

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2' NEW DELHI**

**BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA NO. 1446/DEL/2016
Assessment Year: 2011-12**

Keystroke Pro India Pvt. Ltd., F-3/4, 1 st & 2 nd Floors, Okhla Industrial Area, Phase-I, New Delhi.	vs	Income Tax Officer, Ward 14(3), Room No. 305, C.R. Building, New Delhi.
Appellant		Respondent

**Assessee by : Shri Sandeep Sapra, Adv.
Department by: Ms Saweta Nakra, Sr. DR**

**Date of hearing : 14.06.2019
Date of pronouncement : 20.06.2019**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against the final assessment order dated 29.01.2016 passed subsequent to the directions of the Ld. Dispute Resolution Panel-1, New Delhi (DRP) for assessment year 2011-12.

2.0 Brief facts of the case are that the assessee company was incorporated in the year 2000 and has been engaged in the business of providing Information Technology (IT) enabled services. During the year under consideration, the assessee

company had provided services to its Associated Enterprise (AE) M/s Keystroke Pro India Pvt. Ltd. which included sourcing, providing and processing various types of data as well as providing information technology enabled services including electronic processing of data. The services provided by the assessee company fall within the meaning of 'computer software' as per clause (b) of item (i) of Explanation to section 10A of the Income Tax Act, 1961 (hereinafter called 'the Act'). The undertakings of the company at Vadodara, Gujarat and Noida are also registered in the Software Technology Park of India (STPI) at STPI, Gandhi Nagar and Noida respectively. The undertaking at Noida had commenced production/manufacture on 1.9.2001 and the assessment year under consideration is the ninth year of operation of the undertaking while the undertaking at Vadodara had commenced operations on 1.5.2009 and the assessment year under consideration is the second year of operation.

2.1 The return of income was filed declaring an income of Rs. 82,010/- after claiming deduction u/s 10A of the Act at Rs. 45,78,637/- for the undertaking at Noida and at Rs. 5,14,486/- for the undertaking at Vadodara. The assessee declared book profit of Rs. 43,75,175/- u/s 115JB of the Act and also paid tax

as per the provisions of section 115JB. The case was selected for scrutiny through CASS to examine the claim of exemption u/s 10A of the Act.

2.2 During the year under consideration, the company had also entered into international transaction of providing IT enabled services to its UK based AE and the value of transaction was Rs. 5,33,73,181/-. The assessee had used Transactional Net Margin Method (TNMM) to determine the Arm's Length Price (ALP) of the said transaction. As per the assessee, this transaction was at arm's length. Since the value of international transaction exceeded Rs. 5 crore, reference to the TPO was made u/s 92CA of the Act.

2.3 The assessee had selected 16 companies as comparables by using OP/TC to determine the Profit Level Indicator (PLI). The average margin of the comparables as worked out by the assessee was 12.91% whereas the assessee had worked out its own margin at 10.94%. Based on this analysis, the assessee had concluded that its international transactions were at arm's length. The TPO accepted the methodology adopted by the assessee and accepted TNMM as the Most Appropriate Method but rejected nine comparables out of the 16 as selected

by the assessee and introduced two additional comparables and worked out the mean operating margin at 25.77%. Based on this, the TPO proposed an upward adjustment of Rs. 71,54,140/-.

2.4 The assessee filed objections before the Ld. DRP challenging the upward revision of the ALP by the TPO and the Ld. DRP gave partial relief to the assessee by directing eClerx Services Ltd. to be excluded from the list of comparables, TCS E-serve Ltd. to be retained in the list of comparables, IServices India Pvt. Ltd. to be considered as a comparable if the company passed the filters and was functionally comparable. Savi Infoservices India Pvt. Ltd. was also directed to be considered as a comparable if this company passed the filters and was functionally comparable. The remaining comparables selected by the assessee but not accepted by the TPO were directed to remain excluded from the list of comparables. Direction was given to give working capital adjustment to the assessee as per the guidelines and the assessee's prayer for risk adjustment was not accepted.

2.5 Based on the directions of the Ld. DRP, in the final assessment order, the margins of the comparable companies were re-calculated by the TPO and the mean was worked out to

21.07% and the revised TP adjustment was proposed at Rs. 48,92,246/-.

2.6 Now the assessee is before this Tribunal (ITAT) and has challenged the final assessment order by raising the following grounds:-

“1. That the Ld. Assessing Officer (AO), Ld. Transfer Pricing Officer (TPO) and Hon’ble Dispute Resolution Panel (DRP) have erred on facts and under the law in:

(i) *passing the impugned order which is bad in law;*
(ii) *passing the order without demonstrating that the Appellant Co. had motive of tax evasion;*

(iii) *rejecting/not considering three (3) comparable companies (viz. IServices India Pvt Ltd, Savi Infoservices India Pvt Ltd and Microgenetics Systems Ltd) as selected by the Appellant Co while carrying out fresh TP study for AY 2011-12;*

(iv) *not considering the facts/submissions/objections made before them that out of the remaining eight (8) comparable companies as selected by TPO, TCS e serve Ltd. ought to be excluded on various grounds from the list of such comparable companies;*

(v) *Without prejudice to 1 (i) to 1 (iv) above, if high turnover companies having turnover of more than Rs. 200 crores are also to be considered/taken into account, then there was no justification for excluding Infosys BPO as comparable company.*

(vi) *Without prejudice to 1 (i) to 1 (iv) above, there was no justification for not allowing economic adjustments for differences on account of risks assumed by the Appellant Co. vis-a-vis the comparable Cos*

(vii) *inappropriately computing the operating margins of comparables and the Appellant and not considering the facts/submissions/ made before them to provide detailed line by line margin computation/working of the adjusted average OP/OC percentage of 21.07% of the 8 comparable companies as finally retained by TPO/AO pursuant to directions of DRP;*

(viii) *not giving effect to the rectification order dated 13.03.2015 as passed by DCIT, TPO- 2(1)(1)*

2. *That the addition on account of upward transfer pricing adjustment of Rs.48,92,246/- as made by the authorities below are arbitrary, unjust, illegal and at any rate, without prejudice, very excessive.*

That the penalty proceedings u/s 271 (1)(c) of I.T. Act as initiated on the basis of TP Adjustment are illegal.”

3.0 At the outset, the Ld. Authorised Representative (AR) drew our attention to the final list of comparables which remained after the TPO had given effect to the directions of the Ld. DRP.

The comparables are as under:-

S.No.	Company Name	Adjusted OP/OC
(i)	Informed Technologies India	9.59
(ii)	Accentia Technologies Ltd.	25.21
(iii)	Datamatics Clobal Services Ltd.	4.65
(iv)	E4e Healthcare Business Services Pvt. Ltd.	9.77
(v)	Jindal Intellicom Ltd.	13.69
(vi)	TCS e-serve Ltd.	69.31
(vii)	Stryker Global Services Pvt. Ltd.	17.00
(viii)	SITEL India Ltd.	19.30
Average		21.07

3.1 The Ld. AR submitted that the assessee was not pressing ground nos. 1(i), (ii), (iii), (v), (vi), (vii), (viii) and 3 and 4. The Ld. AR submitted that as per ground no. 1(iv), the assessee was praying for exclusion for TCS E-serve Ltd. and inclusion of IServices India Pvt. Ltd., Savi infoservices India Pvt. Ltd. and Microgenetic Systems Ltd. The arguments of the Ld. AR vis-a-vis the exclusion of TCS E-serve Ltd. and inclusion of the three comparables were as under:-

i) TCS E-serve Ltd.

The Ld. AR submitted that the assessee was praying for exclusion of this company as a comparable because this company is engaged in the business of providing ITES/Business Process outsourcing (BPO) services and its operations broadly comprise of transaction processing and technical processing and technical services, collections, customer care and payments in relation to the services offered by Citigroup to its corporate and retail clients. It was further submitted that technical services involve software testing, verification and validation of software at the time of implementation and data centre management activities. Our attention was drawn to page

450 of the paper book (Director's report and annual accounts) wherein these activities were mentioned. It was submitted that this company is functionally dissimilar to the assessee company which is a low-end BPO providing transaction and data centre management services only to its UK based AE and, thus, is a captive service provider. It was further submitted that this company had a huge brand value because of its close connection with the Tata Group and further that this company had a huge turnover and goodwill being one of the giants of the industry and, therefore, it could not be considered as a comparable to the assessee company. It was submitted that another giant company Infosys Pvt. Ltd. was excluded on a similar reasoning in assessee's own case for assessment year 2010-11. Reliance was also placed on another order of ITAT Delhi Bench in the case of Kronos Solutions India (P) Ltd. vs. ACIT reported 88 taxmann.com 310 (Delhi Tribunal) wherein this company was directed to be excluded on a similar reasoning.

(ii) I-Services India Pvt. Ltd.

The Id. AR submitted that the assessee was praying for inclusion of this company as a comparable as it was functionally similar and the Ld.DRP had directed that the same be included if it passed the necessary filters as applied by the TPO but the TPO had not given any reason for excluding the same subsequent to the directions of the Ld. DRP. Our attention was drawn to Para 3.4 of the directions of the Ld. DRP wherein this direction had been given by the Ld. DRP.

(iii) Savi Infoservice (India) Pvt. Ltd.

It was submitted that the assessee was praying for inclusion of this company also in the final set of comparables and that the Ld. DRP had directed the inclusion of this company if it passed all the filters as applied by the TPO but the TPO/Assessing Officer had kept this company out of the final set of comparables without assigning any reason. Attention was again drawn to Para 3.4 of the directions of the Ld. DRP wherein this company was directed to be included.

(iv) Microgenetics Systems Ltd.

The Ld. AR submitted that the assessee was praying for inclusion of this company also as this company was engaged in medical transcription services and accordingly it was functionally similar and it had passed all the filters as applied by the TPO. It was also submitted by the Ld. AR that the TPO has excluded this company on the ground that the related party transaction filter was not met although the relevant data with respect to the related party transaction was duly filed before the TPO. It was submitted that this company was prayed to be included before the Ld. DRP also and the prayer for its inclusion formed part of the objections filed before the Ld. DRP but the Ld. DRP has not discussed the issue.

4.0 In response, the Ld. Senior Departmental Representative (Sr. DR) submitted that with respect to all the companies under challenge by the assessee either for inclusion or for exclusion had been duly considered and examined by the TPO as well as the Ld. DRP. With respect to TCS E-serve Ltd., it was

submitted that the assessee had not been able to meet the observations of the TPO in this regard and further that the Ld. DRP had also reached the same conclusion after considering the observations of the TPO and no interference was called for. The Ld. Sr. DR placed extensive reliance on the observations of the TPO in respect of all the four comparables and vehemently argued that the TPO and the Ld. DRP had given a finding of fact which need not be disturbed.

5.0 We have heard the rival submissions and perused the material available on record. We now take the comparables one by one.

i) TCS E-serve Ltd.

It is the assessee's contention that this company deserves to be excluded as a comparable company for the reason that it is functionally dissimilar to this company. It is undisputed that the assessee company provides IT enabled services to its UK based AE only and, thus, it is a captive service provider whereas TCS E-serve Ltd. provides transaction processing as well as technical services. It is further seen that TCS E-serve Ltd. provides a broad spectrum of activities involving the 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. This is evident from a reading from the notes to accounts contained in the annual report of TCS E-serve Ltd. for assessment year 2010-11. Thus, there is strength in the contention of the assessee that TCS E-serve Ltd. has entered in activities which are beyond transaction and data processing services as being provided by the assessee to its AE and, thus, it can be safely concluded that this company is functionally dissimilar to the assessee company. We also find support from the judgment of the Hon'ble Delhi High Court in the case of Actis Global Services Pvt. Ltd. in ITA 94/2017 wherein vide judgment dated 15.5.2017, the Hon'ble Delhi High Court had upheld the order of ITAT Delhi Bench in directing the exclusion of this comparable on the ground that TCS E-serve Ltd. was involved both in the transaction processing and technical services and was not

therefore a comparable with respect to a company engaged only in BPO activities. Admittedly, the assessee is also a BPO company and the finding to this effect has been recorded by the ITAT in assessee's own case for assessment year 2009-10 wherein it has been mentioned that this company is into providing low-end BPO services. Therefore, we deem it appropriate to exclude this company from the final set of comparables.

ii) IServices India Pvt. Ltd.

The assessee is praying for inclusion of this company on the ground that it is functionally similar. We note that the Ld. DRP has also directed this company to be included in the list of comparables if it passes all the filters as applied by the TPO. We also note that this direction of the Ld. DRP has not been implemented in so far as the TPO has excluded this company without recording any finding. Therefore, we deem it appropriate to restore this comparable to the file of the TPO with the direction to implement the direction of the Ld. DRP and pass a speaking order on this comparable.

iii) Savi Inforservice (India) Pvt. Ltd.

The assessee is praying for inclusion of this company on the ground that it is functionally similar and the Ld. DRP has directed that the same be included if it passes all the filters as applied by the TPO but again this company has not been included without any reason being assigned by the TPO. Therefore, we direct that the TPO/Assessing Officer should give effect to the directions of the Ld. DRP in respect of this comparable also and decide on its inclusion/exclusion by passing a speaking order.

iv) Microgenetics Systems Ltd.

We note that the TPO has excluded this company on the ground that the related party transaction filter was not met. On the other hand, it is the contention of the assessee that data with respect to the related party transaction was duly filed before the TPO. In view of the contradictory stand by the assessee and the department, we deem it appropriate to restore this comparable also to the file of the TPO with the direction to re-examine the inclusion of this comparable after

duly considering the data with respect to related party transactions.

5.1 The other grounds of appeal are dismissed as not pressed.

6.0 In the final result, the appeal of the assessee stands partly allowed.

Order pronounced in the open court on 20th June, 2019.

Sd/-

**(N.S. SAINI)
ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

Dated: 20th JUNE, 2019
'GS'

Copy forwarded to: -

- 1) Appellant
- 2) Respondent
- 3) CIT(A)
- 4) CIT
- 5) DR

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	