

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 1958/DEL/2017  
[Assessment Year: 2012-13]

&

ITA No. 9131/DEL/2019  
[Assessment Year: 2015-16]

Avaya India Pvt. Ltd  
Global Business Park  
M.G Road, Gurgaon

Vs.

The Addl. C.I.T.  
Special Range - 1  
New Delhi

PAN: AAECA 3592 N  
[Appellant]

[Respondent]

Date of Hearing : 14.01.2020  
Date of Pronouncement : 17.01.2020

Assessee by : A.Y 2012-13  
Shri Shashwat Bajpai, Adv  
Shri Sharad Agarwal, Adv

A.Y 2015-16  
Shri Ajit Korde, Adv  
Shri Vaibhav Agarwal, Adv

Revenue by : Shri Surendra Pal, CIT - DR

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:**

The above two separate appeals by the assessee are preferred against separate orders framed u/s 143(3) r.w.s 144C of the Income-

tax Act, 1961 [hereinafter referred to as 'The Act'] for assessment years 2012-13 and 2015-16. Since both these appeals were heard together, we are disposing them off by this common order for the sake of convenience and brevity.

**ITA No. 9131/DEL/2016 [A.Y. 2015-16]**

2. Ground Nos 1 and 2 are general in nature and need no adjudication.

3. Grievance in Ground No. 3 relates to the TP adjustment in relation to notional interest on overdue receivables amounting to Rs. 4,21,01,399/-.

4. At the very outset, the ld. counsel for the assessee stated that an identical issue arose in assessee's own case in Assessment Year 2010-11 and the Tribunal decided the issue in favour of the assessee and against the revenue. A copy of the order of the Tribunal has been furnished on record.

4. Per contra, the ld. DR strongly supported the findings of the Assessing Officer/TPO and heavily relied upon the decision of the DRP.

5. We have given thoughtful consideration to the orders of the authorities below. We find force in the contentions of the ld. counsel for the assessee. A similar issue was considered by the co-ordinate bench ITA No. 7290/DEL/2018 for A.Y 2014-15 in favour of the assessee and against the Revenue. The relevant findings of the co-ordinate bench read as under:

"19. In ground No. 4 to 4.6 of the appeal, the assessee has challenged transfer pricing adjustment in relation to notional interest on outstanding receivables of Rs.3,81,58,172/-. 19.1 Before us, the Ld. counsel of the assessee submitted that assessee is a debt free entity and since it does not carry any interest cost on its funds, therefore, it is not necessarily required to charge an interest on delayed realization. In this respect, the Ld. counsel relied on the decision of the Hon'ble jurisdictional Delhi High Court in the case of Bechtel India (ITA 379/2016). 19.2 On the other hand, the learned DR relied on the order of the lower authorities.

19.3 We have heard the rival submissions and perused the relevant material on record. On perusal of financial statements of the assessee placed on page 1 to 27 of the paper book, we find that assessee has not borrowed any money. We find that the Hon'ble Delhi High Court in the case of Bechtel India (supra) has observed that where the appellant is a debt free

company, the question of receiving any interest in receivable did not arise. The relevant finding of the Hon'ble High Court is reproduced as under:

"4. As far as question (B) concerning the adjustment for interest on receivables, the Court finds that the ITAT has returned a detailed finding of fact that the Assessee is a debt free company and the question of receiving any interest on receivables did not arise. Consequently, no substantial question of law arises for consideration as far as this issue is concerned."

ITA No.7290/Del/2018 19.4 Respectfully following above decision of the Hon'ble jurisdictional High Court, no adjustment on account of interest on outstanding receivable is warranted in the case of the assessee.

Accordingly, the relevant grounds of the appeal are allowed."

6. Respectfully following the findings of the co-ordinate bench [supra], we direct the Assessing Officer to delete the addition. Ground No. 3 with all its sub-grounds is allowed.

7. Ground No. 4 with all its sub grounds relates to Corporate Tax Adjustment in relation to Tax Deducted at Source Reconciliation.

8. Facts relating to this issue are that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that there was mismatch between Form 26AS and tax credit claimed. The assessee was asked to furnish a reconciliation for TDS as appearing in Form 26AS vis a vis the amount claimed in the return of income and thereby the Assessing Officer proposed to add the difference between the revenue amounting to Rs. 6,93,80,572/- recognised by the assessee in its books of account and the amount appearing in Form No. 26AS.

9. In its reply, the assessee stated that it has recognised total revenue of Rs. 6,93,80,572/- in its financial statement from M/s Bharti Hexacom Ltd based on accrual system of accounting regularly followed by the assessee and the said amount has been duly offered to tax in the return of income. As regards the difference of Rs. 10.79 crores, it was explained that M/s Bharti Hexacom Ltd had created excess provision and the same does not represent income of the assessee.

10. The Assessing Officer was not convinced and proposed the difference amounting to Rs. 1,07,76,96,802/- as income of the assessee.

11. The assessee raised objections before the DRP and the Panel directed the Assessing Officer as under:

"In this case, hearing was held on 16.05.2019 before DRP-1 Panel. With regard to the addition on account of difference in receipts as per 26AS, the AR of the assessee has submitted his Statement contending that 'Bharti Hexacom' has created excess provision during the subject AY and the same does not represent income of the assessee for subject AY.

I am directed by the DRP to direct you to verify transaction with 'Bharti Hexacom on similar lines as done in preceding AY and submit your report giving specific finding the submissions of the assessee [filed during the DRP hearing copy enclosed] provide due and sufficient opportunity to the assessee and submit your report on the same latest by 14.06.2019.

12. Pursuant to the directions of the DRP, the Assessing Officer replied as under:

"In this regard, it is submitted that this office had written a letter F.No. AddI. R-1/Avaya/Remand Rep/2019-20/46/ dated 31.05.2019 to assessee to provide information. Further, the information u/s 133(6) of the I.T. Act, 1961 was called from M/s Bharti Hexacom Limited for the F.Y. 2014-15 in the case of M/s

Avaya India Pvt. Ltd, vide letter F.No. Addl. CIT/Spl R-1/133(6)/2019-20/55 dated 06.06.2019 to corroborate the claim of the assessee with respect to additional evidence.

3. However, M/s Bharti Hexacom Limited has not submitted any information yet in this regards. Therefore the claim of the assessee w.r.t. submission of additional evidences cannot be verified. Hence the proposed addition in the draft assessment order is correct. Total receipts of the assessee appearing in the 26AS which was also confirmed by the M/s Bharti Hexacom Limited through their mail dated 19.12.2018 has not been negated. Thus, the additional evidence cannot be accepted for as it has not been reconciled or confirmed by the M/s Bharti Hexacom Limited.

4. It is further submitted that the case may be decided based on the merits and circumstances, and giving due consideration to the opinion of Assessing"

13. Before the DRP, the assessee filed a reply from M/s Bharti Hexacom and after considering the details furnished by the DRP held as under:

"13. The details have now been received, clearing up the issue after the response from Bharati Hexacom sent by it to the AO

on 15.07.2019. The Annexure 4 submitted by the assessee is attached with this direction which gives the reconciliation. The AO is directed to analyse the same i.e the details filed by the assessee vis-a-vis the details filed by Bharti Hexacom again. The excess provision made by the Bharti Group as made clear by its letter should not be added to the income of the assessee. The Assessing Officer will accordingly recomputed the addition made if any remains, due to mismatch of Form 26AS."

14. Not following the findings /directions of the DRP, the Assessing Officer made addition of Rs. 10,79,78,288/-.

15. Before us, the ld. counsel for the assessee once again furnished complete details of M/s Bharti Hexacom and also furnished a reconciliation statement, which is as under:

Particulars	Amount (in INR)
As per Form 16A/26AS (A)	177,358,800
<i>Add: Invoice dated 16.04.2014 raised for the period of service 14.03.2014 to 13.04.2014 (Proportionate revenue booked for 13 days for FY 2014-15 and hence added back) (B)</i>	2,277.3%
<i>Less: Excess provision booked by Bharti Hexacom (C)</i>	110,255,683
Total (I)=(A)+(B)-( C)	69,380,572
Revenue offered by Avaya India in the financials/income tax return	69,380,572

*Reconciliation of income offered to tax in the return of income vis-a-vis- amount appearing in the response submitted by Bharti Hexacom Limited*

Particulars	Amount (in INR)
As per Bharti Hexacom (A)	59,127,457
Add: Invoices issued by Avaya India in the subsequent year against the services rendered for FY 2014- 15 (Not accounted by Bharti Hexacom) (B)	13,406,434
Less: Reversal of proportionate revenue recognised by Avaya India in the preceding year i.e. FY 2012- 13 vide invoice dated	3,153,317
Total (D)=(A)+(B)-( C)	69,380,573
Revenue offered by Avaya India in the financials/Income tax	69,380,572

16. It is the say of the ld. counsel for the assessee that if the reconciliation statement is examined, then there would remain no difference in the income returned by the assessee vis a vis Form No. 26AS.

17. Per contra, ld. DR stated that this reconciliation may be sent to the Assessing Officer for examination.

18. We have given thoughtful consideration to the orders of the authorities below. At the very outset, we have to state that invoking of provisions of section 68 of the Act on the alleged difference in the

revenue recognised by the assessee and Form 26AS statement is bad in law in as much as section 68 is not at all applicable on such difference. Secondly, we find that the DRP has given categorical finding that only the difference, if any, should have been added but we find that without going into the reconciliation statement, the Assessing Officer has made addition thereby disobeying the directions of the DRP. However, in the interest of justice and fair play, we restore this issue to the file of the Assessing Officer/TPO. The Assessing Officer/TPO is directed to examine the reconciliation statement mentioned elsewhere and when found correct, no addition is called for. With these directions, Ground No. 4 with all its sub grounds is allowed.

19. Ground No. 5 relates to short grant of TDS credit. We direct the Assessing Officer to examine the claim of the assessee as per evidences furnished and allow TDS credit as per provisions of law.

20. Ground No. 6 relates to charging of interest u/s 234B of the Act.

21. Charging of interest is consequential and the Assessing Officer is directed to charge interest as per provisions of law.

ITA No. 1958/DEL/2017

A.Y 2012-13

22. Ground No. 1 is general in nature and needs no adjudication.
23. First grievance relates to TP adjustment of Rs. 2,85,10,070/- to the income of the assessee by holding that its international transactions pertaining to IT enabled services do not satisfy the arm's length principle.
24. The quarrel is in respect of two comparables, namely, Eclerx Services Ltd and Infosys BPO Ltd.
25. At the very outset, the ld. counsel for the assessee stated that an identical issue was considered by the Tribunal in assessee's own case in A.Y 2010-11 wherein the Tribunal excluded these comparables and decided the issue in favour of the assessee and against the revenue.
26. Per contra, the ld. DR could not bring any distinguishing decision in favour of the revenue.
27. We have given thoughtful consideration to the orders of the authorities below. We find force in the contention of the ld. counsel

for the assessee. These two comparables were considered by the Tribunal in ITA No. 1904/DEL/2015 vide order dated 03.12.2018. The relevant findings of the coordinate bench read as under:

"B. Eclerx limited:

6. The Ld. counsel referred to the Annual Report of the company and submitted that the company is engaged in providing data analytics, Data management and process solutions thus it is functionally dissimilar to the ITes segment of assessee. The Ld. counsel also submitted that during the year under consideration, the company has shown very high turnover and supernormal profits and the circumstances being exceptional, the company need to be excluded from the set of the comparables. The Ld. counsel further submitted that the Tribunal in the case of the assessee for assessment year 2008- 09 has directed to exclude the above company from final set of comparables on account of the functional dissimilarity. The Ld. counsel also submitted that the company has been found to be functionally dissimilar by the Hon'ble Delhi High Court with a BPO company in the case of EVALUESERVE SEZ (Gurgaon) Private Limited in ITA 241 of 2018. In view of the above, the Ld.

ITA No.1904/Del/2015 counsel requested to exclude the company from the final set of the comparables.

6.1 The Ld. DR, on the other hand, relied on the order of the Ld. TPO and submitted that the assessee is engaged in wide range of verticals and thus it is difficult to categorise the assessee as a low-end BPO service provider.

6.2 We have heard the rival submissions of the parties on the issue of exclusion of the company from final set of comparables. We note that the Tribunal in ITA No. 146/Del/2013 for assessment year 2008-09 has examined the issue of functional dissimilarity of the assessee with M/s. E Clarx service Ltd. The Tribunal (supra) held that company cannot be compared with a low-end service provider like the assessee. The relevant finding of the Tribunal is reproduced as under:

"As regards the aforesaid two comparables [mentioned at sl.nos.(vii) &

(viii)], The Id. AR at the outset itself pointed out that Eclerx and Vishal are into KPO services. According to him, although KPO services were ITES but the nature of these services were materially different than the services rendered by the assessee. It was asserted that eClerx is engaged in financial services in the nature of account reconciliation, trade order management services and has been rated as a leading KPO by Nelso Hall. It was contended that similarly Vishal was engaged in the services of data analytics and providing data processing solutions to some of the largest brands in the world. Vishal too had been rated as a leading KPO by Nelso Hall. In addition, it

was pointed out that whilst the employee costs incurred by Vishal was relatively low and constituted only 2.30% of its total cost during the relevant year, the hire charges, vendor payments constituted almost 87% of the total costs. According to the AR, this evidenced that Vishal' s business model was different and Vishal had outsourced significant part of its operations.

We have heard both the sides and perused the material available on record. The Hon'ble jurisdictional High Court in the case of Rampgreen Solutions Pvt. Ltd. (supra) has held as under :-

ITA No.1904/Del/2015 "36. As pointed out earlier, the transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an ALP. The methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as product/ service characteristics, functions undertaken, assets used, risks assumed.

This is essential to ensure the efficacy of the exercise. There is sufficient flexibility available within the statutory framework to ensure a fair ALP.

37. Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining the ALP. Vishal and eClerx, both are into KPO Services. In *Maersk Global Centers (India) Pvt. Ltd.* (supra), the Special Bench of the Tribunal had

noted that eClerx is engaged in data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition, eClerx also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee. Further, the functions undertaken (i.e. the activities performed) are also not comparable with the Assessee. In our view, the Tribunal erred in holding that the functions performed by the Assessee were broadly similar to that of eClerx or Vishal. The operating margin of eClerx, thus, could not be included to arrive at an ALP of controlled transactions, which were materially different in its content and value. In *Maersk Global Centers (India) Pvt. Ltd.* (supra), the Special Bench of the Tribunal had noted the same and had, thus, excluded eClerx as a comparable. It is further observed that the comparability of eClerx had also been examined by the Hyderabad Bench of the Tribunal in *M/sCapital Iq Information Systems(India) (P.) Ltd. v. Additional Commissioner of Income-tax* (supra), wherein, the Tribunal directed the exclusion of eClerx as a comparable for the reason that it was engaged in providing KPO Services and further that it had also returned supernormal profits.

38. In our view, even Vishal could not be considered as a comparable, as admittedly, its business model was completely different.

Admittedly, Vishal's expenditure on employment cost during the relevant period was a small fraction of the proportionate cost incurred by the Assessee, apparently, for the reason that most of its work was outsourced to other vendors/service providers. The DRP and the Tribunal erred in brushing aside this vital difference by observing that outsourcing was common in ITeS industry and the same would not have a bearing on profitability. Plainly, a business model where services are rendered by employing own employees and using one's ITA No.1904/Del/2015 own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing of services by Vishal would have no bearing on the profitability of the said entity."

In the light of the aforesaid decision of the Honorable jurisdictional High Court in the case of Rampgreen (Supra) wherein the it was held that both these companies cannot be compared with the low end service provider like the appellant in this case.

6.3 We find that the issue in dispute before us in the year under consideration is also whether the knowledge processing services (KPO) of E-clerx can be compared with the low-end BPO

services of the assessee. Since the issue in dispute in the assessment year 2008-09, being identical to the present issue in same set of circumstances, respectfully following the finding of the Tribunal (supra), we direct the Ld. AO/TPO to exclude the above company from final set of the comparables.

C. Infosys BPO Limited:

7. Before the Ld.TPO, the assessee requested to exclude the company in view of high turnover and profit and brand value of the Infosys. According to the assessee, the brand value has influenced the pricing policy of the company and directly impacted the margins earned by the company and thus, it cannot be compared with the assessee who is providing services to its Associated Enterprise. The Ld. TPO rejected the contention of the assessee and held that high turnover does not have any impact on the profitability. He also observed that brand value in a service industry, may derive its revenues but may not affect the probability because any brand comes with a ITA No.1904/Del/2015 cost i.e. high expenses are required to be incurred to build brand value. Before us the Ld. counsel of the assessee submitted that the company is engaged in customer service outsourcing, financial accounting, knowledge services, human resource outsourcing etc and thus it is functionally dissimilar to the assessee. The Ld. counsel also reiterated the reasons submitted before the Ld. TPO for excluding the above company. 7.1 The Ld. counsel in support of the contention that

Infosys BPO Limited, an entity having high brand value were able to command greater profits, relied on the decision of the Hon'ble Delhi High Court in ITA 241/2018 the case of EVALUESERVE SEZ (Gurgaon) Private Limited. The Ld. counsel also relied on the decision of the Hon'ble High Court of the Bombay in the case of CIT Vs. Pentair water India Private Limited for assessment year 2010-11 reported in (2016) 69 taxmann.com 180 (Bombay), wherein it is held that Infosys BPO Limited having turnover of Rs. 649.56 crores cannot be compared with the company having turnover of Rs. 11 crore.

7.2 On the contrary the Ld. DR relied on the finding of the lower authorities and submitted that there is no advantages to the company of the brand value of Infosys and no expenditure has been incurred by the company for brand value. On the issue of turnover, the Ld. DR submitted that turnover of the assessee company is of Rs. 369 crores which is comparable to the turnover of the Infosys BPO Limited and thus it cannot be rejected on the ground of the high turnover.

7.3 In the rejoinder, the Ld. counsel submitted that turnover of the assessee in ITes segment is merely Rs.23 crores and ITA No.1904/Del/2015 thus the case of the assessee duly covered by the decision of the Hon'ble Bombay High Court.

7.4 We have heard the rival submissions and perused the relevant material on the record. The issue in dispute before us is whether the Infosys BPO Limited can be excluded from the

final set of the comparables in the instant case on the ground of high brand value and high turnover. We note that the issue of high brand value of Infosys BPO Limited and resultant higher profitability has been adjudicated by the Hon'ble Delhi High Court in the case of EVALUESERVE SEZ (GURGAON) Private Limited (supra) as under:

"5. This Court notices that as far as the exclusion of three comparables - M/s. TCS E-Serve Limited; M/s. TCS E-Serve International Limited and M/s. Infosys BPO Ltd. is concerned, the ITAT was cognizant of and took note of the circumstances that these entities had a high brand value and, therefore, were able to command greater profits; besides, they operated on economic upscale. This approach cannot be faulted having regard to the decision of this Court in [Pr. Commissioner of Income Tax v. B.C. Management Services Pvt. Ltd.](#) 2018 (89) Taxman.com 68 (Del), which reads as follows:

"13. The exclusion of second comparable ICRA Techno Analytics Ltd. was on the basis that it had engaged itself in processing and providing software development and consultancy and engineering services/web development services. The reasons for exclusion were functional dissimilarities and that segmental data were unavailable. Again the findings of the ITAT are reasonable and based on record. The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity between that entity and the

assessee, however, there is a close connection between TCS E-serve and TATA Consultancy Service Ltd. which was high brand value; that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable. The rationale for exclusion is therefore upheld. The assessee was aggrieved by the inclusion of Accentia from a Software Development Company. The Revenue is ITA No.1904/Del/2015 aggrieved by the exclusion of Accentia from the TP analysis. The DRP had directed its deletion. We observe that the VIA T has noticed the unavailability of the segmental data so far as these comparables are concerned. Furthermore, the functionality of this entity was concerned, it is different from that of the assessee; Accentia was engaged in KPO services in the healthcare sector.

14. In view of the above findings, this Court is of the opinion that no substantial question of law arises. The appeals are dismissed."

7.5 Similarly, the Infosys BPO Limited has been rejected in view of the high turnover by the Hon'ble Bombay High Court in the case of CIT versus Pentair water India Private Limited (supra).

7.6 In the instant case also the assessee has sought to exclude the Infosys BPO Ltd on the basis of the high brand value and high turnover of the company. Respectfully, following the above

decisions of the Hon'ble Delhi High Court and Hon'ble Bombay High Court, we direct the Ld. AO/TPO to exclude the above company from the final set of the comparables.

28. On finding parity of facts, respectfully following the findings of the coordinate bench [supra], we direct the Assessing Officer/TPO to exclude these two companies from the final set of comparables. Ground No. 2 with all its sub-grounds is allowed.

29. Second grievance relates to the disallowance of the expenses on car lease rentals amounting to Rs. 7,55,58,782/- u/s 40(a)(ia) of the Act.

30. At the very outset, the ld. counsel for the assessee stated that the payees have included lease rentals in their income tax returns and in the light of second proviso to section 40a(ia) of the Act, the additions cannot be made in the hands of the assessee.

31. Per contra, the ld. DR stated that in such a scenario, the matter should be restored to the file of the Assessing Officer for verification.

32. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that the assessee has paid car lease rentals amounting to Rs. 7,55,58,782/- and on such payments, provisions of section 40a(ia) of the squarely apply. However, the second proviso inserted to section 40a(ia) of the Act has been held to be declaratory and curative and have been given a retrospective effect from 1.4.2005 as held by the Hon'ble High Court of Delhi in the case of Ansal Land Mark Township [P] Ltd 377 ITR 635. However, it is incumbent upon the assessee to furnish necessary evidences to demonstrate that the payees have shown receipts as their income.

33. We, therefore, restore this issue to the file of the Assessing Officer/TPO. The assessee is directed to furnish necessary evidences and the Assessing Officer/TPO is directed to examine the same and decide the issue afresh after giving reasonable opportunity of being heard to the assessee.

34. As a result, the appeal of the assessee is partly allowed on the grounds argued before us.

35. In the result, to sum up, ITA No. 1958/DEL/2017 is partly allowed and ITA No. 9131/DEL/2019 is allowed.

**The order is pronounced in the open court on 17.01.2020.**

**Sd/-**

**[SUDHANSHU SRIVASTAVA]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 20<sup>th</sup> January, 2020.

VL/

Copy forwarded to:

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

Asst. Registrar  
ITAT, New Delhi

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 Bench	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Bench	
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	