

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.1003/Del/2016
Assessment Year : 2011-12**

Omniglobe Information Technologies (India) Pvt. Ltd., E-11, Rajouri Garden, New Delhi.	Vs.	ITO, Ward- 19(1), New Delhi.
PAN : AAACO6606M		
(Appellant)		(Respondent)

Assessee by : Shri Neeraj Jain, Adv.
Ms. Deepika Agarwal, CA
Department by : Shri Amrendra Kumar, CIT(DR)
Date of hearing : 08-08-2017
Date of pronouncement : 06-11-2017

ORDER

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 22.01.2016 passed u/s 144C(13) r.w.s. 143(3) of the I.T. Act, 1961 for the assessment year 2011-12.

2. Facts of the case, in brief, are that the assessee is a company incorporated on 19.03.2004 and is wholly owned subsidiary of Omniglobe International LLC, USA, which is engaged in the provision of BPO/Data Processing Services to its AE. It also provides IT Enabled services relating to phone activation and local number portability to various clients for and on behalf of its parent company. It

filed its return of income on 20.09.2011 declaring Nil income. The Assessing Officer referred the matter to the TPO for determination of arm's length price of the international transactions entered into by the assessee company. The TPO observed that the assessee has entered into the following international transactions during the year :-

<i>Nature of international transaction</i>	<i>Method selected</i>	<i>Amount (In INR)</i>
<i>Data Processing Services</i>	<i>TNNM</i>	<i>33,98,09,045/-</i>

3. The TPO observed that the major international transaction of the assessee is the provision of BPO services to its AE, for which the assessee has chosen TNMM as the most appropriate method and OP/TC as the PLI. He noted that the assessee in its TP report has arrived at comparables with an average margin of 7.56%. The assessee has worked out its margin to be 8%. Based on this analysis, the assessee has concluded that its transactions are at arm's length. The TPO issued a show cause notice to the assessee to justify its TP study report. After considering the various arguments advanced by the assessee, the TPO rejected some of the comparables selected by the assessee and added few more comparables and finally selected the following comparables whose working capital adjusted OP/OC was 32.84% :-

<i>Sl. No.</i>	<i>Name of the company</i>	<i>Working capital Adjusted OP/OC (%)</i>
1	<i>Accentia Technologies Limited</i>	29.12%
2	<i>Acropetal Technologies Limited (Seg)</i>	18.12%
3	<i>E4e Healthcare Business Services Pvt. Limited</i>	13.74%
4	<i>Eclerx Services Limited</i>	58.57%
5	<i>Infosys BPO Limited</i>	21.56%
6	<i>Jindal Intellicom Limited</i>	16.76%
7	<i>T C S E-serve Limited</i>	71.99%
<i>Average</i>		32.84%

4. Accordingly, the TPO made an upward adjustment of Rs.7,33,40,509/- to the arm's length price of the assessee.

5. The Assessing Officer passed the draft assessment order on the basis of the order of the TPO. The assessee approached the DRP raising certain objections. The DRP vide order dated 01.12.2015 directed the TPO to retain Professional Management Consultants Pvt. Ltd., TCS E-serve Ltd., Accentia Technologies Ltd., Cosmic Global Ltd. and directed to exclude Eclerx Services Ltd.. The DRP also directed that the adjustment cannot exceed the amount of margin retained by the AEs. After the directions of the DRP, the TPO verified the margins of the comparables and computed the correct margins i.e. OP/OC, the details of which are as under :-

<i>Sl. No.</i>	<i>Name of the company</i>	<i>As per DRP direction</i>	<i>Working capital Adjusted OP/OC (%)</i>
1.	<i>Accentia Technologies Limited</i>	<i>Retained</i>	29.12%
2.	<i>Acropetal Technologies Limited (Seg)</i>	<i>Excluded</i>	-
3.	<i>E4e Healthcare Business services Pvt. Limited</i>	<i>Retained</i>	13.74%
4.	<i>Eclerx Services Limited</i>	<i>Excluded</i>	-

5.	<i>Infosys BPO Limited</i>	<i>Retained</i>	<i>21.56%</i>
6.	<i>Jindal Intellicom Limited</i>	<i>Retained</i>	<i>16.76%</i>
7.	<i>T C S E-serve Limited</i>	<i>Retained</i>	<i>71.99%</i>
8.	<i>Professional Management Consultants</i>	<i>Included</i>	<i>4.29%</i>
	<i>Average</i>		<i>26.24%</i>

6. Accordingly, the Assessing Officer determined the arm's length price of the international transactions related to the provision of IT Enabled Services at Rs.39,26,22,701/- as against Rs.33,98,09,045/- determined by the assessee and made an upward adjustment of Rs.5,28,13,656/-. Since the DRP had directed that the adjustment cannot exceed the margin retained by the AE which is Rs.90,63,995/-, the Assessing Officer, therefore, restricted the proposed adjustment to Rs.90,63,995/-.

7. Aggrieved with such order of the Assessing Officer, the assessee is in appeal before the Tribunal by raising the following grounds :-

"1. That the assessing officer erred on facts and in law in completing assessment under section 144C read with section 143(3) of the Income-tax Act, 1961 ('the Act') at an income of Rs. 3,43,34,318 as against income of Rs. 2,52,70,318 returned by the appellant.

2. That the assessing officer erred on facts and in law in making an adjustment of Rs. 90,63,995 allegedly on account of difference in the arm's length price of the 'international transaction' of provision of BPO/Data Processing Services on the basis of the order passed under section 92CA(3) of the Act by the TPO.

2.1 That the DRP/AO erred on facts and in law in upholding the additional filter of export sales less than 75% of the total income applied by the TPO, without appreciating that selection of comparable companies on the basis of such quantitative filters alone, defies the purpose of the benchmarking analysis.

2.2 That the DRP/AO erred on facts and in law in rejecting Professional Management Consultants Pvt. Ltd. despite the directions of the DRP that the said company is required to be retained in the list of comparables.

2.3 That the DRP/AO erred on facts and in law in considering the following companies in the final set of comparable companies for the purpose of benchmarking

analysis not appreciating that the said companies were not functionally comparable to the appellant:

- *Accentia Technologies Limited*
- *Eclerx Services Limited*
- *Acropetal Technologies Ltd.*
- *TCS E-Serve Ltd.*
- *Infosys BPO Limited.*

2.4 That DRP/AO erred on facts and in law in not rejecting Accentia Technologies Limited from the set of comparable companies, even while holding that the said company was engaged in software product development and medical transcription services.

2.5 That the DRP/AO erred on facts and in law in not rejecting Eclerx Services Limited and Acropetal Technologies Limited even while holding that the said companies were KPOs.

2.6 That the DRP/AO erred on facts and in law in not rejecting TCS E-Serve Limited from the set of comparable companies which is high turnover and functionally different company.

2.7 That the DRP/AO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent ITES service provider.

2.8 That on the facts and in the circumstances of the case and in law, the DRP/AO erred in rejecting the contention of the appellant regarding risk adjustment, allegedly holding that the appellant failed to provide any evidence to demonstrate that whether any risk was actually undertaken by the comparable companies and such risks has affected their operating profit margins.

2.9 That the assessing officer erred on facts and in law in levying interest under Section 2348 and Section 234C of the Act.

The appellant craves leave to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal.”

8. Ground no.1 and 2 being general in nature are dismissed.
9. Ld. counsel for the assessee did not press ground no.2.1 and 2.2 for which the ld. DR has no objection. Accordingly the same are dismissed.
10. So far as the remaining grounds are concerned, they relate to selection of certain comparables which according to the assessee are not comparable companies. Although, the assessee has challenged the selection of number of

comparables, however, his argument was restricted to three comparables namely, Accentia Technologies Limited, TCS E-Serve Ltd. and Infosys BPO Limited, since the DRP has already directed to exclude Eclerx Services Limited, Acropetal Technologies Ltd..

11. So far as Accentia Technologies Limited is concerned, the ld. counsel for the assessee submitted that no segmental details are available in case of Accentia Technologies Limited. For this proposition, he referred to the decision of the Tribunal in the case of Equant Solutions India P. Ltd. vs. DCIT in ITA No.1202/Del/2015 order dated 21.01.2016 for assessment year 2010-11. He submitted that Accentia Technologies Limited is also not a good comparable since it is functionally not comparable. It provides services to healthcare industry in the nature of medical transcription, medical coding, billing and receivable management etc.. The company is also engaged in the business of providing KPO services. The company owns proprietary software products such as instacare, instascribe, instaweb etc.. Further, the company is engaged in two business segments i.e. medical transcription and development of software products and segmental profitability is not available in the financial statements. It also owns significant intangible assets amounting to Rs.21,94,49,287/- in the form of Goodwill. Referring to various decisions, he submitted that the company was rejected on account of functional dissimilarity in the case of BNY

Mellon International Operations (India) (P.) Ltd. vs. DCIT in ITA No.23/PN/2014 order dated 11.02.2015 for assessment year 2009-10. Similarly, the Delhi Bench of the Tribunal in the case of Equant Solutions India P. Ltd. (supra) has also directed to exclude Accentia Technologies Ltd. on account of functional dissimilarity. Referring to various other decisions given in the appeal set, he submitted that this company was directed to be excluded on account of functional dissimilarity. Referring to various other decisions, he submitted that this company was also directed to be deleted from the list of comparables on account of non-availability of segmental data. Referring to the recent decision of the Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Ltd. vs. CIT reported in 377 ITR 533 he submitted that the Hon'ble High Court in the said decision has observed that in terms of provision of Rule 10B(2)(a), comparability of controlled and uncontrolled transactions shall be judged with reference to specific service/product characteristics.

12. So far as TCS E-Serve Limited is concerned, ld. counsel for the assessee submitted that segmental data is not available. The operations of this company broadly comprise of transaction processing and technical services. Transaction processing includes the broad spectrum of activities involving processing; collections, customer care and payments in relation to the services offered by Citigroup to its corporate and retail clients. Technical services involve software

testing, verification and validation of software at the time of implementation and data centre management activities. There is no bifurcation available in respect of the revenues of this company from Transaction processing and Technical services. In the absence of the availability of any such segregation of the total revenue of this company, it is not possible to separately consider its profitability from rendering of 'Transaction processing services'. He submitted that this company exploits the brand 'TATA' and therefore, enjoys the goodwill and recognition associated with the said brand leading to higher volume of business and/or premium pricing. Companies owning/exploiting intangibles such as brand etc. cannot be compared with a routine captive service provider such as the assessee. Further, TCS E-Serve Ltd. was excluded by the DRP in assessment year 2012-13 on account of functional dissimilarity and having significant intangibles.

13. Referring to various decisions as given in the Paper Book, he submitted that this company was excluded due to absence of segmental data and holding of significant intangibles. He accordingly submitted that the TCS E-Serve Ltd. should be excluded from the list of comparables.

14. So far as Infosys BPO Ltd. is concerned, the ld. counsel for the assessee submitted that the said company is functionally different and ownership of intangibles and synergy benefits of Infosys Brand. It is a part of Infosys group,

a giant in the field of IT services. The company, as a result of being a part of the Infosys group, enjoys the benefits such as use of brand 'Infosys', availability of skilled manpower and technical knowhow etc.. The company holds a brand name in the ITES/BPO market and during the relevant year, the company has won many prestigious accolades, which has moreover strengthened the reputation and goodwill of the company worldwide. The Company wins many prominent clients from all over the world. The Infosys BPO was excluded by the DRP in assessment year 2012-13 on account of having significant intangibles and brand value.

15. Ld. counsel for the assessee submitted that various Benches of the Tribunal have directed to exclude Infosys BPO Ltd. from the set of comparables on the ground that the company owns/exploits intangibles such as brand etc. and, therefore, cannot be compared with a routine captive service provider. He submitted that if these three companies are excluded the average margin comes to 11.60% as against the margin of assessee at 8.63% which is within +/-5% and no TP adjustment is required.

16. The Ld. DR on the other hand supported the order of the TPO and various decisions.

17. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer/TPO and the Paper Book filed on behalf of

the assessee. We have also considered the various decisions cited before us. From the various details furnished by the assessee and the arguments advanced before us, the same relates to exclusion of three companies from the list of comparables namely Accentia Technologies Ltd., TCS E-Serve Ltd. and Infosys BPO Ltd..

18. So far as Accentia Technologies Ltd. is concerned, we find from the Paper Book that this company is engaged in two business segments i.e. medical transcription and development of software products and segmental profitability is not available in the financial statements. Further, it also owns significant intangible assets amounting to Rs.21,94,49,287/- in the form of Goodwill. The Co-ordinate Benches of the Tribunal are taking the consistent view that in absence of non-availability of segmental data Accentia Technologies Ltd. cannot be considered as a good comparable. Further, the Co-ordinate Benches of the Tribunal have also rejected this company from the list of comparables on account of functional dissimilarity, since this company provides service to healthcare industry in the nature of medical transcription, medical coding, billing and receivable management etc. and the company is also engaged in the business of providing KPO services. Further, this company also owns proprietary software products such as instacare, instascribe, instaweb etc.. We, therefore, find merit in the submissions of the ld. counsel for the assessee that

this company should be excluded from the list of comparables. We accordingly direct the Assessing Officer/TPO to exclude this company from the list of comparables.

19. So far as the TCS E-Serve Limited is concerned, we find the DRP in assessee's own case for assessment year 2012-13 has excluded this company from the list of comparables on account of functional dissimilarity and having significant intangibles. We further find the Delhi Bench of the Tribunal in the case of Exevo India Pvt. Ltd. vs. ITO in ITA no.907/Del/2016 order dated 25.07.2016 has rejected this company by observing as under :-

“6.10. After considering the rival submissions and pursuing the relevant material on record, we find that the financial results of this company shows that this company is into financial services to help its customers achieve their business objectives by providing innovative best in class services. During the year under consideration, this company has made payments towards use of Tata brand. Consequentially use of the TCS brand has substantially increased the operating profits post acquisition. The Ld. AR submitted that the DRP had excluded this company in the immediately preceding previous year. Without any proper reason or change in the functionality and financial data for the year under consideration, it cannot be held that this company can be considered as a comparable. The Ld. TPO has to bring some material on record to show that why this comparable was excluded, in the previous year and in the year under consideration it should be included. Admittedly neither the TPO nor the Ld. DR has been able to demonstrate the difference in the functionality and/or financial data of the assessee for the year under consideration viz-a-viz previous assessment year. Hence following the rule of consistency, we are of the opinion that this company cannot be considered as comparable for the year under consideration. We therefore direct to exclude this comparable.”

20. Further, the Delhi Bench of the Tribunal in the case of Bechtel India Pvt. Ltd. vs. DCIT in ITA No.1478/Del/2015 has directed to exclude TCS E-Serve Ltd. on the ground that this company owned significant intangibles and brand

value. Admittedly, TCS E-Serve Ltd. was excluded by the DRP in assessee's own case in assessment year 2012-13 on account of functional dissimilarity and having significant intangibles. Therefore, we direct the Assessing Officer/TPO to exclude this company from the list of comparables.

21. So far as Infosys BPO Ltd. is concerned, we find this company was also excluded by the DRP in assessee's own case for assessment year 2012-13 on account of having significant intangibles on brand value. We further find the Delhi Bench of the Tribunal in the case of Equant Solutions India Pvt. Ltd. vs. DCIT (supra) has directed the exclusion of Infosys BPO Ltd. on the ground that it is engaged in high end integrated services and, therefore, it is functionally dissimilar. It is further held that Infosys brand undisputedly is a huge brand and definitely result of this brand goes to this comparable. Therefore, the brand of Infosys definitely results in earning higher profits. It was accordingly directed to be excluded from the list of comparables. We further find the Co-ordinate Benches of the Tribunal have also directed to exclude Infosys BPO Ltd. from the list of comparables on account of significant intangibles on brand value and functional dissimilarity. Such decisions are given by the assessee in the Paper Book to support his case. We, therefore, direct the Assessing Officer/TPO to exclude Infosys BPO Ltd. from the list of comparables.

22. The Id. counsel for the assessee submitted that if these three comparables are excluded from the list of comparables, the average margin of the OP/OC of the comparables comes to 11.60% as against 8.63% margin declared by the assessee and the assessee falls within +/-5%. The TPO is accordingly directed to verify the same and pass appropriate order. The grounds raised by the assessee are accordingly partly allowed.

23. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open Court on this 06th day of November, 2017.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 06-11-2017.

Sujeet

Copy of order to: -

- 1) The Appellant
- 2) The Respondent
- 3) The DRP-2, New Delhi.
- 4) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi