably a huge brand and definitely, result of that brand goes to this comparable. Therefore, the brand of Infosys definitely results in opening higher profits to this company. In view of the following decisions, the same is required to be excluded and hence it is ordered accordingly.”

4.5 On the contrary, the Ld. D.R. supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

4.6 We have perused the orders of the authorities below and the submissions made by both the parties. We have perused the order of this Tribunal for assessment year 2010-11(supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been excluded from the list of comparables by this tribunal for assessment year 2010-11 for the reasons reproduced hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11(supra), we are inclined to exclude this company from the final list of comparable.

iii. TCS e Serve Ltd.:-

4.7 Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2020-11 (supra) rejected the inclusion of this company as comparable on the ground that this comparable, provides high end technology services such as software testing, verification and validation of the software. The coordinate bench of this Tribunal has rejected this comparable by holding as under:

“We have also considered the rival contention for exclusion of TCS e-service Ltd. It is mainly involved in transaction processing and technology services. It carries on business of providing technology service such as software testing, verification and validation. It is also developed a software such as transport management software therefore functionally this company is dissimilar to the assessee company. It also owns huge intangible and use of 'Tata' Brand, which has definitely benefited this comparable, it is directed to be excluded.

4.8 On the contrary, the Ld. D.R. supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

4.9 We have perused the orders of the authorities below and the submissions made by both the parties. We have also perused the order of this Tribunal for assessment year 2010-11(supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly

contended by the Ld.AR, this company has been excluded from the list of comparables by this tribunal for assessment year 2010-11 for the reasons reproduced hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11 (supra), we are inclined to exclude this company from the final list of comparable.

5. Now, we shall take up the next segment of computer software, being IT (CSD) segment:

Before us, Ld. A.R. submitted that the following comparables have been excluded by this Tribunal in assessee's own case for the Assessment Year 2010-11 which are as under:

- a. Infosys Ltd.,
- b. Persistent Systems Ltd.,
- c. Wipro Technology Services Ltd.,
- d. Zylog Systems Ltd.

a. Infosys Ltd.:- The ld.AR submitted that the DRP has rejected this comparable in assessment year 2010-11 and therefore this company was not contended to be excluded before this tribunal by the assessee for assessment year 2010-11(supra). He submitted that following the rule of consistency this comparable may be excluded for the year under consideration.

On the contrary, the Ld. D.R. supported the order of the authorities below and prayed for inclusion of this company as a comparable.

5.1 We have perused the order of the authorities below, and the DRP's order for assessment year 2010-11.

5.2 We are of the considered opinion that a consistent approach must be followed while selecting/rejecting the set of comparables when facts are identical. It is an admitted position that the DRP had excluded this company as a comparable as it has high turnover and has a huge brand value. It is observed by us that the DRP for the year under consideration on one hand notes that this company has diversified operations and that this company is primarily engaged in the development of software and software services. Whereas on the other hand, admits to that the assessee provides information technology enabled network management and other back-office support to its group companies. The brand of Infosys undisputedly is huge and results in obtaining high profits to the company. In our view this company is required to be excluded from the final list of comparables.

b. Persistent Systems Ltd.:-

5.3 Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2010-11 (supra) rejected the inclusion of this company as comparable on the ground that segmental details were not available separately. The coordinate bench of this Tribunal has rejected this comparable by holding as under:

We have perused the arguments on the same. Firstly on perusal of the balance sheet of this comparable it

is noted that that this company has not provided segmental information for sale of services and sale of products of software's. Further It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is engaged in contract software development services. We find that, as submitted by the assessee, the segmental details are also not available separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telcordia Technologies India (P.) Ltd. v. Asstt. CIT [2012] 137 ITD 1/22 taxmann.com 96 (Mum.) that in the absence of segmental details/information a company it cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.

5.4 On the contrary, the Ld. D.R. supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

5.5 We have perused the orders of the authorities below and the submissions made by both the parties. We have perused the order of this Tribunal for assessment year 2010-11(supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been excluded from the list of comparables by this tribunal for assessment year 2010-11 for the reasons reproduced hereinabove. Respectfully following the decision of this

Tribunal in assessee's own case, for the Assessment Year 2010-11(supra), we are inclined to exclude this company from the final list of comparable.

c. Wipro Technology Services Ltd:-

5.6 Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2010-11(supra), rejected the inclusion of this company as comparable on the ground that this company is a subsidiary of Wipro Ltd, which has a considerable brand name, and further that the entire revenue during the year in this company is covered by a master service agreement entered into by breakthrough with CITI group services. The coordinate bench of this Tribunal has rejected this comparable by holding as under:

We carefully considered the rival contention regarding exclusion of this comparable. This company had agreed an agreement with CITI Technology Services Ltd, which is 100% subsidiary of Wipro Technology Ltd. The entire revenue during the year is covered by a master service agreement entered into by Wipro with CITI Group Services. Further, this company is also a subsidiary of Wipro Ltd., which company has a considerable brand name, therefore benefit accruing to this company from the brand name of Wipro cannot be denied. Therefore relying on the decision of the coordinate bench in the case of Agnity Technology Pvt. Ltd, in ITA No.955jDe1j2015 for Assessment Year 2010-11, wherein the Infosys owns of its brand name was held to be incomparable on the same analogy, brand value of 'Wipro' does help this comparable. Hence, we direct TPO to exclude this comparable, it is ordered accordingly.”

5.7 On the contrary, the Ld. D.R. supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

5.8 We have perused the orders of the authorities below and the submissions made by both the parties. We have perused the order of this Tribunal for assessment year 2010-11 in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been excluded from the list of comparables by this tribunal for assessment year 2010-11 (supra) for the reasons reproduced hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11 (supra), we are inclined to exclude this company from the final list of comparable.

d. Zylog Systems Ltd.:-

5.9 Ld. A.R. submitted that the Tribunal in assessee's own case for the Assessment Year 2010-11 (supra) rejected the inclusion of this company as comparable on the ground that this company has undergone restructuring process during the year under consideration and cannot be held as a comparable in view of the extraordinary circumstances. The coordinate bench of

this Tribunal has rejected this comparable by holding as under:

We have considered the rival contention, wherein it is stated the Zylog Systems Ltd is engaged in the sale of software service as well as its products and has operation in Wifi place and broadband connectivity. It is apparently an onsite service company. This is evident from the various comparables of only reports and related documents produced before us. Zylog system Ltd also undergone into the business of restructuring where it is clear Dugout fair flex matrix. Therefore, it is apparent that the company, which have undergone the business restructuring process during the year, cannot be held to be a comparable in view of the extraordinary circumstances. The company is also owning significant intangibles and carrying on research and development activities ownership significant intangibles cannot be held to be a comparable with the assessee and therefore on this ground too this comparable is ordered accordingly to be excluded.

5.10 On the contrary, the Ld. DR supported the order of DRP and Ld. TPO. He thus prayed for inclusion of this company as a comparable.

5.11 We have perused the orders of the authorities below and the submissions made by both the parties. We have also perused the order of this Tribunal for assessment year 2010-11 (supra) in assessee's own case. It is observed that there is no difference in the functional profile of the assessee for the year under consideration with that of the assessee for assessment year 2010-11. As rightly contended by the Ld.AR, this company has been

excluded from the list of comparables by this Tribunal for assessment year 2010-11(supra) for the reasons mentioned hereinabove. Respectfully following the decision of this Tribunal in assessee's own case, for the Assessment Year 2010-11(supra), we are inclined to exclude this company from the final list of comparable.

6. Ld. A.R. submitted that in the event these comparables are excluded the operating margin would still be within the range of $\pm 5\%$.

7. We find that the assessee has made a detailed submission before the authorities below on this issue which suffice to say that the contentions raised by the assessee had not been dealt with by the TPO as well as DRP. The reliance placed by the Ld. A.R. in assessee's own case for the Assessment Year 2010-11 covers all the disputed comparables at length. Respectfully following the decision of this Tribunal, we are inclined to exclude the comparables disputed by the Ld. A.R. in both segments i.e. ITeS and computer software development. Accordingly, the grounds raised by the assessee stand allowed.

8. In the result, appeal filed by the assessee stands allowed.

Order pronounced in the open court on 31st May, 2016.

Sd./-
(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 31.05.2016

Sd./-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknaya Bhawan, Khan Market, New Delhi.

True copy.

By Order
(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author	31/5		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	31/5/16		Sr. PS/PS
6	Kept for pronouncement	31/5		Sr. PS/PS
7	File sent to Bench Clerk	31/5		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			