

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES “ K ”, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

IT(TP)A No. 2299/Mum/2017
Assessment Year : 2012-13

Clear Info Analytics Private Limited, 1203A, Floor 12A, Tower 2A, One India Bulls Centre, Jupiter Mills Compound, 841, Senapati Bapat Marg, Elphiston Road-West, MUMBAI [PAN : AACCC3323P]	Vs.	The Assistant Commissioner of Income Tax, Range-15(1)(2), MUMBAI
(Appellant)		(Respondent)

Appellant by : Shri Shailesh S. Shah,
Respondent by : Shri Vikash Kumar Agarwal, DR

Date of Hearing : 11-03-2019	Date of Pronouncement : 15-03-2019
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आदेश / ORDER

Per B.R. Baskaran, Accountant Member:

The assessee has filed this appeal, challenging the assessment order passed by the Assessing Officer (AO) u/s 143(3) r.w.s 144C(13) of the Income Tax Act (Act), in pursuant to the directions given by the Ld. Dispute Resolution Panel

(DRP). The assessee is aggrieved by the decision of the Ld. DRP in including a company named M/s. Excel Infoways Ltd., I the list of comparables and in excluding a company named M/s. R System International Ltd., from the list of comparables.

2. The assessee-company is engaged in the business of providing investment research support services exclusively to its holding company M/s. Execution Noble Research Ltd., UK (formerly known as Clear Capital Ltd., UK). Hence it is a captive service provider. During the year under consideration, the assessee received a sum of Rs. 2330.04 Lakhs from its Associated Enterprises (AE) for providing the said services. It was submitted that the assessee was raising invoice on its Associated Enterprise (AE) at cost+15% mark up. The assessee benchmarked his transactions under Transactional Net Margin Method (TNMM) by selecting 10 comparable companies. The average net margin of comparable companies was 8.24%. Accordingly, the assessee submitted that its international transactions were at arm's length. However, the Transfer Pricing Officer (TPO) selected three companies, whose OP/OC was 23.95%, while the assessee's margin was 15%

only. Accordingly, the TPO made TP adjustment of Rs. 181.33 Lakhs. Ld. DRP upheld the order of TPO.

3. The assessee is aggrieved by the decision of tax authorities in including M/s. Excel Infoways Ltd., and excluding M/s R System International Ltd.

4. We shall first deal with the comparable company, M/s Excel Infoways Ltd. The contention of the assessee is that M/s. Excel Infoways Ltd., is engaged in the business of providing customer care services and handling clients business relations through voice based services in the areas of collections, telemarketing and customer care. On the contrary, the assessee-company is providing support services to investment research carried out by its holding company. Accordingly he submitted that the services provided by the assessee company are totally different from the services rendered by M/s. Excel Infoways Ltd. Accordingly, he that the functions performed by the assessee and the above said company are totally different. He further submitted that there are further differences between the assessee and the above said company, viz.,

(a) the entity level of employee cost of M/s. Excel Infoways Ltd., is around 13%; while employee cost of the assessee-company is above 54%.

(b) the assessee is a captive service provider and is risk free, whereas M/s. Excel Infoways Ltd., has been providing services to third parties, where risk element is more.

(c) the profitability of M/s. Excel Infoways Ltd., is very much fluctuating and the profit levels are declining over the years substantially.

The Ld A.R submitted that all these aspects have been considered by the Pune Bench of the Tribunal in the case of M/s. Ocwen Financial Solutions Private Limited Vs. ACIT in ITA No. 2669/PUN/2016, dt. 21-01-2019 and the Tribunal, by following the decision rendered by the another Bench in the case of Emerson Climate Technologies (India) Pvt. Ltd., Vs. DCIT in ITA No. 359 & 2847/PN/2016, dt. 25-04-2018, has held that M/s Excel Infoways Ltd cannot be considered as a comparable due to fluctuating margins. It was held that this company does not pass in “diminishing revenue filter”.

Accordingly, Ld. AR submitted that Ld. DRP was not justified in confirming the inclusion of M/s. Excel Infoways Ltd.,

5. On the contrary, Ld. DR submitted that the Tribunal, in the case of M/s. Ocwen Financial Solutions Private Limited, has followed the decision rendered in the case of 'Emerson Climate Technologies (India) Pvt. Ltd', whose functions are totally different. Further, the decision in the case of Emerson Climate Technologies (India) Pvt. Ltd., was rendered for a different assessment year. Accordingly, Ld. DR submitted that the assessee cannot take support of the above said decisions.

6. We have heard rival contentions and perused the record. We noticed that the Pune Bench of the Tribunal examined the comparable company, M/s. Excel Infoways Ltd., in the case of M/s. Ocwen Financial Solutions Private Limited Vs. ACIT in ITA No. 2669/PUN/2016, dt. 21-01-2019. For the sake of convenience, we extract below the relevant discussions made by the Pune Bench of the Tribunal in the above said case:

"12. With regard to Excel Infoways Limited, we find that the Co-ordinate Bench of the Tribunal in the case of Emerson Climate Technologies (India) Pvt. Ltd. Vs. DCIT (supra.) has decided whether Excel Infoways Limited can be comparable company or not by observing as under:

"18. We have heard rival contentions and perused the record. The limited issue which arises is against benchmarking of ALP of the

international transactions on account of provisions of Oracle Support Services (JT-enables services) by assessee to its associated enterprise and for benchmarking of ALP of the international transactions to the said concern i.e. Excel Infoways Ltd. which has been finally selected by the DRP, is to be excluded since it is showing fluctuating margins. It is further observed that the operating margin of the company had shown drastic fluctuations ranging from 247.74% in F.Y. 2008-09 to 2% in FY 2014-15. The assessee has pointed out the margins shown by the said concern were as under:

<i>Financial Year</i>	<i>OP/TC margin</i>
<i>2008-09</i>	<i>247.74%</i>
<i>2009-10</i>	<i>267.31%</i>
<i>2010-11</i>	<i>238.71%</i>
<i>2011-12</i>	<i>41.48%</i>
<i>2012-13</i>	<i>75.70%</i>
<i>2013-14</i>	<i>30%</i>
<i>2014-15</i>	<i>2%</i>

19. We find that the Tribunal in assessee's own case in assessment years 2011-12 & 2012-13 vide para 16 & 17 of the order of Tribunal has excluded Excel infoways Ltd., because of its fluctuating margins shown by the said concern. The Tribunal held that the said concern i.e. Excel Infoways Limited which is in the process of closing down its ITES segment and also because of the factum of fluctuating margins, could not be selected as functionally comparable to the assessee. Following the same parity of the reasons, we hold that the said concern i.e. Excel Infoways Limited, because of different factors and also fluctuating to be excluded from final set of comparables. Accordingly, we hold The Assessing Officer is directed to recompute mean margin of the comparables and determine ALP of the international transactions of provision of Oracle support services (ITes) by the assessee to its AEs after affording reasonable opportunity of hearing to the assessee. Thus, ground No. 3 raised in appeal by assessee is allowed."

In the case of Excel Infoways Limited, a chart provided before us wherein we have seen that there is fluctuating profit margins and

following the same parity of reasoning, Excel Infoways Limited because of fluctuating profit margin, is to be excluded from the final set of comparables.

13. Further, the TPO has applied diminishing revenue filter to exclude the companies from the comparable set whereas, the revenue of Excel Infoways Limited also clearly demonstrated diminishing revenue trend. In such situation, we refer to the decision of Co-ordinate Bench of the Tribunal, Delhi in the case of *Baxter India Pvt. Ltd. Vs. ACIT (supra.)* where the Tribunal has held as follows:

"24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/ loss making filter wherein the companies with losses/ diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/ diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing ITA No.6158/Del/2016 revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume -1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 201-15 are as under:-

Particulars	Financial Year					
	2009-10 (INR'000)	2010-11 (INR'000)	2011-12 (INR'000)	2012-13 (INR'000)	2013-14 (INR'000)	2014-15 (INR'000)
Revenue	204,161.34	203,526.39	76,096.95	76,098.54	53,792.12	22,994.38
Operating, cost	43986.99	50,751.24	55,991.57	47,539.99	41,355.78	22,895.57
Operating Profit	160,174.35	152,775.14	23,105.38	28,558.55	11,436.34	98.81
OP/OC(%)	364.14%	301.30%	41.27%	60.07%	22.65%	0.43%

25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue has decreased consistently from financial years 2009-10 to

2011-12 ie. including the year under consideration. Further, the above company has super normal profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of DCIT vs. Willis Processing Services (India) Pvt. Ltd. vide ITA No.2152/Mum/2014 has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year.

