

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.445/Bang/2017
Assessment year : 2012-13

M/s. Indeca Sporting Goods Pvt. Ltd., No.20, 2 nd Floor, Uniworth Plaza, Sankey Road, Bengaluru – 560 020. PAN : AABCI 5081 P	Vs.	Assistant Commissioner of Income-tax, Circle – 3(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. T. Sanjay Mehta, CA
Revenue by	:	Shri. Pradeep Kumar, CIT-DR(ITAT)(Bengaluru)

Date of hearing	:	09.10.2019
Date of Pronouncement	:	16.10.2019

ORDER

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the final order of assessment dated 12.12.2016 passed by the ACIT, Circle - 3(1)(1), Bengaluru, under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (Act) in relation to Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

1. *The learned Transfer Pricing Officer (hereinafter referred to as "TPO") and the Hon'ble Dispute Resolution Panel (hereinafter referred to as "DRP") have grossly erred by not considering the upper limit of turnover filter applied by the appellant thereby ignoring the numerous jurisdictional precedents. The following comparable are sought to be rejected under this ground:*

- a. *Infosys BPO Limited*
 - b. *TCS e-Serve Ltd*
 - c. *Accentia Technologies Ltd*
 - d. *e4e Healthcare Services Pvt Ltd*
2. *The learned TPO and the Hon'ble DRP have grossly erred by considering BNR Udyog Ltd as comparable even though it fails the RPT criteria as applied by the learned TPO himself.*
3. *The learned TPO and the Hon'ble DRP have grossly erred by comparing the appellant with companies which have an entirely different functional and risk profile. The following comparables are sought to be rejected under this ground:*
- a. *Infosys BPO Limited (this also fails on upper limit of turnover filter)*
 - b. *TCS E Serve Ltd (this also fails on upper limit of turnover filter)*
 - c. *BNR Udyog Ltd (this also fails on RPT filter)*

The learned Assessing Officer has erred in initiating penalty proceedings under Section 271(1)(c) of the Income Tax Act mechanically and without recording any adequate satisfaction for such

2. The assessee is a company. It is engaged in the business of Trading in fabric, support services, local sales, manufacturing and sale of garments and providing information technology enabled services (ITES) to its Associated Enterprises (AE). The only issue that needs to be decided in this appeal is as to whether the consideration received by the assessee for providing IT enabled services (ITES) to its AE is at arms length as laid down under the provisions of section 92 of the Act. The assessee received a sum of Rs.2,30,63,135/- for providing ITES to its AE. To justify the price paid in the international transaction as at arms length, the assessee filed the TP study in which it had chosen Transaction Net Margin Method (TNMM) as the most appropriate method for determining arms length price (ALP). The profit level indicator (PLI)

chosen for the purpose of comparison was operating profit on Operating cost (OP/OC). The OP/OC as computed by the assessee was at 5.05%. The assessee had chosen 8 comparable companies and compared their average arithmetic mean profit margin which was 7.53% with the profit margin of the assessee and claimed that since the profit margin of the assessee was within the tolerance range of + 5% of the arithmetic mean profit margin of the comparables, the price charged in the international transaction was at arms length.

3. The Transfer Pricing Officer (TPO) to whom the AO referred the question for determination of ALP agreed with the choice of PLI as well as method adopted by the assessee for determination of ALP. The TPO accepted 1 out of the 8 comparable companies chosen by the assessee in its TP analysis and on his own the TPO selected 9 other comparable companies and determined the ALP and the addition to be made to the total income on account of determination of ALP as follows:-

Final list of Comparable companies chosen by the TPO and their profit margins:

Sl. No.	Name of the Case	Operating Income	Operating Cost	OP/OC
1	Accentia Technologies Ltd.	126,38,02,000	112,89,16,000	11.75
2	Universal Print Systems Ltd.(Seg)(BPO)	6,17,67,000	3,87,49,000	52.46
3	Informed Technologies India Ltd.	1,96,36,431	1,82,45,770	6.08
4	Infosys B P O Ltd.	1316,75,11,974	962,91,06,964	36.30
5	Jindal Intellicom Ltd.	30,27,51,875	30,29,02,990	-0.05
6	Microgenetic Systems Ltd.	1,29,93,217	1,08,63,390	19.61
7	T C S E-Serve Ltd.	15,78,44,000	9,64,28,000	63.69
8	B N R Udyog Ltd.(Seg)(Medical Transcription)	1,47,04,000	97,87,000	50.61
9	Excel Infoways Ltd.(Seg)(IT/BVPO)	790,96,95,000	559,06,04,000	29.79
10	e4e Healthcare Services Pvt Limited	89,50,04,209	74,59,23,078	19.85
	Average PLI			28.11%

Computation of Arm's Length Price by the TPO:

Arm's Length Mean Margin on cost	28.11%
less: Working Capital Adjustment (As per Annex. C)	-0.63%
Adjusted margin	28.74%
Operating Cost	2,20,16,779
Arms Length Price(ALP)	2,83,44,401
128.74% of Operating Cost)	
Price Received	2,30,63,135
Shortfall being adjustment u/s 92CA:	52,81,266
5% of price received	11,53,157
Since the shortfall is exceeding 5% of the International Transaction, adjustment is made	

4. The AO incorporated the addition suggested by the TPO in the draft order of Assessment. The Assessee filed objections before the Dispute Resolution Panel (DRP) against the proposed addition in the draft assessment order. On objection appeal by the assessee, the DRP excluded 3 out of 10 comparable companies chosen by the TPO.

5. The AO passed the final assessment order after giving effect to the order of the DRP and the addition ultimately sustained was a sum of Rs.44,96,326/-. Against the aforesaid addition, the assessee is in appeal before the Tribunal.

6. At the time of hearing of the appeal, the learned Counsel for the assessee pleaded for exclusion of 3 out of 7 comparable companies that remained after the order of the DRP viz., Infosys BPO Ltd., TCS E-Service Ltd., and BNR Udyog Ltd. As far as Infosys BPO Ltd., is concerned, the learned Counsel for the assessee brought to our notice a decision of the ITAT, Bangalore Bench, in the case of Zyme Solutions Pvt. Ltd., Vs. ACIT in IT(TP)A No.1661/Bang/2016 dated 16.11.2018 and another order in the same case dated 28.06.2019. In the aforesaid order dated 28.06.2019, the Tribunal considered exclusion of Infosys

BPO Limited in the case of assessee who is also engaged in rendering ITES such as the assessee. The Tribunal held that the aforesaid 2 companies should be excluded from the list of comparable companies as they were not functionally comparable with ITES. The following were the relevant observations of the Tribunal:-

“5. We have heard the rival submissions on the comparability of Infosys BPO as a comparable company. The Delhi ITAT in the case of Baxter India Pvt. Ltd. Vs. ALIT ITA No.6158/Del/2016 for AY 2012-13 in the case of a company rendering ITES such as the Assessee, vide order dated 24.8.2017 Paragraph 23 held that Infosys BPO is not comparable with a company rendering ITES for the following reasons:-

"23. In so far as exclusion of Infosys BPO Ltd. is concerned, we find from the submissions made by the assessee before the Assessing Officer/TPO/DRP is that Infosys BPO Ltd. is predominantly into areas like Insurance, Banking, Financial Services, Manufacturing and Telecom which are in the niche areas, unlike the assessee. Further it was also submitted that the Infosys BPQ Ltd. comprises brand value which will tend to influence its business operation and the pricing policy thereby directly impacting the margins earned by the Infosys BPO Ltd.. We find the submissions of the Id. counsel for the assessee before TPO/DRP that in order to maintain the brand image of Infosys BPQ Ltd. in the market, the company incurs substantial selling and marketing expenditure whereas the assessee being a contract service provider does not incur such expenses to maintain its brand has not been controverted by them. Further, Infosys BPO Ltd. being a subsidiary of Infosys has an element of brand value associated with it. This can be further confirmed by the presence of brand related expenses incurred by Infosys BPO Ltd. Further, Infosys BPO Ltd. has acquired Australian based company M/s Portland Group Pty Ltd. during financial year 2011-12. They provide sourcing and category management services in Sydney, Australia. Therefore, this company also failed the TPO's own filter of rejecting companies with peculiar circumstances. In view of the above i.e. functionally not comparable, presence of brand and extraordinary event that has taken place during the year on account of acquisition of Australian based company, we are of

the considered opinion that Infosys BPO Ltd. should not be included in the list of comparables. We accordingly direct the Assessing Officer/TPO to exclude Infosys BPO Ltd. from the list of comparables for the purpose of computing the average margin."

6. *It was also brought to our notice that the Hon'ble Delhi High Court in ITA No.260/2018 in the appeal filed by the Revenue against the aforesaid order dismissed the appeal at the admission stage observing that rationale given by the ITAT for exclusion was correct. In view of the aforesaid decision, we direct exclusion of Infosys BPO from the list of comparable companies chosen by the TPO.*

7. *The next company that is sought to be excluded by the assessee from the list of comparable companies chosen by the TPO is BNR Udyog Ltd. In original order passed by the Tribunal this company was retained as a comparable company. In the M.P. filed by the Assessee it was pointed out that the chart filed at the time of hearing before the Tribunal, the assessee company sought to exclude this company on the ground that the turnover of this company was only 1.7 cores and it cannot be compared with turnover of assessee which was 30.6 crores. It was also submitted on behalf of the assessee that this company has related party transaction (RPT) over and above the threshold limit of 15% and is also functionally different. The assessee in this regard at the time of hearing placed reliance on the decision of ITAT Bangalore Bench in the case of Indegne Pvt. Ltd., Vs. ACDIT in IT(TP)A No.591/Bang2017 for asst. year 2012-13 order dated 2/8/2017 wherein at page 10 of this order in para 10.3.2 the Tribunal remanded the matter of comparability of this company with ITES company. Decision in the case of M/s e4e Business Solution India Pvt. Ltd., Vs. ITO in IT(TP)TP No.451/Bang/2017 was also filed in support of assessee's claim for remand on functional comparability. The Tribunal in the impugned order however in paragraph 13 to 13.2 followed the decision rendered in the case of CGI Information Systems and Management Consultation Ltd., Vs. ACTT-TS-320—ITAT-2018(Bang) wherein this company was considered as comparable with ITeS company. The Tribunal however did not render any decision on functional comparability of this company. On the above objections in the MP, the Tribunal recalled the original order for analysis the comparability of this company afresh, with the following observations:*

"7. We have considered the submissions of the Ld. counsel for the assessee and are of the view that the contention in

the MA that this company was sought to be excluded by the assessee on functional comparability and that the tribunal's order in the case of CGI Information Systems (supra) did not consider functional comparability or application of RPT filter of this company is correct. Therefore there is error in the order of the Tribunal in as much as functional comparability of this company with ITeS company has not been considered by the Tribunal. We, therefore recall the order of the Tribunal for the limited purpose of examining the functional comparability of this company with the assessee company."

8. *We have heard the rival submissions on the comparability of the aforesaid company. The Delhi ITAT in the case of BT e-Service (India) Ltd. Vs. ITO ITA No.6690/Del/2016 for AY 2012-13 order dated 19.6.2018 considered the comparability of this company and came to the conclusion that this company was carrying out medical transcription, medical billing and coding whereas the Assessee was a captive service provider. The Tribunal followed its own ruling in the same Assessee's case in AY 201112 in ITA No.99/Del/2016 reported in (2017) 87 taxmann.com 251 (Del) in BT e-Serve (India) Pvt.Ltd. Vs. ITO giving identical reasons for excluding BNR Udyog Limited from the list of comparable companies in the field of companies rendering ITES such as the Assessee. Respectfully following the aforesaid decision, we direct exclusion of the aforesaid company from the list of comparable companies chosen by the TPO."*

7. In view of the aforesaid decision of the Tribunal which is also in relation to Assessment Year 2012-13, we hold that the aforesaid 2 companies should be excluded from the list of comparable companies.

8. As far as TCS E Service Ltd., is concerned, the comparability of this company was considered by this Tribunal in the case of Zyme Solutions Ltd., in its order dated 16.11.2018 as follows:-

"11. TCS E Service Ltd.:

This company was selected by the TPO and objected by the assessee for inclusion in the list of comparables on the ground that it is functionally different as it is engaged in the business of BPO, banking, finance, insurance domain. This contention was rejected by the TPO by holding that it is engaged in BPO, business of banking, finance, insurance domain, which are purely in the nature of ITES. Even the Hon'ble DRP confirmed the findings of the TPO.

11.1 Being aggrieved, the assessee is before us contending that this company is functionally different as it is engaged in diversified business activities of BPO such as banking, finance, insurance. Learned AR of the assessee has also drawn our attention to the Annual Report placed at pages 563 to 563 of the paper book and reliance in this regard was placed on the following decisions:

Turnover Filter:

- i. McAfee Software (India) Pvt Ltd **US-136-ITAT-2016(Bang)-TPJ***
- ii. Swiss Re Global Business Solutions India (P.) Ltd. **FS-307-ITAT-2017(Bang)** Functionally different filter:*
 - i. XL Health Corporation India (P.) Ltd. (supra)*
 - ii. Baxter India (P.) Ltd. v. ACIT12017185 taxmann.com 285 (Delhi - Trib.)*
 - iii. CGI Information Systems and Management Consultants (P.) Ltd. (supra)*

11.2 On the other hand, ld. CIT(DR) opposed its exclusion. He submitted that this company is engaged in KPO services and there is no difference between KPO and ITES.

*11.3 We have heard rival submissions and perused material on record. The issue of comparability of this company was considered by the co-ordinate bench of Tribunal in the case of XLHealth Corpn. India (P.) **Dd.** (supra). The relevant findings of the Tribunal are as under:*

‘. . . We have heard the rival submissions and perused the material on record. From the perusal of the Annual Report of this entity placed at page Nos. 583 to 678 of paper book, at page No. 604 it is stated as under.

"2. COMPANY OVERVIEW

Your Company, along with its subsidiary companies - TCS e-Serve International Limited and TCS e-Serve America Inc., is primarily engaged in the business of providing Business Process Services (BPO) for its customers in Banking, Financial Services and Insurance domain.

The Company's operations include delivering core business processing services, analytics & insights (KPO) and support services for both data and voice processes.

Your Company is an integral part of the Tata Consultancy Services' (TCS) strategy to build on its 'Full Services Offerings' that offer global customers an integrated portfolio of services ranging from IT services to BPO services.

The Company provides its services from various processing facilities, backed by a robust and scalable infrastructure network tailored to meet clients' needs. A detailed Business Continuity Plan has also been put in place to ensure the services are provided to the customers without any disruptions."

Thus, this company is also stated to be a Knowledge Process Outsourcing and therefore for the reasons stated by us while dealing with this issue of comparability of the company Infosys BPO Ltd. shall equally hold good and therefore we direct the AO/TPO to exclude this company from the list of comparables.

Since the appellant company is into low end BPO, it cannot be compared with KPO service provider.

11.4 Respectfully following the decision of the co-ordinate bench of Tribunal, we direct for exclusion of this company from the list of comparable."

9. Respectively following the aforesaid decision, we hold that TCS E Service Ltd., should be excluded from the list of comparable companies. The TPO is directed to compute the ALP in the light of the directions given above, after affording opportunity of being heard to the assessee. All other issues arising on

account of TP adjustments were not argued and therefore treated as not pressed for adjudication.

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

Order pronounced in the open court on this 16th day of October, 2019.

Sd/-
(B. R. BASKARAN)
Accountant Member

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 16th October, 2019.

/NS/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.