

**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. 5270/Del/2012
(Assessment Year 2007-08)**

Income Tax Officer Ward-11(2),Room no. 321, C. R. Building, New Delhi (Appellant)	VS.	Evaluesserve.com Pvt. Ltd. 701, Guru Apartments, Sector-14, Rohini, New Delhi GIR / PAN : AACE8014F (Respondent)
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AND

**CO No. 462/Del/2012
(in ITA No. 5270/Del/2012)
Assessment Year : 2006-07**

Evaluesserve.com Pvt. Ltd. 701, Guru Apartments, Sector-14, Rohini, New Delhi GIR/PAN:AACE8014F (Appellant)	VS.	Income Tax Officer Ward-11(2), New Delhi (Respondent)
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Revenue by : Mr. Neeraj Kumar, Sr. DR.

Assessee by : Mr. Salil Kapoor, Adv.

Ms. Ananya Kapoor, Adv.

Date of hearing : 19.10.2016

Date of Pronouncement: 13.12.2016

ORDER

PER BEENA A. PILLAI, JM:

1. The present appeal by the revenue and cross objection by the assessee against order dated 31/07/2012 passed by ld.CIT (A)-20, New Delhi for assessment year 2007-08. In the department appeal following grounds have been raised.

1. *The Learned CIT(A) ;has erred on facts and circumstances of the case and in law in deleting the addition of Rs. 7,76,09,600/- by ignoring the computation of margins (PLI)-ITES adopted by TPO vide order dated 25.10.2010. The Ld. CIT(A) has further eared in believing the version of the assessee and holding the international transaction to be at arm's length as claimed in the return of Income.*

2. *The Learned CIT(A) has erred on the facts and circumstances of the case and in law by holding that the AO should allow deduction u/s 10A first and only after that the carry forward of losses should be set off from the balance income.*

3. *The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.*

2. Brief facts of the case emanating from the records are as under:

2.1. As per the TP report filed by the assessee for the relevant assessment year, assessee has been engaged in providing IT enabled services to its AE's. Assessee is registered with software technology parks of India (STPI). During the year under consideration assessee entered into the following international transactions with its AE:

- provision of IT enabled services Rs.93,22,63,907/-
- reimbursement of expenses Rs. 3,17,38,766/

2.2. It is observed by ld.TPO that assessee has selected itself as the tested party and transactional net margin method (TNMM) has been used as the most appropriate method to arrive at Arms length price (ALP). Assessee calculated its margin using profit level indicator

(PLI) as operating profit by operating cost (OP/OC) which has not been disputed by ld.TPO.

2.3. It has been observed by ld.TPO that assessee derives 100% revenue from export of call centre services to its AE. Assessee selected comparables having aggregate mean margin of 9.11% as against 17.63% in case of assessee. Ld.TPO rejected TP study of assessee of IT enabled services segment and conducted independent search of comparables, based on industry analysis and understanding of the functions assets and risk profile of the assessee. He arrived at 26 comparables with a mean margin of 29.42%. Ld.TPO rejected the comparables selected by the assessee as according to him, the comparables did not pass through quantitative filters and functions were different from that of the assessee. Ld.TPO rejected the TP study submitted by the assessee.

3. On an appeal before the Ld.CIT (A), the order of Ld.TPO was upheld in respect of the comparables selected by him, though assessee had objected for inclusion of comparables, except Aditya Birla Minacs worldwide Ltd, Cosmic Global Ltd, Data Metrics Financial Services Ltd, Genesis International Corporation Ltd, I Service India Pvt. limited, Triton Corporation Ltd and Nitany Outsourcing private Ltd. Ld.CIT (A) upheld the comparables selected by Ld.TPO except a company called Mold- Tech Technologies Ltd. It has been observed by Ld.CIT(A) that ld.TPO has accepted TNMM as the most appropriate method and under such circumstances exactly similar comparable companies would not be

in existence as TNMM as a method tolerates certain level of difference in function as well as employment of assets and risk.

Another issue that was raised by the assessee before Ld.CIT(A) was in respect of deduction claimed under section 10 A of the Act. Ld.AO reduced the amount of allowable deduction by setting off carry forward losses before allowing such deduction following decisions of Hon'ble Supreme Court, High Courts and this Tribunal. The Ld.CIT(A) directed the ld.AO to calculate the deduction under section 10 A after setting off the carry forward of loss.

Aggrieved by the order of Ld.CIT(A), revenue as well as assessee are in cross appeals before us now.

ITA No. 5270/del/2012 (revenue's appeal)

4. Ground No. 1: This issue raised is in respect of the exclusion of M/s Mould Tech Technologies Ltd.

4.1. Ld. DR submitted that findings of Ld.CIT(A) in respect of this comparable are irrational and without any substance, it has been held by Ld. CIT (A) that this comparable company is indulging in evasion of tax by overstating profit in 100% exempt ITES division and understating the profit in the plastic division without having any shred of evidence.

4.2. Ld. DR submitted that Ld.CIT (A) has selectively applied employee cost filter to this company as there are other comparables who is employee cost/sales ratio are even lower than 7.6%. He further submitted that the assessee has categorised itself to be

providing KPO services and this comparable also deals in engineering design, website designing etc which is also characterised as a KPO service. He has placed his reliance upon the order of this Tribunal in assessee's own case for assessment year 2005-06 for the functional profile of the assessee. He thus submitted that this comparable should be considered. The Ld. DR submitted that in case this company is excluded by applying employee cost filter, then all the other comparables must be subjected to the same filter.

4.4. On the contrary the Ld. Counsel for assessee submitted that this company operates in two segments, being Plastic division and IT division. IT division of this comparable specialises in providing structural designs and detailing services which are categorised as structural engineering services. The Ld. Counsel for assessee emphasised that employee cost of this company is only 7.6% whereas that of assessee's 54%. He submitted that employee cost indicates that assessee is an employee dominated company. In addition Ld. Counsel for assessee submitted that he has no objection in applying the employee cost filter to all other comparables, as according to him many more comparables selected by Ld.TPO will automatically be excluded. Ld.Counsel for assessee placed reliance upon a set of judgments wherein this company has been excluded for the very same reason for the same assessment year which is under consideration before us. The Ld. Counsel for assessee has not objected for exclusion of any other comparables,

as according to him, exclusion of M/s Mould-Tech Technologies Ltd. is upheld, would be sufficient.

5. We have perused the submissions advanced by both the sides in the light of the records placed before us. On perusal of the order of this Tribunal in assessee's own case for assessment year 2005-06 in ITA No. 393/del/2010, we observe that assessee has been treated as a low end ITES service provider, rendering data processing or an IT enabled services, who is not involved in domain knowledge, so as to include any KPO service provider as a comparable (refer paragraph 38-39 of the decision).

5.1. In respect of comparable M/s Mould-Tech Technologies Ltd., it is observed from reasoning given by Ld.CIT(A) that, this comparable is having an extraordinary profits in ITES segment, reaching up to 213% for the assessment year under consideration. It is also been recorded by Ld.CIT(A), that this company is not functionally similar with that of assessee as assessee is in back-office research service area, whereas the comparable is dealing in engineering design and detailing services, website the design services etc. It is also been observed that ITES segment of this comparable is having 100% exemption.

5.2. Ld. AR has relied upon various decisions of this Tribunal wherein it has been recorded that this company cannot be compared with any other company, which was engaged in providing low end ITES enabled call Centre services. He has placed reliance upon the decision of coordinate bench of this Tribunal in iQur India

Services Pvt. Ltd., vs. ITO, reported in (2015) 69 SO T 37, COWI India Pvt. Ltd., vs. ACIT, reported in (2016) 69 Taxmann.com 427, wherein it has been held as under:

“18. We have heard the rival submissions and perused the relevant material on record. During the year under consideration, financial results of Mould-Tech Technologies as available are after the acquisition of Crossroad Detailing INC., an engineering service KPO. Further as evidenced from the annual report of the company for FY 2007-08, the company gave effect to the above scheme of amalgamation and demerger w.e.f. October 2006 and the entire accounts of the company for FY 2006-07 were also revised. In the case of Tallulah India private limited versus ACIT “(2014) 50 Taxmann.com 24/151 ITD 177 (Delhi), it was held that a company cannot be considered as comparable because of exceptional financial results due to mergers/Demergers.”

5.3. Respectfully following the afforested ratio laid, we do not find any infirmity with the decision of Ld.CIT (A) in excluding this company from the list of comparables.

Accordingly this ground raised by the revenue stands dismissed.

Ground No. 2

6. This issue has been raised by the revenue against the deduction under section 10A being granted on the gross total income.

6.1. Ld. AO in his order had limited the deduction under 10A by reducing the amount of allowable deduction after setting off carry

forward losses. On an appeal before Ld. CIT(A), the deduction under section 10A was allowed before the carry forward of the losses that should be set off on the balance income.

Against the order of Ld. CIT(A), the revenue is in appeal before us now.

6.2. Ld. DR placed reliance upon the orders passed by the assessing officer as alleged decision of this Tribunal in the case of Honeywell International India Pvt. Ltd., vs. DCIT reported in (2008) 26 SO T503.

6.3. On the contrary Ld.AR submitted that term “total income” used under section 10 A (1) of the Act has to be understood as the total income of STPI unit. He submitted that the relief under this section is in the nature of exemption, although termed as deduction and the said relief is in respect of the profits earned from such eligible unit or undertaking. He submitted that brought forward business loss is to be set off under section 72 of the Act, against profit earned by assessee. He placed reliance upon various decisions of Hon’ble High Court’s.

7. We have considered the contentions raised by the parties before us in the light of the records placed.

7.1. Assessee had claimed deduction under 10A and thereafter set off the brought forward losses of assessment year 2001-02 and 2002-03 against the balance profit under the head. This treatment adopted by the assessee was rejected by the assessing officer, who

made an addition of Rs.16,78,71,339/-. Section 10 A is a provision which is in the nature of a deduction and not an exemption, as emphasised by Hon'ble Bombay High Court in the case of Hindustan Unilever Ltd vs. DCIT reported in (2010) 325 ITR 102, while dealing with provisions of section 10 B of the Act. Hon'ble Bombay High Court in the case of CIT vs. Black & Veatch Consulting Pvt. Ltd., reported in (2012) 348 ITR 72 has held as under:

“The submission of the revenue placed its reliance on the literal reading of section 10 A under which a deduction of such profit and gains as are derived by an undertaking from the export of articles or things or computer software for a period of 10 consecutive assessment years is to be allowed from the total income of the assessee. The deduction under section 10 A, in our view, has to be given effect to at this stage of computing the profits and gains of the business. This is anterior to the application of the provisions of section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the legislature while incorporating the provisions of chapter VI-A. Section 80 A (1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income in accordance with and subject to the provisions of this chapter, the deduction specified in section 80 C to 80 U. Section 80 P (5) defines for the purposes of chapter VI-A “gross total income” to mean the total income computed in accordance with the provisions of the act, before making any deduction under that chapter. What the revenue in essence seeks to

attain is to telescope the provisions of chapter VI-A in the context of deduction which is allowable under section 10 A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof, such an approach cannot be accepted. In the circumstances, the decision of the tribunal would have to be affirmed since it is plain and evident that the deduction under section 10 A has to be given at this stage when the profits and gains of business are computed in the 1st instance.”

7.2. Respectfully following the same we do not find any infirmity in the directions given by Ld.CIT(A), in computing deduction under section 10 A before carry forward of losses.

Accordingly this ground raised by revenue stands dismissed

In the result appeal filed by the revenue stands dismissed

CO No. 462/del/2012 (cross objection by assessee)

8. Assessee has raised the above cross objection in context of the appeal filed by the revenue

Ground No. 1 is in support of the order passed by Ld.CIT (A).

8.1. The Ld.Counsel for assessee submits that in the event exclusion of Mold-tech Technologies Ltd is upheld it would not be required to deal with the other objections of the comparables finalized by Ld. TPO.

8.2. In the light of the above submission, as we have upheld the exclusion of Mold-tech Technologies Ltd., the remaining grounds

raised by the assessee in the cross objections stands dismissed not pressed.

Accordingly the cross objection filed by the assessee becomes infructuous.

Order pronounced in the open court on 13th December, 2016.

(N. K. SAINI)
ACCOUNTANT MEMBER

(BEENA A. PILLAI)
JUDICIAL MEMBER

Date: 13.12.2016

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Copy forwarded to:-

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

True copy.

By Order
(ITAT, New Delhi)