25.1 Further, from the order of the TPO we find he has obtained the employee cost and the sale for the ITES segment by exercise of his powers u/s. 133(6), wherein the said company has allocated entire employee cost to IT - BPO segment with no allocation to Infra Activity segment which accounts to 49% of Excels total revenue. In our opinion, it is highly impractical that no employee has been hired by Excel for Infra Activity segment. We, therefore, find merit in the argument of the Id. counsel for the assessee that the information provided as per section 133(6) by Excel Infoways Ltd. is unreliable and should not be used to compute employee cost for ITES segment The Delhi Bench of the Tribunal in the case of Motorola Solutions India Private Limited vide ITA No.5637/Del/2011 has held that a company should be rejected as comparable in case there is contradiction in the facts or data sourced from annual report and as per the information gathered u/s. 133(6). In view of above discussion, we hold that Excel Infoways Ltd. cannot be considered as comparable and should be excluded from the list of comparables. We hold and direct accordingly."

Therefore, it is examined that both, Universal Print Systems Limited and Excel Infoways Limited cannot be considered as comparable companies with that of the assessee company. Hence, ground No. 4 is, thus, allowed".

7. We notice that M/s Excel Infoways Ltd was not considered as a comparable company for the reason that the profits of the company was declining and it was having super normal profits. The year-wise profit percentage would show

that the same was consistently declining from 364.14% in FY 2009-10 to 0.43% in FY 2014-15. In view of the fluctuating profit, i.e., diminishing profit, the above said company was not taken as a comparable. Even though the Ld D.R contended that the decision in the case of Emerson Climate Technologies (India) Pvt. Ltd, which was followed by the Pune bench of Tribunal in the case of Ocwen Financial Solutions P Ltd (supra) was related to different assessment year and further the functions of M/s Emerson Climate Technologies (India) Pvt. Ltd. were different, yet we are of the view that the principle laid down in the above said case with regard to diminishing revenue and fluctuating profit can be adopted in the instant case. Further the Ld A.R has pointed out that there is difference in the functions performed between the assessee company and M/s Excel Infoways Ltd. In view of the above, we agree with the contentions of the assessee that M/s Excel Infoways Ltd cannot be considered as a comparable company in the hands of the assessee.

8. The next grievance of the assessee is that the comparable company M/s R System International Ltd should not have been rejected by TPO & Ld DRP. The Ld A.R

submitted that the TPO has rejected this company only for the reason that

- (a) It is having different financial year and
- (b) It is making persistent losses

The Ld DRP has also upheld the same. The Ld A.R submitted that the financial results of the above said company are published on quarterly basis and the assessee has collated the financial results for the financial year 01-04-2011 to 31-03-2012 on the basis of the published results. As per the same, the above said company was making a profit of 2.17% on sales. He submitted that this company was making profits in earlier years also. Accordingly, the Ld A.R submitted that this company should be considered as a comparable company.

9. On the contrary, the Ld D.R submitted that the assessee is furnishing new information and the same requires examination.

10. From the submissions made by Ld A.R, we notice that the assessee has collated the financial results of the above said company for the financial year 01-04-2011 to 31-03-2012. Further the details furnished by the assessee also show

that this company cannot be categorised as persistent loss making company. Hence both the reasons given by the TPO to exclude this company would, in our view, fail. However the details furnished by the assessee require examination at the end of AO/TPO. Accordingly we restore this issue to the file of the AO/TPO for examining the details furnished by the company and if no fault is found with them, then the above said company should be considered as a comparable company.

11. In view of the foregoing discussions, the issue relating to ALP of international transactions requires re-examination. Accordingly we restore the same to the file of AO/TPO for examining them afresh in the light of discussions made supra.

12. In the result, the appeal of the assessee is treated as allowed .

Order pronounced in the open court on 15th day of March, 2019

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(B.R. BASKARAN)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 15th March, 2019

Copy of the order forwarded to :

1. Appellant
2. Respondent
3. Dispute Resolution Panel (DRP), Mumbai
4. Director of Income Tax (IT & TP)
5. Addl. Commissioner of Income Tax (Transfer Pricing)
6. D.R. ITAT, Mumbai
7. Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai