

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE 'I-1', NEW DELHI**

**Before Sh. N. S. Saini, Accountant Member
And**

Sh. Sudhanshu Srivastava, Judicial Member

ITA No. 6471/Del/2012 : Asstt. Year : 2008-09

IBM Daksh Business Process Services Pvt. Ltd., Birla Tower, 1 st Floor, 25 Barakhamba Road, Connaught Place, New Delhi-110001	Vs	Deputy Commissioner of Income Tax, Circle-11(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCD4187D		

**Assessee by : Sh. G. C. Srivastava, Adv.,
Sh. Suvinay Kr. Dash, Adv. &
Sh. Parichay Solanki, CA
Revenue by : Sh. Sanjay I. Bara, CIT DR**

Date of Hearing : 24.01.2019

Date of Pronouncement : 06.02.2019

ORDER

Per N. S. Saini, AM:

This is an appeal filed by the assessee against the order of DRP-I, New Delhi dated 03.09.2012 for assessment year 2008-09.

2. Ground No. 1 of the appeal of the assessee reads as under:

"1. Assessment and reference to Transfer Pricing Officer are bad in law

a) The learned Deputy Commissioner of Income-tax – 11(1) ['DCIT' or 'AO' / Additional Commissioner of Income-tax [TPO-I(2)], New Delhi ['ACIT' or TPO] erred in law and on facts in making addition of INR 314,525,713 to the total income of the Appellant on

account of adjustment to the arm's length price with respect to Information Technology ('IT') enabled services of the Appellant with its associated enterprises other than IBM World Trade Corporation ('IBM WTC').

b) The AO/TPO erred in law and on facts as he failed to establish that the Appellant shifted profits outside India."

3. This ground of appeal is general in nature and hence does not require separate adjudication by us.

4. Ground Nos. 2 to 5 of the appeal of the assessee read as under:

"2. Comparability analysis adopted by the TPO for determination of arm's length price - from Associated Enterprises other than IBM World Trade Corporation ('IBM WTC').

a) The AO/ TPO grossly erred on facts and in law in rejecting the filters and search process adopted by the Appellant in the Transfer Pricing Study. Further, the AO/TPO also erred on facts and in law by conducting a fresh benchmarking analysis in respect of captive IT enabled services provided by the Appellant and wrongly comparing the Appellant s activities with companies operating as full-fledged entrepreneurs without considering the differences in functions performed, assets employed and risks assumed by the Appellant vis-a-vis comparable companies.

b) The AO/TPO erred in law in applying arbitrary filters as criterion for rejection of companies identified by the Appellant in the Transfer Pricing Study such as (i) companies whose data for financial year ('FY) 2007-08 was not available, (ii) companies with IT enabled service revenue less than 75% of total operating revenue, (iii) companies with IT enabled service revenue less than INR 1 crore, (iv)

companies with export sales less than 25% of total revenue, (v) companies with related party transactions greater than 25% of operating revenue, (vi) companies with different financial year ending (i.e. other than 31 March 2008), and (viii) companies having diminishing revenues / persistent losses during financial year 2007-08.

c) The AO/TPO erred in considering a set of 'secret data', i.e. data which was not available in public domain and not allowing the Appellant an opportunity to cross examine the data furnished by companies to whom notice under Section 133(6) of the Act were issued.

3. Erroneous data used by the AO/TPO

a) The AO/TPO has erred in law in using data, which was not contemporaneous and which was not available in the public domain at the time of conducting the transfer pricing study by the Appellant.

b) The AO/TPO erred in law and on facts in disregarding the application of multiple- year data while computing the margins of comparable companies.

4. Non-allowance of appropriate adjustments to the comparable companies, by the AO/TPO

a) The AO/TPO and the Honorable Dispute Resolution Panel ('DRP') erred in law and on facts in not allowing appropriate adjustments under Rule 10B to account for, inter alia, differences in (i) accounting practices, (ii) marketing expenditure, (iii) research and development expenditure, (iv) policy for charging depreciation and (v) risk profile between the Appellant and the comparable companies;

b) The Honorable DRP erred in passing a nonspeaking order and not considering the rectification application preferred by the Appellant in

respect of claim for depreciation adjustment under Rule 10B.

5. Variation of 5% from the arithmetic mean

The AO/TPO erred in law in not granting the variation as per proviso to section 920(2) of the Act.”

5. As the AR of the assessee has argued these grounds together, hence, they are being disposed off together as under.

6. The brief facts of the case are that the assessee has done business of providing BPO services to Fortune 500 companies in the transaction processing and customer care services segments. The assessee offers remote support services including customer care and technical support through multiple communication channels, back-end transaction processing, outbound collections, telemarketing web based services including real time chat. The unique co-sourcing model and 100 per cent BPO focus enabled it to re-engineer processes and also provide value added services. The assessee has shown receipts from BPO services at Rs.448,80,74,820/-. The assessee employed TNMM method and OP/TC as the PLI. The assessee arrived at a set of 11 companies with an average margin of 14.69%. The assessee used multiple year data. The assessee's own margin was worked out at 10.93% under BPO services segment. Based on the analysis, the assessee concluded that its international transactions are at arm's length. The Assessing Officer referred the matter to the TPO for determination of the arm's length price. The TPO took the

following comparables and arrived at PBDIT as comparables selected by him as under:

Sl. No	Company	Total Income (Rs. Cr)	PBIT/Cost (%)
1	Accentia	51.04	44.5
2	Aditya Birla Minacs	183.17	-0.55
3	Asit C Mehta	4.82	9.42
4	Caliber Point Business Solution(seg)	58	10.97
5	Coral Hub(Vishal Inf)	13.07	51.84
6	Cosmic Global	5.86	24.3
7	Crossdomain Solution P Ltd	27.4	26.96
8	Datamatics Financial(BPO Div)	16.72	34.87
9	e4e (earlier known Nitanny)	25.99	16.87
10	Eclerx	123.45	66.5
11	Genesys International	47.52	48.15
12	Hcl Comnet systems& services ltd(seg)	388.05	32.97
13	ICRA(Seg)	82.29	11.22
14	Infosys BPO	825.08	20.03
15	I-service Ind P Ltd	13.39	9.73
16	Mold Tek	17.84	96.66
17	Spanco Ltd(seg)	42.27	8.94
18	Acropetal Technologies Ltd(seg)	20.8	35.3
19	Wipro BPO	1158.8	30.23
20	R System International Ltd(seg)	21.33	4.3
		AVG	29.16

"a. Computation of Arm's Length Price:

The arithmetic mean of the Profit Level indicators is taken as the arm's length margin. (Please see Annexure E for details of computation of PLI of the comparables). Based on this, the arm's length price of the IT enabled services rendered by you is computed as under:

<i>Arithmetic mean</i>	<i>: 29.16%</i>
<i>Less: Working Capital Adjustment</i>	<i>: 1.77%</i>
<i>Arm's Length Price</i>	<i>: 27.39%</i>

<i>Operating Cost</i>	<i>Rs.4,046,032,124</i>
<i>Arm's Length Margin</i>	<i>27.39% of the Operating Cost</i>
<i>Arm's Length Price (ALP)</i>	<i>Rs.5,154,240,322</i>
<i>Price shown in the international transactions</i>	<i>Rs.4,488,074,819</i>
<i>Shortfall being adjustment u/s 92CA</i>	<i>Rs.666,165,503</i>

The above shortfall of Rs.666,165,503/- is treated as transfer pricing adjustment u/s 92CA.

Based on the above detailed discussion, the arm's length price of the international transactions pertaining to providing IT enabled services is determined at Rs.5,154,240,322/- instead of Rs.4,488,074,819/- charged in its international transactions, resulting in an adjustment to the extent of Rs.666,165,503/-."

Thus, he made an addition of Rs.66,61,65,503/-.

7. The assessee carried the matter in appeal before the DRP who confirmed the action of the TPO following the decision of the DRP in assessee's case for assessment year 2009-10 and reasoning given therein.

8. Before us, the AR of the assessee submitted that as the matter with the United Kingdom Associated Enterprises and the United States of America Associated Enterprises has been settled under the Mutual Agreement Procedure as per copy forwarded by the Assessing Officer on 29.11.2018 in case of India-United Kingdom Mutual Agreement Resolution and copy forwarded by the AO dated 23.07.2018 in case of India-United States MAP resolution. Therefore, they are no longer under dispute. He submitted that in case of BPO services from associated enterprises other than IBM, World Trade Corporation

and IBM United Kingdom Ltd. The determination made in the Mutual Agreement Procedure with UK and US should also be applied in case of business of BPO with other associated enterprises. For this, he relied on the decision of Delhi 'I-2' Bench of the Tribunal in the case of Fidelity Business Services India Pvt. Ltd. Vs DCIT, Circle-II, New Delhi in ITA Nos. 5872/Del/2011 and 4180/Del/2014 for the assessment years 2007-08 and 2008-09, order dated 13.02.2018 and submitted that in the said decision, the Tribunal has held and directed the TPO to make adjustment after taking the net profit margin as adopted/agreed in the MAP to benchmark the transaction of non-US AE also.

9. The departmental representative vehemently opposed the submission of the AR of the assessee. He argued that as the business conditions in other countries may not be the same as were in the case of UK and US Associated Enterprises transaction. Therefore, the net profit margin adopted in the UK and US Associated Enterprises cannot be adopted in case of other associated enterprises of the assessee.

10. We have heard the rival submissions and perused the orders of the lower authorities and materials available on record. In both the years under consideration, the assessee is engaged in the business of BPO services. Turnover of the assessee during the assessment year 2008-09 was Rs.448,80,74,820/-. The break-up of the same are as under:

<i>Name of the country</i>	<i>AY 2008-09</i>
<i>US/UK MAP</i>	<i>33%</i>
<i>Non-UK/US countries</i>	<i>67%</i>

11. The entire transaction was entered into with associated enterprises. The assessee has shown income at the rate of 10.93% in assessment year 2008-09. The TPO, however, determined the margin at the rate of 27.39% in the assessment year 2008-09.

12. Thereafter, MAP was entered into by the assessee and the department whereby net margin in respect of turnover with USA and UK was agreed upon at 15.04% for the assessment year 2008-09. Thus, it is now settled between the parties that in respect of turnover of 33% in the assessment year 2008-09 net margin is to be calculated at 15.04%.

13. Thus, the issue which is still in dispute is the margin which is to be calculated in respect of turnover of non-USA and UK countries which is 67% of the total turnover in the assessment year 2008-09.

14. We find that it is not in dispute that the nature of transaction which was entered into with associated enterprises situated in US and UK were same as associated enterprises situated in non-US and UK countries. The TPO has also applied same net profit margin rate for turnover of non-USA and UK countries as was applied for USA and UK countries. We, therefore, do not find any good reason why the margin rate agreed upon under MAP in respect of USA and UK business should not be applied for business transaction of other countries also. We have no material to hold that the net margin rate for the non-UK and USA countries will be different from the net margin rate of transactions with USA and UK. We,

therefore, set aside the orders of the lower authorities and direct the AO to adopt net margin @ 15.04% for the assessment year 2008-09. Therefore, the ground of appeal of the assessee is partly allowed.

15. Ground Nos. 6 & 7 of the appeal of the assessee reads as under:

"6. Claim for set off of losses derived from Software Technology Park Unit ('STP') undertaking located at Kolkata against the profit derived by other STP units

a) The Ld. AO has erred in law in not following the directions of the Hon'ble DRP regarding adjustment of loss derived from STP undertaking located at Kolkata amounting to Rs. 967,426 against the profit of other STP undertakings located at Mumbai, Pune, Bangalore, and NCR while computing 10A deduction of respective STP undertaking, thereby reducing the claim of deduction under section 10A of the Act.

b) The assessment order passed by the Ld. AO is bad in law given the fact that the direction of the DRP has not been followed.

7. Claim for set off of losses derived from STP undertaking located at Kolkata against the income derived from domestic sales.

The Ld. AO erred in disallowing the assessee's claim for set off of losses derived from undertaking located at Kolkata against income derived from domestic sales."

16. Facts of the case in brief are that the Assessing Officer observed that the action of the assessee company in claiming exemption of Rs.1,56,93,33,236/- u/s 10A of the Act in respect of profit earning units by ignoring the losses of Rs.9,67,426/- of STP Kolkata unit is not correct as the provisions of Section

10A(1) of the Act provides that "a deduction of such profits and gains as derived by an undertaking from the export of articles or things or computers software". The use of word "undertaking" makes it clear that the deduction u/s 10A of the Act is available to the assessee as a whole and that for the purposes the eligible profits shall be the consolidated profits after taking into account the profit/loss incurred by all the eligible units. Further, Section 70 of the Income Tax Act, 1961 also provides for set off loss of a unit against the profits of the other units of the same assessee. Therefore, the AO observed that profit eligible for exemption u/s 10A of the Act available to the assessee is calculated at Rs.1,56,83,65,810/- after adjusting the loss of Kolkata unit from the profit of other eligible units.

17. Before us, the AR of the assessee relied on the decision of Hon'ble Supreme Court in the case of CIT Vs Yokogawa India Ltd. reported in (2017) 391 ITR 274 has held as under:

"16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,

"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship

with the other business of the assessee outside these zones or units for the purposes of this provision."

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."

18. Therefore, it was a submission that the deduction was allowable to the assessee before set off of loss of Rs.9,67,426/- incurred by the STP Kolkata unit of the assessee.

19. The DR could not controvert the submissions of the AR of the assessee.

20. After considering the rival submissions and materials on record we find that the Hon'ble Supreme Court has held that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage, the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. Therefore, we set aside the orders of the lower authorities and direct the AO to re-compute the income of the assessee in light of the decision of the Hon'ble Supreme Court cited above. Thus, this ground of appeal of the assessee is allowed.

21. Ground No. 8 of the appeal of the assessee reads as under:

"8. Computation of deduction allowable under section 10A of the Act.

a) The Ld. AO erred in law and on facts in reducing communication charges amounting to INR 191,549,668 from export turnover in computing the deduction allowable under section 10A of the Act, without appreciating the fact that communication charges is not included in export turnover.

b) Without prejudice to above, the Ld. AO erred in law in not following the directions of the Hon'ble DRP regarding reduction of communication charges from total turnover.

c) The assessment order passed by the Ld. AO is bad in law given the fact that the direction of the DRP has not been followed."

22. Facts of the case in brief are that the Assessing Officer computed the deduction u/s 10A of the Act allowable to the assessee after reducing the telecommunication expenses of Rs.19,08,87,950/- paid in foreign currency from export turnover.

23. The AR of the assessee submitted that the issue stands covered in favour of the assessee by the decision of Hon'ble Delhi High Court in the case of Genpact India Vs CIT reported in 203 Taxmann.com 632 wherein it was held as under:

"14. Having considered the arguments advanced by the counsel for the parties, we are in complete agreement with the decision of the Bombay High Court in the case of Gem Plus Jewellery(supra). In order to avoid prolixity, we set out the relevant portion of the decision of the Bombay High Court in Gem Plus Jewellery and endorse the same. The relevant portion of the said decision is as under:

"6. The total turnover of the business carried on by the undertaking would consist of the turnover from export and the turnover from local sales. The export turnover constitutes the numerator in the formula prescribed by sub-section (4). Export turnover also forms a constituent element of the denominator inasmuch as the export turnover is a part of the total turnover.

7. The export turnover, in the numerator must have the same meaning as the export turnover

which is a constituent element of the total turnover in the denominator. The Legislature has provided a definition of the expression "export turnover" in Explanation 2 to Section 10A by which the expression is defined to mean the consideration in respect of export by the undertaking of articles, things or computer software received in, or brought into India by the assessee in convertible foreign exchange but so as not to include inter alia freight, telecommunication charges or insurance attributable to the delivery of the articles, things or software outside India. Therefore, in computing the export turnover the Legislature has made a specific exclusion of freight and insurance charges.

8. The submission which has been urged on behalf of the Revenue is that while freight and insurance charges are liable to be excluded in computing export turnover, a similar exclusion has not been provided in regard to total turnover. The submission of the Revenue, however, misses the point that the expression "total turnover" has not been defined at all by Parliament for the purposes of section 10A. However, the expression "export turnover" has been defined. The definition of "Export turnover" excludes freight and insurance. Since export turnover has been defined by Parliament and there is a specific exclusion of freight and insurance, the expression "export turnover" cannot have a different meaning when it forms a constituent part of the total turnover for the purposes of the application of the formula. Undoubtedly, it was open to Parliament to make a provision to the contrary. However, no such provision having been made, the principle which has been enunciated earlier must prevail as a matter of correct statutory interpretation. Any other interpretation would lead to an absurdity. If the contention of the Revenue were to be accepted, the same

expression viz. "export turnover" would have a different connotation in the application of the same formula. The submission of the Revenue would lead to a situation where freight and insurance, though it has been specifically excluded from "export turnover" for the purposes of the numerator would be brought in as part of the "export turnover" when it forms an element of the total turnover as a denominator in the formula. A construction of a statutory provision which would lead to an absurdity must be avoided." (underlining added)

16. All the points raised by Mr Sabharwal stand answered in the reasoning given by the Bombay High Court and Karnataka High Court in the said decisions with which we are in complete agreement."

24. The DR could not controvert the submission of the AR of the assessee.

25. Therefore, respectfully following the decision of the Hon'ble Delhi High Court in the case of Genpact India (supra), we set aside of the orders of lower authorities and direct the AO to compute deduction u/s 10A of the Act after deducting the Telecommunication expenses both from export turnover and total turnover of the assessee. Thus, this ground of appeal of the assessee is allowed.

26. Ground no. 9 of the appeal of the assessee reads as under:

"9. Disallowance of prior period expenditure amounting to INR 25,186,105

a) The Ld. AO erred in law and on facts in disallowing prior period expenses of INR 25,186,105 even though the said expenses were incurred for

the purpose of business and had crystallized during the FY 2007-08.

b) Without prejudice to the above, if the prior period expenses are disallowed, then proper allocation should be made between various units of the assessee (STP, Special Economic Zone and Domestic Tariff Area) and deduction to be allowed on the enhanced profits for the eligible units."

27. The brief facts of the case are that the Assessing Officer disallowed prior period expenses debited in the profit and loss account amounting to Rs.25,186,105/- as they pertained to the earlier year and not to the year under appeal

28. On appeal, the DRP confirmed the action of the AO. The AR of the assessee submitted that this Bench of the Tribunal in the case of the assessee itself in the assessment year 2009-10 vide order dated 05.07.2016 passed in ITA NO. 2666/Del/2014 had restored the matter back to the file of the Assessing Officer and therefore, the matter should be restored back to the file of the Assessing Officer with the very same direction as given in the assessment year 2009-10.

29. The DR had no objection to the above submissions of the AR of the assessee.

30. We find that Tribunal in the assessment year 2009-10 held as under:

"25. Ground NO. 5 relating to the issue of alleged prior period expenses is restored to the file of the AO for examining/verifying the claim of the assessee and allowing the same if it is found that the payments have crystallized in the year under appeal. Hence the ground is allowed for statistical purposes."

31. Hence, we set aside the orders of the lower authorities and remand this issue back to the file of the AO with the very same direction as given in assessment year 2009-10. Thus, this ground of appeal of the assessee is allowed for statistical purposes.

32. Ground Nos. 10, 11 & 12 of the appeal of the assessee read as under:

"10. Levy of Interest under section 234B of the Act

The Ld. AO has erred in law and on facts in levying interest under section 234B of the Act amounting to Rs. 107,342,818.

11. Levy of Interest under section 234C of the Act

The Ld. AO has erred in law and on facts in levying interest under section 234C of the Act given the fact that no interest is leviable as per returned income.

12. Levy of Interest under section 234D of the Act

The Ld. AO has erred in law and on facts in levying interest under section 234D of the Act amounting to Rs. 12,075,131."

33. At the time of hearing, the AR of the assessee submitted that charging of interest is consequential. Therefore, these grounds of the appeal of the assessee are dismissed.

34. Ground No. 13 of the appeal of the assessee reads as under:

"13. Initiation of penalty proceedings

On the facts and in the circumstances of the case, the learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act."

35. This ground of appeal is pre-mature and is accordingly dismissed.

36. Ground Nos. 14 & 15 of the appeal of the assessee reads as under:

*"14. Directions issued by the Honourable DRP
The Honorable DRP has erred in law and on facts in not taking cognizance of the objections filed by the Appellant in relation to the draft assessment order issued by the AO/ TP order and confirming the draft order of the AO.*

15. Relief

The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.

The Appellant submits that the above grounds are independent and without prejudice to one another."

37. At the time of hearing, no arguments were advanced by the AR of the assessee on these grounds of appeal raised before us. Hence, they are dismissed for want of prosecution.

38. In the result, the appeal of the assessee is partly allowed.
(Order Pronounced in the Open Court on 06/02/2019)

Sd/-
(Sudhanshu Srivastava)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 06/02/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR