

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "सी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.2320/PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

BNY Mellon International Operations
(India) Private Limited,
Tower S-III, Level I, Cybercity,
Magarpatta City, Hadapsar,
Pune – 411028

PAN : AADCM9640E

.... अपीलार्थी/Appellant

Vs.

The Deputy Commissioner of Income Tax
Circle – 1(1), Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Ketan Ved

Revenue by : Shri Manoj Kumar Gautam

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| सुनवाई की तारीख / Date of Hearing : 02.05.2019 | घोषणा की तारीख / Date of Pronouncement: 07.05.2019 |
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against the order of Dy. Commissioner of Income Tax, Circle-1(1), Pune, dated 04.08.2017 relating to assessment year 2013-14 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. The issue raised in the present appeal is against the transfer pricing adjustment made to the value of international transactions entered into by the assessee with its associated enterprises with respect to export of transactional processing services (ITES) amounting to Rs.27.40 crores.

3. The learned Authorized Representative for the assessee at the outset pointed out that if the ground of appeal No.2.1 is decided in favour of the assessee i.e. the concern Excel Infoways Ltd. (Seg.) is excluded, then the margins shown by the assessee would be higher than the mean margin of comparables finally selected. The learned Authorized Representative for the assessee referred to the order of TPO and pointed out that he had applied the filter of high PLI/low PLI and excluded Excel Infoways Ltd. (Seg.) being functionally not comparable. It was further pointed out that the DRP vide para 4.9 held that the filter was not good and directed the Assessing Officer to apply correct filter. In consequent to the direction of DRP, the TPO passed the order giving effect and included Excel Infoways Ltd. (Seg.) as comparable. He further stated that where the assessee was engaged in providing services in ITES segment then the issue of exclusion of Excel Infoways Ltd. (Seg.) is squarely covered by the order of Tribunal in case of Emerson Climate Technologies (India) Private Limited in ITA No. 2432/PUN/2017 relating to assessment year 2013-13, vide order dated 06-06-2018. He brought out attention to the said order of Tribunal where Excel Infoways Ltd. (Seg.) was directed to be excluded because of its fluctuating margins. He clearly pointed out that once Excel Infoways Ltd. (Seg.) is excluded from the list of comparables then all the other grounds would become academic.

4. The learned Departmental Representative for the Revenue fairly admitted that the issue stands covered by the order of Tribunal.

5. We have heard the rival contentions and perused the record. The limited issue which needs adjudication in the present appeal is in respect of benchmarking of international transactions undertaken by the assessee in ITES segment and by applying the TNMM method to benchmark the transaction and whether Excel Infoways Ltd. (Seg.) can be held to be comparable? The TPO in TP proceedings had altered the filters to be applied while benchmarking the international transactions of transactional based BPO segment and had applied the filter of high PLI/low PLI and excluded Excel Infoways Ltd. (Seg.) as comparable. However, the DRP gave directions that the said filter was not good filter to be applied and also directed the TPO to pass consequential order giving effect to its directions. In the said proceedings the TPO included Excel Infoways Ltd. (Seg.) as comparable. The limited question which arises in the present appeal is whether the concern Excel Infoways Ltd. (Seg.) can be taken as comparable where it was showing fluctuating margins from year to year.

6. We find that similar issue arose before the Tribunal in the case of Emerson Climate Technologies (India) Private Limited (supra) where the TPO had applied filter of rejecting exceptionally high/low margin concerns, which was modified by DRP, which led to inclusion of 3 concerns and we are concerned with only Excel Infoways Ltd. (Seg.). The Tribunal vide para 18 and 19 observed that for benchmarking the international transactions the assessee in providing ITES to its associated enterprises, the concern Excel Infoways Ltd. (Seg.) is to be excluded since, it was showing fluctuating margins. The relevant findings of Tribunal vide para 18 and 19 reads 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 (IT-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 margins is to be excluded from final set of comparables. Accordingly, we hold so. 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.”

7. The Tribunal also noted that Excel Infoways Ltd. (Seg.) was in the process of closing down its ITES segment and also because of fluctuating margins could not be selected as functionally comparable. Following the same parity of reasoning we hold that in the case of assessee for benchmarking its ITES segment, the concern Excel Infoways Ltd. (Seg.) could not be included as functionally comparable, both on the factum of fluctuating margins and also on the ground that the said concern was in the process of closing down its ITES segment and hence, the margins were not comparable.

8. The learned Authorized Representative for the assessee fairly pointed out that in the case of Excel Infoways Ltd. (Seg.) is excluded then the margin shown by the assessee would be higher than the mean margins of comparable and no adjustment needs to be made in the hands of assessee. Accordingly, we hold so. The grounds of appeal No. 2.1 raised in the appeal by the assessee is thus, allowed and all the other grounds become academic and hence are dismissed.

9. In the result, the appeal of assessee is partly allowed.

Order pronounced on this 7th day of May, 2019.

Sd/-
(D.KARUNAKARA RAO)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 7th May, 2019.

RK/GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP-3, Mumbai;
4. The Pr. CIT-1, Pune;
5. The DR 'C', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune