

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

IT(TP)A No.66/Coch/2018
Assessment Year: 2011-12

M/s. Delphi Connection Systems India Pvt. Ltd., (Formerly FCI Technologies Services Ltd.), XII/101, Thiruvaniyoor Vettickal Road, Thiruvaniyoor, Puthencruz via, Kochi-682 308. [PAN: AAACF 5044Q]	Vs.	The Assistant Commissioner of Income-tax, Corporate Circle-1(1), Kochi.
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	Shri Vivek Krishna Govind, CA
Revenue by	Shri Shantham Bose, CIT(DR)

Date of hearing	05/12/2019
Date of pronouncement	10/12/2019

ORDER

Per CHANDRA POOJARI, AM:

This appeal by the assessee is directed against the directions of the Dispute Resolution Panel-II, Bengaluru passed under section 144C(5) of the Income Tax Act dated 28/12/2017 and pertain to the assessment year 2011-12.

2. The assessee has raised the following grounds of appeal:

1. The order of the learned Dispute Resolution Panel-2, Bengaluru to the extent appealed against is against law, equity and justice.

2. The learned panel erred in confirming the decision of the Assessing Officer in making an upward transfer pricing adjustment of Rs.4,32,18,348/- to the total income of the assessee by computing the Arms Length Price under the Transaction Net margin Method at substantially higher than computed by the appellant.

3. The learned TPO/DRP has erred in disregarding the Transactions Net Margin of 11 comparable companies taken by the appellant after considering all facts and similar business parameters.

a. The panel erred in not considering the revised search process conducted by the assessee company based on the same filters as taken by the TPO and after excluding giant companies.

b. The Ld. DRP erred in rejecting the two additional comparable companies produced before the Ld. TPO stating that the assessee has not produced this argument before the TPO nor it has been admitted as additional grounds by the Hon'ble ITAT. The Ld. DRP ought to have accepted the request of the assessee to include the new comparables as above.

4. The TPO/DRP erred in selecting several high-end KPO/BPO companies as comparable companies. If at all the activities of the Company can be categorized as KPO/BPO, it would fall under the category of "low end KPO/BPO" employing the services of lesser-qualified manpower.

a. The Ld. DRP erred in not considering the written submissions filed and explanation/information furnished at the time of hearing regarding the comparability of the companies selected by the TPO and basis of computation of the margins of such companies.

b. The panel erred in rejecting the objection of the assessee against selection of iGATE Global Solutions Limited as a comparable company by the TPO. It is submitted that the turnover of iGATE Global Solutions Limited is significantly higher and the nature of its services and the category of its customers are not comparable with the Company. Several judicial decisions in favour of the assessee were produced which clearly states that a giant company cannot be compared with a company of the size of the assessee company, which have been rejected by the learned panel.

6. Notwithstanding the fact that the TPO has selected companies that are not comparable as stated in para 4 above, the DRP erred in not considering the detailed workings submitted by the assessee to substantiate that the profit margins considered by the TPO are incorrect in certain cases.

a. In the case of the company where the segment information has been used, the TPO erred in not allocating the unallocated expenses to various segments before computing the margin resulting in unusually high margins.

b. The Panel erred in rejecting the objections of the assessee regarding adoption of M/s. Jeevan Scientific Technology Ltd. as a comparable company and there is lack of clarity in functions performed and erroneous margin computation. It is submitted that the BPO/ERP segmental margin of the company was extremely high due to the large chunk of unallocated expenses. As can be seen from the results of the company, the margin for BPO segment is 70% while the net margin of the company is 4.77%. Hence, it is clear that there is an error in the segmental results of the company. This objection of the assessee has been rejected by the Ld. Panel.

6. The appellant craves to add, alter, amend or modify any of the grounds of appeal during the course of hearing of the appeal.

7. For these and other grounds that may be further adduced at the time of hearing the order of the learned Deputy Commissioner of Income Tax requires to be modified suitably.

3. At the time of hearing, Ground Nos. 1 & 2 were not pressed and hence, they are dismissed as not pressed.

4. Regarding Ground No. 4, the Ld. AR submitted that the following comparables are KPO/BPO and cannot be considered as comparables.

1. Accentia Technologies Ltd.
2. Acropetal Technologies Ltd.
3. ICRA Online Ltd.
4. Jeevan Scientific Technolgoy Ltd.
5. iGATE Global Solutions Ltd.

4.1 In the case of Accentia Technologies Ltd., the Ld. AR submitted that for the period ended 31st March, 2011 and 31st March 2010, 84% and 86% respectively of

the operating revenues were derived from Medical Transcription services and other healthcare services respectively and the remaining 16% and 14% from Medical coding services respectively and therefore, not functionally comparable. It was submitted that the filter engineering design service is a very broad one and are not comparable.

4.2 In the case of Acropetal Technologies Ltd., the Ld. AR submitted that the company is mainly into information technology services, engineering design and health care service. For the period ending 31st March 2011, the revenue from engineering design comprised only 35% of the total operating revenues. The filter engineering design is a very broad one and are not comparable. According to the Ld. AR, the TPO had relied on the CBDTD Circular for IETES. However, IETES would be a very broad classification and the TPO had not differentiated the activities of the comparable with the assessee company.

4.3 In the case of Jeevan Scientific Technology Ltd., the Ld. AR submitted that there was lack of clarity in functions performed. The Ld. AR submitted that margin computation was erroneous and the assessee had also submitted financial statements of Jeevan Scientific Technology Ltd. It was submitted that the BPO/ERP segmental margin of the company was extremely high due to the large chunk of unallocated expenses. As seen from the results of the company, the margin for BPO segment was 70% while the net margin of the company is 4.77%. It was submitted that the TPO had erroneously taken 70% as the margin. Further, the DRP

had stated that the assessee failed to furnish any documents proving the error in margin computation which was factually wrong since the revised computation and annual report was submitted along with the submission made before DRP. In view of the above, the Ld. AR submitted that the margin computation is to be corrected.

4.4. In the case of iGATE Global Solutions Ltd., the Ld. AR submitted that the turnover of this company was significantly higher and the nature of its services and the category of its customers are not comparable with the assessee company.

4.5 It was submitted that the Panel had erred in not considering the difference in margin computation of comparables which was furnished by the assessee and the TPO had computed the margin of the assessee (OP/OC) as 6.68% combining both CPRC and GBS division. The TPO had arrived at arithmetic margin of 36.84% considering the margin (OP/OC) of companies selected with new search filters. The Ld. AR submitted that the assessee had recomputed the margins computed by the TPO in case of companies where segment information had been used and the TPO erred in not allocating the unallocated expenses to various segments before computing the margin which was not considered by the DRP. The assessee recomputed the margins as follows:

Name of Company	Margin (OP/OC)
Accentia Technologies Ltd.	28.89%
Acropetal Technologies Ltd.	14.26%
ICRA Online Ltd.	3.50%
Jeevan Scientific Technologies Ltd.	4.77%
iGATE Global Solutions Ltd.	25.07%
Average arithmetic margin	15.30%

4.6 The Ld. AR further submitted that the Panel erred in not considering the revised search process conducted by the assessee based on the same filters as taken by the TPO. The assessee had applied the following filters for the revised search.

- a) Search conducted using the keyword BPO/KPO
- b) Companies with turnover less than 1 crore were eliminated.
- c) Companies with export sales less than 25% of turnover were eliminated
- d) Companies whose Related Party sales is greater than 25% of turnover were eliminated.
- e) Companies whose employee cost is less than 25% of turnover were eliminated.
- f) Companies with financial years not matching the tested party were eliminated.
- g) Consistently loss making companies were eliminated.
- h) Functionally different companies were eliminated.
- i) Companies with turnover higher than Rs.300 crores were eliminated.
- j) Companies with peculiar economic circumstances were excluded.

4.7 The Ld. AR submitted that the search criteria used by the assessee was same as those used by the TPO. The following companies were selected after the search process and the margin for the same were as follows:

Company Name	Sales Turnover (Rs. in crores)	Operating Cost (Rs. in Crores)	Operating profit (Rs. in crores)	PLI %
Bertelsmann Marketing Services India Ltd.	41.66	42.63	-0.97	-2.28%
Datamatics Global Services Ltd.	138.45	132.15	6.3	4.77%
Informed Technologies India Ltd.	1.75	1.67	0.08	4.79%
Jeevan Scientific Technology Ltd.	2.42	2.31	0.11	4.76%
Sheorey Digital Systems	5.82	4.53	1.20	28.48%

Ltd.				
Sundaram Business Services Ltd.	22.38	24.05	-1.67	-6.94%
Tech Mahindra BPO Ltd.	111.76	111.36	0.4	0.36%
Average PLI of Comparables				4.85%
PLI of the appellant as in 28 above				6.68%

The Ld. AR submitted that the companies selected now were more or less having comparable turnovers with the assessee and the average PLI of the companies came to 4.85% as compared to the PLI of as sfor CEPC division which came to 9.45%. Therefore, it was submitted that the revised search process may be taken into consideration

4.8 The Ld. AR submitted that the GBS division of the company which provides services had during the year offered income at 4.22% which was considered at Arms Length. It was submitted that the division had arrived at the profitability as per the industry standards. The Ld. AR relied on the decision of the ITAT, Delhi in the case of Lumax Industries vs. JCIT (89 taxmann.com 138) wherein it was held that royalty paid by as was within limits of payment of royalty in automobile sector as per the market trend. Therefore, it was submitted that the profit offered by the assessee which is as per the industry standards should be allowed.

5. The Ld. DR submitted that the concept of economy of sale cannot be applied to service delivering companies and there was no empirical evidence to suggest that margins were related to turnover.

6. We have heard the rival submissions and perused the material on record. The matter was referred to the DRP u/s 144C of the IT Act. Under sub-section (1) of Section 144C, the Assessing Officer is under an obligation to forward a draft of the proposed order of assessment to the assessee if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Under sub-section (2) of Section 144, the assessee within 30 days of the receipt of such draft order can accept the variation made by the Assessing Officer or he can file objections either to Dispute Resolution Panel or to the Assessing Officer. Since the assessee had filed his objections with DRP, then, under sub-section (5) the DRP, upon receipt of objection is under obligation to issue directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment and under subsection (6) such directions which are put up under sub-section (5) would be further considering the following documents:

- (a) Draft order;
- (b) The objection filed by the assessee;
- (c) The evidence furnished by the assessee;
- (d) Report, if any, of the Assessing Officer, valuation officer, or TPO or any other authority;
- (e) Records relating to the draft order;
- (f) Evidence collected by, or caused to be collected by, it; and
- (g) Result of any inquiry made by, or caused to be made by it.

6.1 Under sub-section (7), DRP is also authorized before issuing of direction under sub-section (5) to make such further inquiry, as it think fit or cause any further inquiry to be made by any income-tax authority and report the result of the same to it. Under sub-section (8), the DRP has power to confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further inquiry and passing of the assessment order. Under sub-section (11), no direction u/s sub section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue respectively. Under sub-section (12), directions under sub-section (5) cannot be passed after nine months from the end of the month in which draft order is forwarded to the eligible assessee. Under sub-section (13), on receipt of directions issued under subsection (5), the Assessing Officer has to pass the assessment order in conformity with the directions without providing any further opportunity of being heard to the assessee within one month from the end of the month in which such directions are received.

6.2 The directions passed by DRP u/s 144C (5), as it can be seen in the present case, are not speaking about what objections were raised by the assessee and how they have been found to be not acceptable. The DRP has simply observed that the TPO has given reasons for rejecting the comparables and by the Assessing Officer in the draft order. Therefore, the order passed by the DRP is a non-speaking order on the issues raised by the assessee, not stating the objections raised by the assessee

and the reasons have also not been given as simply the order of TPO and Assessing Officer are referred. We find that similar issue was considered by the Hon'ble Delhi High Court in the aforementioned case of Vodafone Essar Ltd. (340 ITR 352) against the order passed by the DRP.

6.3 In view of the above, we find that it is a fit case where this issue should be restored back to the file of DRP to pass a detailed order stating all the objections of the assessee and disposing them by giving a cogent and germane reason for adjudication of the objections of the assessee. We direct accordingly. After receiving the order from DRP, the Assessing Officer will again pass order u/s 144C(13) and the present assessment passed by the Assessing Officer is set aside as the DRP is directed to readjudicate the objections raised by the assessee as per directions give above. We direct accordingly. This ground of appeal of the assessee is allowed for statistical purposes.

7. The next ground, Ground No. 3 is with regard to disregarding the transaction net margin of 11 comparable companies taken by the assessee after considering all facts and similar business parameters. Since we have remitted similar issue to the file of the Assessing Officer for calling for fresh TP study from the TPO, this issue is kept open to be considered by the Assessing Officer/TPO while passing fresh TPO order.

8. The next ground, Ground No. 5 is with regard to non consideration of the detailed workings submitted by the assessee to substantiate that the profit margins considered by the TPO were incorrect in certain cases.. Since we have remitted similar issue to the file of the Assessing Officer for calling for fresh TP study from the TPO, this issue is kept open to be considered by the Assessing Officer/TPO while passing fresh TPO order.

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

Order pronounced in the open court on 10th December, 2019.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 10th December, 2019

GJ

Copy to:

1. M/s. Delphi Connection Systems India Pvt. Ltd., (Formerly FCI Technologies Services Ltd.), XII/101, Thiruvaniyoor Vettickal Road, Thiruvaniyoor, Puthencruz via, Kochi-682 308.
2. The Dispute Resolution Panel-2, 7th Floor, Income-tax Office, BMTC Building, 80 feet Road, Koramangala, Bengaluru-560 095.
3. The Pr. Commissioner of Income-tax, Kochi.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin