

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE
BEFORE SHRI. B. R. BASKARAN, ACCOUNTANT
MEMBER**

AND

SMT. BEENA PILLAI, JUDICIAL MEMBER

IT(TP)A No.672/Bang/2017
Assessment Year : 2012-13

<p>M/s Entco IT Services Pvt. Ltd., (Formerly known as Interwoven Software Services India Pvt. Ltd.) C/o Autonomy Software Asia Pvt. Ltd., 2nd Floor, Hibiscus, Embassy Tech Village Marathahalli Outer Ring Road, Devarabeesanahhli, Bengaluru-560 103.</p> <p>PAN : AAACI 4421 N</p>	Vs.	<p>The Asst. Commissioner of Income Tax, Circle-2(1)(2), [(Erstwhile ACIT, Circle-3(1)(1))] Bengaluru.</p>
APPELLANT		RESPONDENT

Appellant by	:	Shri Sharath Rao, C.A
Respondent by	:	Ms. Neera Malhotra, CIT (DR)

Date of Hearing	:	17-06-2020
Date of Pronouncement	:	08-09-2020

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 18/01/2017 passed by Ld.AO under section 143 (3) read with section 144C (13) of the act for

assessment year 2012-13 on following revised grounds of appeal:

“1. General ground

1.1. *The assessment order dated January 18, 2017, passed by the learned AO under section 143(3) read with section 144C(13) of the Act, is not in accordance with the law and is contrary to the facts and circumstances of the present case.*

Transfer Pricing Adjustment

2.1. *The Honorable DRP have erred, in law and on facts in making an adjustment of Rs 1,389,455 with respect to information technology enabled services ("ITES") rendered to the AEs, to the taxable income of the Appellant and erred in upholding the approach of the learned AO and TPO in holding that the international transactions of ITES rendered by the Appellant to its AE5 was not at arm's length as defined under section 92F(ii) of the Act.*

3. Rejection of the TP documentation of the Appellant

3.1. *The Honorable DRP have erred in law and on facts by upholding the approach of the learned AO and TPO in rejecting the TP documentation prepared by the Appellant with respect to ITES, in the manner contemplated under Section 92D of the Act read with Rule 10D of the Rules stating that the data used in computation of the ALP is "not reliable or correct", under section 92C(3)(c) of the Act.*

4. Use of multiple year data

4.1. *The Honorable DRP have erred in law and on facts by upholding the approach of the learned IPO by ignoring the provisions of Rule 1013(4) of the Rules, international commentaries and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the ALP.*

5. Fitters and qualitative criteria applied by the Appellant

5.1 *The Honorable DRP have erred in law and on facts by upholding the approach of the learned TPO by conducting a fresh search for comparable companies and by rejecting the search process carried out by the Appellant as contemplated under Section 92C of the Act.*

5.2 *The Honorable DRP have erred in law and on facts by upholding the approach of the learned TPO in adopting / modifying the following additional filters for conducting TP analysis, without appreciating the TP documentation prepared by the Appellant for the ITES segment:*

- *Rejection of companies whose data is not available for FY 2011-12 (disregarding use of multiple year data);*
- *Rejection of companies having employee cost less than 25 percent of sales;*
- *Rejection of companies having different FY ending (other than March 31, 2012); and*
- *Rejection of companies with export sales less than 75 percent of sales.*

5.3. *The Honorable DRP, learned AO and TPO have erred in determining the ALP for the international transaction of ITES by selecting companies by way of a fresh search which are not comparable to the Appellant due to various factors such as functional differences, previous year's rejection by the learned TPO, difference in size, presence of intangible / brand value etc. Further, the learned AO, TPO and the Honorable DRP has erred in not taking cognizance of the judicial precedence wherein these companies have been adjudicated to be not comparable to ITES rendered by a captive service provider:*

- *Accentia Technologies Limited;*
- *TCS E-Serve Limited;*
- *BNR Udyog Limited (Seg. - Medical Transcription); and*
- *Infosys BPO Limited.”*

Brief facts of the case are as under:

2. It has been submitted that assessee was originally known as Interwoven Software Services India Pvt.Ltd and subsequently the name was changed to” IT services Pvt.Ltd, vide certificate of incorporation dated 22/06/2017. Assessee has accordingly filed revised form 36 before this *Tribunal* with the change of name on 13/12/2017.

2.1. Assessee is a company engaged in business of software development and related technical support services. It filed its return of income for year under consideration on 27/11/2012 declaring total income of Rs.2,07,61,010/-. The case was selected for scrutiny and notice under section 143 (2) of the act was issued in response to which representative of assessee appeared before Ld.AO and filed requisite details as called for.

2.2. Ld.AO observed that, assessee had international transaction exceeding Rs.15 crores with its associated enterprises. Accordingly, case was referred to Transfer Pricing officer to determined arm’s length price of international transactions.

2.3. Upon receipt of reference under section 92CA, Ld.TPO called on assessee to file economic details of international transactions in Form 3CEB. Ld.TPO observed that, assessee had entered into following international transaction during the year under consideration:

Particulars	Amount (Rs. in lakhs)
SWD	752.77
ITES	206.76
MSS	99.61
Reimbursements (cost to cost)	4.77

2.4. Ld.TPO noted that, transaction under software development segment was within +/-5% of adjusted operating margin of comparable companies and hence no adverse inference was drawn.

2.5. However, in respect of IT enabled service segment, it was noted by Ld.AO that, assessee earned margin of 18%. Assessee while conducting the benchmarking analysis adopted 5 comparables with average margin of 16.29%. Assessee thus concluded the transaction to be at arms length.

2.6. Ld.TPO rejected TP documentation maintained by assessee and carried out separate benchmarking that culminated in a set of following 10 comparables:

--- This space is left vacant intentionally ----

Sl. No.	Name of the case	OP/OC
1	Accentia Technologies Ltd.	11.75
2	Universal Print Systems Ltd.(Seg) (BPO)	52.46
3	Informed Technologies India Ltd.	6.08
4	Infosys BPO Ltd.	36.30
5	Jindal Intellicom Ltd.	-0.05
6	Microgenetic Systems Ltd.	19.61
7	TCSE-Serve Ltd.	63.69
8	B N R Udyog Ltd.(Seg)(Medical Transcription)	50.61
9	Excel Infoways Ltd.(Seg)(IT/BVPO)	29.79
10	e4e Healthcare Services Pvt. Ltd.	19.85
	Average PLI	28.11

2.7. Ld.TPO thus determined average margin at 28.11% and computed adjustment being shortfall at Rs.18,20,496/-.

3. Aggrieved by proposed adjustment, assessee raised objections before DRP.

3.1. DRP accepted arguments of assessee in respect of certain comparables and directed exclusion of 3 comparables. Consequent to DRP direction following comparables remained in final list:

SN	Names of the companies	OP/OC (%)
1	Accentia Technologies Ltd,	11.75
2	Informed Technologies Ltd.	6.08
3	Infosys BPO Ltd	36.30
4	Microgenetics Systems Ltd. TCS	6.38

5	TCS E-serve	63.69
6	B N R Udyog Ltd.,	41.58
7	e4e Healthcare Service Pvt. Ltd.,	19.85
	Mean margin	26.52

3.2. DRP also directed Ld.TPO to recompute operating margin in case of e-4-E Healthcare Business Services Pvt.Ltd., and to rectify errors in computing working capital adjustment.

4. On receipt of DRP directions, Ld.AO passed impugned order making transfer pricing addition in the hands of assessee at Rs.13,89,455/- to ITES segment.

Aggrieved by order of Ld.AO, assessee is in appeal before us now.

5. At the outset, Ld.AR submitted that, assessee wish to argue only 2 comparables in **Ground 5.3** on exclusion, being Infosys BPO Ltd and TCS e-serve Ltd., for having high turnover. He placed reliance on decision following decisions of this *Tribunal*:

- *Citrix R&D India Pvt.Ltd., assessment year 2012-13 in IT(TP)ANo.383/B/2017*
- *XL Health Corporation India Pvt.Ltd, reported in (2018) 91 taxmann.com 310 for assessment year 2012-13*
- *Decision of Hon'ble Delhi High Court in E Valueserve SEZ (Gurgaon) in ITA No. 241/2018*

5.1. He submitted that, in the event these comparables are excluded, assessee is well within the margin of +/-5% and no adjustment would be required to be made in the hands of assessee.

Accordingly, all other comparables mentioned in this ground along with other grounds stands dismissed as not argued. Assessee is however granted liberty to contest these grounds/comparables in appropriate years.

6. Be that as it may, before getting into comparability of these 2 comparables with assessee, it is *sine qua non* to understand functions performed by assessee under this segment.

6.1. Functions:

Ld.TPO analysed functional profile of assessee as under:

“Interwoven Software Services India Pvt.Ltd is engaged in the business of contract software development and related technical support services on a dedicated basis for Interwoven Inc. Of U.S. The tax payer is also rendering certain presales and marketing support services for interwoven Inc. Hence the 3 segments are software development service (SWD), technical support service which is basically classified in the functional analysis as I T enabled services (ITES) and marketing support services (MSS)”

6.2. In transfer pricing study also, assessee has been held to be carrying out with developing initial structure of the product based on the decided product features by AE under the guidance of AE.

Assets:

6.3. Assets owned by assessee are only computer equipments and accessories, furniture fixtures office equipments and other leasehold improvements. It is also been noted that all intangible and non-routine assets are owned by the AE.

Risks:

6.4. It has been noted in TP study that, all major risks are undertaken by AE, except for foreign exchange fluctuation risk, as assessee earns its revenue in foreign exchange rates. TP documentation, thus characterises assessee as a captive contract service provider that assumes minimal risk associated with business of providing software development services. This position has not been disputed by Ld.TPO.

6.5. Based on above FAR analysis, we shall now analyse comparables alleged for exclusion and argued before us.

7. Ld.AR submitted that, two comparables alleged by assessee for exclusion have been considered by Coordinate bench of this *Tribunal* in case of *VWR Lab Products Pvt.Ltd vs ACIT*, reported in (2020) 116 *taxmann.com* 244. He submitted that, assessee therein, has also been characterised to be rendering contract software development services to its AE. It has also been stated that, functional profile of assessee in present appeal and that of assessee in decision cited by Ld.AR are same, and following were relevant observations therein:

“8. (b) Infosys BPO Ltd.

Assessee objected for inclusion of this comparable primarily on the basis of functional incompatibility and presence of intangibles. It has been submitted that this company owns huge brand and

not a fit comparables for company like assessee, who provide captive service to its AE's by observing as under:

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. v. ACIT* 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 BPO Ltd. comprises bLd. CIT DR opposed the exclusion and placed reliance upon orders passed by authorities below.

We have perused submissions advanced by both sides in the light of the records placed before us. Assessee placed reliance upon decision of this Tribunal in case of *Zyme Solutions (P.) Ltd. v. Asstt. CIT* [2019] 108 taxmann.com 495 (Bang. - Trib.), wherein this comparable has been excluded 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 ld. counsel for the assessee before TPO/DRP that in order to maintain the brand image of Infosys BPO 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."

2. 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.

From above, it is clear that this company is functionally not comparable with captive service provider.

Respectfully following the same we direct this company to be excluded from the list of comparables.

9. (c) TCS e-Serve Ltd.

Ld. AR submitted that this company has been objected by assessee for its functional dissimilarity as it renders both BPO and KPO services without segmental reporting. It is submitted that this company owns huge brand of TATA group and has also incurred brand related expenses and therefore cannot be accepted to be compared with a captive service provider like assessee.

Ld. CIT DR on the contrary opposed its exclusion and placed reliance upon orders passed by authorities below.

We have perused submissions advanced by both sides in light of records placed before us. Assessee placed reliance upon following decisions in support of its argument for exclusion of this comparable:

Zyme Solutions (P.) Ltd. (supra)

Baxter India (P.) Ltd v. ACIT [2017] 85 taxmann.com 285 (Delhi - Trib)

Pr. CIT v. BC Management Services (P.) Ltd. [2018] 89 taxmann.com 68/2
Taxman 138/403 ITR 45 (Delhi)

It is observed that this comparable has been excluded by this Tribunal. Assessee placed reliance upon decision of this Tribunal in case of *Zyme Solutions (P.) Ltd. (supra)*, by observing as under:

"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.) Ltd. (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 I - 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 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 this company from the list of comparable".

It has been observed that this company is into high-end KPO services and an assessee rendering low end BPO services cannot be compared with it. Further, this company has been excluded due to absence of segmental information.

Respectfully following aforesaid decision, we direct Ld.TPO to exclude this company from the list of comparables."

Respectfully following the decision of this Tribunal, we hold that aforesaid 2 comparables to be excluded from finalist.

Accordingly Ground 5.3 raised by assessee stands partly allowed.

In the result appeal filed by assessee stands partly allowed.

Order pronounced in the open court on 8th September, 2020.

Sd/-

(B. R. BASKARAN)
Accountant Member

Bangalore,

Dated, the 8th September, 2020.

/Vms/*

Sd/-

(BEENA PILLAI)
Judicial Member

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
Income-Tax Appellate Tribunal.
Bangalore.

		Date	Initial	
1.	Draft dictated on	On Dragon		Sr.PS
2.	Draft placed before author	10-03-2020		Sr.PS
3.	Draft proposed & placed before the second member	10-03-2020		JM/AM
4.	Draft discussed/approved by Second Member.	10-03-2020		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	20-03-2020		Sr.PS/PS
6.	Kept for pronouncement on	-03-2020		Sr.PS
7.	Date of uploading the order on Website	-03-2020		Sr.PS
8.	If not uploaded, furnish the reason	--		Sr.PS
9.	File sent to the Bench Clerk	-03-2020		Sr.PS
10.	Date on which file goes to the AR			
11.	Date on which file goes to the Head Clerk.			
12.	Date of dispatch of Order.			
13.	Draft dictation sheets are attached	No		Sr.PS