

IN THE INCOME TAX APPELATE TRIBUNAL  
DELHI BENCH "I.2": NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

**ITA No. 1961/DEL/2015**

A.Y.: 2010-11

VAILDOR CAPITAL INDIA PVT. LTD.  
8599, EAST PARK ROAD,  
KAROL BAGH,  
NEW DELHI  
(PAN: AABCH8403J)  
**(Appellant)**

VS. ITO, WARD 26(1),  
C.R. BUILDING,  
NEW DELHI

**(Respondent)**

Assessee by : Sh. S.D. Kapila, Adv. & Sh. R.R.  
Maurya, Adv.  
Department by : Ms. Saweta Nakra Datta, Sr. DR.

**ORDER**

**PER H.S. SIDHU, JM**

01 This appeal is filed by the Assessee against the order of the Assessing Officer passed u/s. 143(3) of the Income Tax Act, 1961 (in short "Act") for the assessment year 2010-11 in pursuance of the Direction of The Learned Dispute Resolution Panel for determining Arm's Length Price u/s. 92CA(3) of the Act by the Ld. Transfer Pricing Officer (TPO) vide order dated 29.1.2014 which became the subject matter of the directions before the Ld. Dispute Resolution Panel (DRP)-II, New Delhi vide order dated 14.11.2014.

Consequently, the assessment was passed at Rs. 1,36,42,883/- against the returned income of Rs. 8,046/-. The assessee though has filed 07 grounds of appeal, however, has agitated the issue of

- i. inclusion of Foreign Exchange Fluctuation as Operating income while determining Profit Level Indicator (PLI);
- ii. grant of working capital adjustment and
- iii. Dispute with inclusion and exclusion of the comparables.

02 The Assessee is a company engaged in the business of rendering IT enabled services ( ITES) in the nature of data management services (i.e. data management services, data collection, organization, validation, analysis and filtering of accounts) and call center services to its overseas associated enterprise ( AE) . The return of income was filed on 15.10.2010 declaring income of Rs. 8,046/-. The AO noted that assessee has entered into the international transaction with its associated enterprises, therefore, reference was made to the Ld. TPO-II(7), New Delhi to determine the arms length price u/s. 92CA(3). The TPO recorded the functional profile of the assessee at Page no. 2 to 4 of his order and then characterized the functions of the assessee as ITE services. The functions of the assessee are undisputedly as under:-

### ***“3. Functional Analysis***

*As per the TP documentation submitted by the assessee, the functions performed by the assessee as part of data management services provided to AE are as follows:*

**a) *Data management services***

*Data Collection: Validator India gathers data pertaining to the non-performing assets/debtors from HFO Ireland. Such data related to the defaulted customer receivables owned by HFO Ireland. All data received in raw format is loaded on to the CRM system by Validator India.*

*Data Organization: After collection of data, Validator India structures, organizes and categorizes the same into legible format.*

*Data Validation: The information collected is validated by use of credit bureau tools to locate the debtors. In the process, any additional information found in relation to the debtor accounts is also fed into the system to update the records.*

*Additional analysis: Validator India further analyzes the available data to establish the home ownership, employment and other details of the debtors. This aids in building an accurate record of all accounts in a structured fashion,*

*Filtering of accounts: As a final stage to the analysis, Validator India analyzes the information collated by way of the above mentioned key functions in order to categorize the accounts on a priority basis. This aids in making decisions with respect to which accounts need to be pursued and in what manner.*

**b) *Call Center Services***

*Validator India acts as a communication link for HFO Ireland in connection with the collection of debts/non-performing assets. Once the accounts for doubtful debts/non-performing assets are routed to Validator India, Validator India performs the following function:*

*Filtering: Accounts with a higher likelihood of collection assume priority. Immediately all such accounts are sent to the collectors work queue. Validator India contacts the debtors either manually or via a progressive automated dialer.*

***Repayment arrangement:*** *Validator India performs the following function:*

- > *The term and conditions for collection are pre-set by HFO Ireland and Validator India Communications such terms to the debtors.*
- > *The feedback received from the debtors is communicated to HFO Ireland.*
- > *HFO Ireland depending on the feedback received from the debtors and its internal terms and conditions for debt collection communicates its decision on the amount of settlement to Validator India. The decision / approval of HFO Ireland for the settlement are communicated to the debtors.*
- > *On acceptance, the debtor directly pays the amount to the account of HFO Ireland outside India and no payments are received in the Indian accounts or by Validator India.*
- > *Post payment, Validator India updates its records for collection of the doubtful debt/non-performing asset.*
- > *Trace/Issues: Any issues relating to bankruptcy, medical urgency of the debtor is fed into the system to update the*

*account records.*

c) *Infrastructure services*

*Validor India renders certain IT infrastructure support services to HFO Ireland. The functions performed by this division essentially entail the following.*

1. *Technical support services*
2. *Troubleshooting of application services*
3. *Infrastructure set up and maintenance*
4. *Disaster recovery set up*
5. *Maintenance of databases*

*Characterization*

*Based on the facts as presented in the above analysis of functions performed, risks borne and assets used, the assessee company has been characterized as an Information Technology ("IT") enabled service provider with limited risk and assuming minimal risks. The assessee company has been made the tested enterprise for the purpose of comparability analysis.*

03 The assessee has entered into the international transactions of provisions of IT enabled services of Rs. 15,33,09,068/-. The Assessee benchmarked it by applying Transactional Net Margin Method (TNMM) and adopted Profit Level Indicator (PLI) of operating profit / operating cost ( OP/OC) at 18.03%. The assessee selected 9 comparables companies using multiple year data and determine their PLI at 13.10% and held that international transaction of the assessee is at arms' length.

04 The Ld. TPO rejected the TP Study of the assessee holding that it has used multiple year data. He carried out the fresh search applying various filters using current year data and ultimately selected the 10 comparables computing their PLI of OP/OC at 32.72%. The margin of the assessee was also recomputed holding that profit of exchange fluctuation is not part of operating profit amounting to Rs. 39,74,862/- recomputed the PLI of the assessee at 23.39% and then determine the ALP on the total cost of Rs. 12,99,27,574 @ 32.72% and determine the ALP of 17,24,39,840/- of the international transaction of Rs. 15,33,09,068/- and thereby proposing the adjustment of Rs. 1,91,30,772/-. A draft assessment order passed on this was passed by the AO on 11.2.2014 against which assessee submitted objections before the Ld. DRP and consequently, the adjustment of ALP was determined at Rs. 1,36,34,837/- and assessment u/s. 143(3) of the Act was made.

05 The first issue is with respect to the inclusion of foreign exchange gain received by the assessee during the year whether part of the operating profit of the assessee or not. During the year the assessee has received the foreign exchange gain and included the same as operating income and computed its margin. The Ld. TPO rejected the same vide page no. 67 of his order. The main contention of the TPO is that it does not have any bearing upon the transactions which has already been undertaken. The

main contention of the assessee before the Ld. DRP with respect to this aspect was also rejected vide para no. 16 of the order of the Ld. DRP. The Ld. DRP relying upon the Safe Harbour Rules issued on 18.9.2013 where the foreign exchange gain or loss was not included as operating income upheld the action of the Ld. TPO.

06 The Ld. AR submitted that this issue has now been covered in favor of the assessee by the decision of the Hon'ble Delhi High Court in the case of Assessee in Rampgreen Solutions Pvt. Ltd cs. CIT 234 Taxman 573 (Delhi). He further stated that in Pr. CIT vs. Ameriprise India (P) Ltd in ITA No. 461/2016 vide order dated 19.10.2016 this issue is also decided in favour of the assessee.

07 The Ld. DR relied on Safe Harbour Rules and the orders of the lower authorities.

08 We have carefully considered the rival contentions and hold that foreign exchange gain by the assessee is on account of export of services. Therefore, the same is part of the operating income of the assessee. This issue has already been decided by the Hon'ble Delhi High Court in view of the decision cited by the Ld. AR which covers the issue in favour of the assessee. Further the safe harbor rules are like presumptive taxation and has been made applicable only from 18<sup>th</sup> September, 2013 and therefore, same are not applicable to the present assessment year. Even otherwise they are to be opted by the assessee and if not opted those are not binding on assessee. In view of

this we allow ground no. 5 of the appeal of the assessee and direct the AO /TPO to consider the foreign exchange fluctuation gain as operating income for computing the PLI of the assessee.

09 The ground no. 6 of the appeal is with respect to not granting the working capital adjustment of the assessee. The Ld. AR referred the para no. 12 of the order of the Ld. TPO where at page no. 73 the TPO himself has stated that assessee is entitled to the working capital adjustment. However, in the final order same adjustment was not given. Therefore, he requested for direction to the TPO/AO to grant working capital adjustment. The Ld. DR also of the same view.

10 Vide para no. 12 at Page no. 73 of the order of TPO, Ld TPO himself stated that working capital adjustment is required to be granted to the assessee and he has also mentioned the methodology of the same. However, in the computation of ALP same adjustment was not given. In view of this, we direct the TPO/AO to grant the working capital adjustment to the assessee in accordance with law. Ground NO. 6 of the appeal of the Assessee is allowed accordingly.

11 Ground No. 1, 2 and 7 are not pressed before us. Similarly, the part of the ground no. 6 with respect to the risk management is also not pressed before us and therefore, the same are dismissed as such.

- 12 This leave us with only ground no. 3 & 4 which rejects the certain comparables selected by the assessee and also includes certain fresh comparables selected by the Ld TPO objected by assessee, and confirmed by DRP.
- 13 The first objection of the assessee is that the Ld. TPO has excluded R Systems International Ltd. which have been included by the assessee in its TP Study Report, but rejected by the Ld. TPO holding that company follows the calendar year whereas the assessee follows the financial year as its accounting period. The Ld. AR submitted that R Systems International Ltd. has been excluded by the Revenue on the identical lines. However, in the several decisions of the Coordinate Benches it has been held that if the assessee furnishes the quarterly published results of this company then the same may be included for the reason that it is functional similar to the assessee. Ld. DR also accepted the above proposition. And stated that if the assessee produces the authentic and reliable information with respect to the relevant quarters and if the result can be co-related for the financial year then the same may be considered for comparability analysis.
- 14 We have carefully considered the rival contentions and also find that if the R Systems International Ltd. is functionally comparable, it should not be excluded merely for the reasons of that company following different accounting period, if the reliable and authentic data is available with respect to missing quarters . In the

present case if the assessee submits reliable and authentic data of the relevant quarters to reconstruct the results of that comparable for the financial year similar to the accounting year of the assessee, then the same should be considered for comparability analysis. Accordingly, this comparable is directed to be included provided assessee submits the above information.

15 The next comparable was Accentia Technologies Ltd. contested by the assessee. This comparable has been selected by the TPO on fresh search. Before the TPO the assessee objected that the comparable is engaged in different segment and functionally not comparable. The Ld. TPO rejected the contention of the assessee and held that Accentia Technologies Ltd. that the Company has one segment of Healthcare Management and Receivable hence Segment reporting is not applicable. Hence, according to him it is comparable. The Id. DRP was also of the view that where assessee pointed out that assessee has undertaken the extraordinary activity of amalgamation during the year, held that the merger has no impact on the company as the merged company is also engaged in the similar line of activity. It was also held that intangible assets are also of no significance in this case.

16 Ld. AR submitted that the issue is squarely covered in favour of the Assessee for the assessment year 2010-11 by the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Ameriprise India (P) Ltd. in ITA No. 461/2016

vide order dated 19.10.2016 where in deletion of Accentia Technologies Ltd. as a comparable due to certain extraordinary events which distorted the profitability of that company to be excluded. The Hon'ble High Court upheld the same.

17 Ld. DR vehemently supported the orders of the lower authorities.

18 We have carefully considered the rival contentions and also perused the balance sheet of the company placed at page no. 538 to 481 of the Paper Book. According to the Management Discussions and Analysis comparable is engaged in the business Healthcare Receivables Management and it was the pioneer to offer SaaS Model in that field. During the year, the Company has acquired acquisition of IQ group of companies in United Kingdom and entered into the legal process outsourcing segment. These facts are amenable at pages 556 of the Annual Accounts. Vide Schedule-8 the income streams are Medical Transcriptions And Coding alongwith Bills and Calculations Systems. As per Schedule No. 10-B it is mentioned that it is the subsidiary of the company which was engaged in the business of Medical Transcription and Coding and has the software which are used by the company in serving end to end results is amalgamated in the assessee company. The amalgamation is effective from 1.4.2008 and therefore, FY 2010-11 is the second year of operation. Looking to the revenues stream also as per Schedule-8 of

the Balance Sheet there is no change in the Revenues streams of the comparable company for in 31.3.2009 and 31.3.2010. Therefore, on reading of Note No. 10B placed at page no. 571 of the Paper Book as financial results of the company are impacted for FY 2008-09 relevant to AY 2009-10, but there is no impact of financial results during the year ( AY 2010-11 ) of any extraordinary events. Therefore, on this ground this company cannot be excluded as comparable. The functions of the assessee stated that page no. 195 of the PB as per Transfer Pricing Study Report are also the data collection, data organization, data validation and filtering of accounts. In view of this, it cannot be said that Accentia Technologies Pvt. Ltd. is performing any function, which is dissimilar to the assessee company. We have also perused the decision of the Hon'ble Delhi High Court in the case of Pr. CIT vs. Ameriprise India (P) Ltd. the main reasons for dismissing the appeal of the Revenue is that the order of the Tribunal dealing with 03 comparables was not found reasonable and further even if the comparables are to be accepted then the margin of the Respondent in that case fell within the Safe Harbour Rules. The Hon'ble Delhi High Court did not comment on the specific comparable of Accentia Technologies. Even otherwise, the one company if held not be comparable with another company, it cannot be said that the same is not at all comparable with the whole world. In view of this the action of the AO in including Accentia Technogloeis cannot

be faulted with. Further the decision of the Hon'ble Bombay High Court in the case of Pr. CIT vs. Aptara Technology Pvt. Ltd. (2018) 92 taxmann.com 240 (Bom) is pertaining to AY 2008-09 wherein, the amalgamation in Accentia Technologies happened. Even otherwise, the merger in the case of Accentia Technologies is of the similar nature of business as the income streams as well as functionality of the company has not changed. Even otherwise, when one add one box with another identical box, then the nature of the functions of the boxes do not change.

19 The second comparable contested by the assessee exclusion of E4e Healthcare. The Ld. TPO included the above company having margin of 32.67% which was objected by the assessee before the TPO. However, assessee did not object before the TPO as well as before the Id. DRP. The Ld. AR has also not submitted the financial accounts of the above company. He has merely relied upon decisions. The comparability analysis is factual analysis of the functions, assets and risk of one company with the other company. Therefore, the judicial precedent of excluding the one company against the other cannot be judged as such without comparing functions of that comparable company with the assessee company. In this view, we do not find any infirmity in the order of the Ld. TPO and Ld. DRP in including the E4e Healthcare as a comparable company.

- 20 The next comparable is TCS e-Serve Ltd.. This company is included by the TPO after taking the fresh search. Assessee objected the same before the TPO. The assessee objected and pressed on the Annual Report extraction stating the same was takeover over by the TCS Ltd. in the year 2009-10. The TPO rejected the same holding that the company was taken-over by TCS in the preceding year and not during the relevant year i.e. AY 2010-11. Therefore, according to the TPO the same is to be included. Before the Ld. DRP the assessee objected the inclusion stating that its functions are different. The Ld. DRP rejected the contention of the assessee and held that functional similarity are there and exceptional events are not relevant as it was taken over by TCS in the earlier year and not in this year.
- 21 The Ld. AR vehemently stated that TCS E Serve Ltd is not functionally comparable as it is engaged in providing of business process outsourcing services along with ITES services and also providing technical services involving software testing, verification and validation of software for implementation and Data Centre Management activities. It also has Tata Brand and Software License of Rs. 24.30 Crores. It was further stated that there is no segmental accounting is available.
- 22 The Ld. DR supported the orders of the TPO and DRP.
- 23 We have carefully consider the rival contentions and also perused the balance sheet of TCS E-serve Ltd. Submitted

at page no. 693 to 735 of the Paper Book for the year ended on 31.3.2010. The functions shown by the company are at Schedule-O which shows that the company is engaged in IT enable service and BPO services. It is also engaged in technical services of software testing verification and validation software. These functions itself shows that this comparable is not to be taken in comparability analysis of the assessee. Further, the gross revenue of the comparable company is Rs. 1359 Crores whereas the assessee's turnover is merely Rs. 15 crores. Further, the assessee was also contributing to the Tata Brand as per Schedule-N of the balance sheet. Further all the business of the company is considered as single segment and segmental analysis was not available of software testing and other ITES services. In view of this looking to the functional analysis of the company, size of the business of the assessee and brand value of the comparable, it deserves to be excluded.

24 The other comparable is TCS E-Serve International Ltd. for which similar arguments were raised by both the parties. We have perused the balance sheet at page no. 617 to 692 of the paper book of that company. This company also contributes to the Tata Brand, has a turnover of Rs. 150 crores and is engaged in technical services of software testing etc. Therefore, for similar reasons as we have given for exclusion of TCS E-Serve Ltd.. we also direct the TPO to exclude the TCS E-Serve International Ltd.

- 25 The next comparable objected by the assessee is Infosys BPO Ltd. This comparable was included by the assessee in its Transfer Pricing Study Report thereby its functional comparable with the assessee company. Before the TPO assessee tried to resile from the above comparable stating that its functionally dissimilar and its service lines is BPO/KPO. The TPO rejected the argument of the assessee about the functional dissimilarity. It was further submitted that there is an acquisition by company of Brazilian Company and therefore, there is an extraordinary events. The TPO also rejected the same as the acquired company was also in the similar lines of business. The assessee also objected to the brand value which was also not accepted, the assessee before the Ld. DRP reiterated the same arguments. The Ld. DRP upheld the reasons of the TPO.
- 26 The Ld. AR submitted it has a diverse business activities, huge goodwill and excluded by many decisions of Coordinate benches in comparability analysis.
- 27 The Ld. DR vehemently stated that the same is already included by the assessee in its Transfer Pricing Study Report stating functionally comparable but is now cannot be prayed for exclusion.
- 28 We have carefully considered the rivals contentions and also perused the balance sheet of the company at page no. 1 to 582 of the Paper Book. According to the Annual Accounts the company it provides the Business Process Management Services and further is wholly owned and

controlled subsidiary of Infosys , which has a huge Brand. Therefore, it has a different asset basis. At page no. 607 the Segmental Analysis of the company is also perused. The segments of the company prepared on the basis of customers related to a particular industry and not according to the functions. On perusal of the fixed assets, it has a huge goodwill and further being the subsidiary of software Giant Infosys assets used were also different. The company derives its revenue from business process management services at page no. 593 of the Paper Book which are neither shown by the assessee nor by the Ld. TPO that what kind of services are provided by the comparable company. The same is also not coming out of the Annual Accounts of the company as well as the segmental accounts. Therefore, for the simple reason of not having proved by the TPO how this company is functionally comparable with the assessee company when assessee itself has objected later on before him, it cannot enter into the comparability analysis for benchmarking the international transactions. Even otherwise, it has a huge brand value and the huge asset base of intangible assets. Therefore, the same is not comparable. The risk of the Infosys BPO Ltd. is also ranging over various industrial segments of customers and across geographies. Therefore, it bears higher risk. Hence, in the absence of the specific functions, huge asset base including brand value and higher risk, this comparable is to be excluded.

29 In view of the above facts, the appeal of the Assessee is decided with respect to various claims pressed before us. Hence, it is partly allowed.

Order pronounced on 22-11-2018.

**Sd/-**

**Sd/-**

**[PRASHANT MAHARISHI]  
ACCOUNTANT MEMBER**

**[H.S. SIDHU]  
JUDICIAL MEMBER**

Date:22/11/2018

**SRBhatnagar**

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By Order,

Assistant Registrar, ITAT, Delhi Benches