

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

**BEFORE,  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI O.P.KANT, ACCOUNTANT MEMBER**

**ITA No.3328/Del/2016  
(ASSESSMENT YEAR-2010-11)**

M/s Futures First Info Services Private Limited, 303, Mansarovar Building, 90 Nehru Place, New Delhi-110019 PAN -AAACF 8545J <b>(Appellant)</b>	Vs.	Dy. CIT, Circle-11(1), New Delhi.  <b>(Respondent)</b>
---	-----	--

Appellant By	<b>Sh. Prashant Mehar Chandani, Adv., S/Sh. Kamal Sawhney, Adv. Ms. Priti Gupta, CA Mr. Shubham Singh, CA Mr. Divyansh Singh Adv.</b>
Respondent by	<b>Ms. Maimun Alam, &amp; Sh. Subhakant Sahu, Sr. DRs</b>

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JM:**

This appeal is preferred by the assessee against order dated 28.01.2019 passed by the Learned Commissioner of Income Tax (Appeals)-44, New Delhi {CIT(A)} for Assessment Year 2010-11.

2.0 The brief facts of the case are that the assessee i.e., Future First Info Services Ltd. is a subsidiary of GHF Holding Ltd. Mauritius. It provides IT Enabled Services (ITes) to its Associated Enterprises ('AEs') through the use of IT infrastructure which includes use of online software, live information services, research on international database such as Bloomberg and Reuters and high speed internet networks to perform its functions. The return of income was filed declaring a total income of Rs.16,62,49,964/-. The same was processed u/s 143(1) of the Income tax Act, 1961 (hereinafter called 'the Act') and subsequently, the case was selected for scrutiny.

2.1 The international transaction(s) under taken by the assessee during the year under consideration was for the provision of support services as per the following chart:

Sr. No.	Name of address of the associated enterprise with whom the international transaction has been entered into	Description of services provided to the associated enterprises	Amount received/receivable for the services provided		Method used for determining the arm's length [See section 92C (1)]
			As per books of account	As computed by the assessee having regard to the arms's length price	
			(Rs.)	(Rs.)	
	Clause 10(a)	Clause 10(b)	Clause 10(c)		Clause 10(d)

1	Linus Services Limited 1 <sup>st</sup> Floor, HSBC Centre, 18 Cybercity, Ebene, Mauritius	Provision of IT Enabled Services	512,185,530	512,185,530	Transactional Net Margin Method (Refer to Note and a below)
2	Indus Derivatives Limited 1 <sup>st</sup> Floor, HSBC Centre, 18 Cybercity, Ebene, Mauritius	Provision of IT Enabled Services	420,444,257	420,444,257	
		Total	932,629,787	932,629,787	

2.2 Since, the assessee had entered into international transactions during the assessment year under consideration, a reference was made to the Transfer Pricing Officer (TPO) for determination of Arms Length Price (ALP) u/s 92CA(3) of the Act. The functional profile of the assessee was accepted by the TPO as is apparent from his observation, *“..the main international transaction of the assessee is the provision of IT Enabled Services which were in the nature of economic and financial research, software support and transactions support functions to assist AEs to perform its core activities of trading in derivatives. The Transfer Pricing Report (TP Report) has described the functions of the assessee and its AE and functions of the assessee as submitted in the TP Report are found to be in order.”*

2.3 The TPO proposed an adjustment of Rs.5,70,19,166/- being upward adjustment to the ALP of the international transaction. Thus, the TPO determined the ALP at Rs.98,96,48,933/- as against Rs.93,26,29,767/- as determined by the assessee. The assessee had adopted TNMM as the most appropriate method. The assessee had taken a set of 9 companies with an average margin of 15.17% and had used multiple year data. The assessee's own margin was worked at 18.96% and, therefore, it was the assessee's contention that its international transactions were at Arm's Length. The assessee's Profit Level Indicator (PLI) was re-casted by the TPO by taking out non-operational items and the same was recomputed at 20.02% by the TPO after calling for assessee's objections and considering the same, the TPO finally selected four comparables i.e., (i) Cosmic Global Ltd. (ii) e4e Healthcare Business Services Pvt. Ltd. (iii) ICRA Techno Analytics Ltd. (Segment) and (iv) Infosys BOP Ltd., and computed their mean margin at 27.35% and, accordingly, proposed the upward adjustment of Rs.5,70,19,166/- with respect to the international

transactions. Subsequently, the final assessment order was passed by making the aforesaid adjustment and the assessment was completed at Rs.22,32,69,130/-.

2.4 Aggrieved, the assessee approached the Ld. First Appellate Authority, challenging the adjustment, who partly allowed the assessee's appeal and the average margin of the four comparables in the final set was recomputed at 26.86% thereby reducing the adjustment to 5.32 Crores.

2.5 Now, the assessee is before this Tribunal challenging order of the Ld. CIT (A) by raising the following grounds of appeal.

*"1. On the facts and in law, the Hon'ble Commissioner of Income Tax (Appeals)- 44 ("Ld. CIT(A)") erred in partially confirming the addition made by the Learned Transfer Pricing Officer (hereinafter referred to as "Ld. TPO") and the Learned Assessing Officer (hereinafter referred to as "Ld. AO") under section 92CA of the Income Tax Act, 1961 ("the Act")*

*2. On the facts and in law, the Ld. CIT(A)/ Ld. AO/ Ld. TPO erred in violating the provisions of Rule 10B(2) of the Income Tax Rules, 1962 ('the Rules') in rejecting Caliber Point Business Solutions Ltd.*

*3. On the facts and in law, the Ld. CIT(A)/ Ld. AO/ Ld. TPO erred in violating the provisions of Rule 10B(2) of the Rules in rejecting Datamatics Financial Services Ltd.*

4. *On the facts and in law, the Ld. CIT(A)/ Ld. AO/ Ld. TPO erred in violating the provisions of Rule 10B(2) of the Rules in rejecting R Systems International Ltd.*

5. *On the facts and in law, the Ld. CIT(A)/ Ld. AO/ Ld. TPO erred in violating the provisions of Rule 10B(2) of the Rules by considering Infosys BPO Ltd. as comparable to the Appellant.*

6. *Without prejudice to the above grounds, on facts and in law, the Ld. AO/ Ld. TPO erred in incorrectly computing the operating profit margin of e4e Healthcare Business Services Private Limited as 31.03% instead of correct operating profit margin of 19.52% by treating (1) provision for bad debts and (2) bank charges as non-operating in nature. Even though the Ld. CIT(A) has decided the issue relating to treatment of bank charges in the favour of the Appellant, Ld. AO/ Ld. TPO have not corrected the same yet.*

7. *Without prejudice to the above grounds, on facts and in law the Ld. CIT(A)/Ld. AO/ Ld. TPO erred in incorrectly computing the operating profit margin of ICR A Techno Analytics Limited as 28.66% instead of correct operating profit margin of 24.96%.*

8. *Without prejudice to the above grounds, on facts and in law, the Ld. CIT(A)/ Ld. AO/ Ld. TPO erred in incorrectly computing the operating profit margin of Cosmic Global Limited as 18.28% instead of correct operating profit margin of 16.59% by treating bank charges as non-operating in nature. Even though the Ld. CIT (A) has decided the issue relating to treatment of bank charges in the favour of the Appellant, Ld. AO/Ld. TPO have not corrected the same yet.*

9. *On facts and in law, the Ld. AO erred in levying interest under section 234B of the Act.*

10.        *On the fact and in law, the Ld. AO has erred in initiating penalty proceeding u/s 271(1)(c) of the Act.”*

3.0        The Ld. Authorized Representative (AR) submitted that the assessee was aggrieved with erroneous inclusion/exclusion of several comparables. It was submitted that the assessee is praying for exclusion of Infosys BPO Ltd. and inclusion of R-System International Ltd., Caliber Point Business Solutions Ltd. (segment). It was also submitted that the assessee was also challenging the incorrect computation of operating profit margin of e4e Health Care Business Service Pvt. Ltd. and ICRA Techno Analytics Ltd. The arguments of the Ld. Authorized Representative with respect to the various comparables are as under:

(i). Infosys BPO Ltd. – The Ld. Authorized Representative fairly admitted that this was assessee’s comparable in the transfer pricing study but the assessee had the right to pray for its exclusion as it was inadvertently included by it in its Transfer Pricing Study. The Ld. Authorized Representative submitted that it was settled law that a tax payer is allowed to revisit its position taken in the transfer pricing documentation if the same is found to

be incorrect. It was also argued that the purpose of Income Tax Assessment is to determine the correct income of the assessee and although the Revenue cannot allow an assessee to depress its income, in the same manner, it is not permissible for the Revenue to take advantage of the mistake of the assessee in offering more than due income to tax. The Ld. AR submitted that Infosys Ltd. could not be included in the final list of comparables as it is a 'giant' as compared to the assessee company and having a turnover of more than 12 times the turn over the assessee. It was submitted that Infosys BPO Ltd. was among the top 10 third-party BPO Companies in India, whereas the assessee did not stand anywhere close to the size of this company. The assessee also pointed out that the assets of Infosys PBO Ltd. were almost 18 times more than that of the assessee company and in addition to this, the assessee company had less than 400 employees as compared to approximately 17,000 persons employed by Infosys BPO Ltd. The Ld. AR also placed reliance on numerous judicial

precedents wherein Infosys BPO Ltd was directed to be excluded from the final set of comparables.

(ii) R-System International Ltd. – With respect to this comparable, being ground No.4 of the appeal, it was submitted that the assessee was praying for inclusion of this comparable as this has been excluded by the TPO on the ground that it was following a different accounting year. The Ld. Authorized Representative referred to numerous case laws wherein it had been held by the Tribunal that R-Systems could not be rejected on the ground of a different financial year. The Ld. Authorized Representative submitted that R-System International Ltd. was functionally similar to the assessee company and the functional comparability of this company had not been disputed either by the TPO or by the Ld. CIT (A). It was submitted that R-System International Ltd. was a provider of IT Solutions and Business Processing outsourcing services and was, thus, functionally similar to the assessee company.

(iii) Caliber Point Business Solutions Ltd.- The Ld. Authorized Representative submitted that the assessee was praying for inclusion of this comparable in ground No.2 of the appeal. It was submitted that this comparable was also rejected on the ground that this company followed a different accounting year. It was submitted that although the Ld. CIT (A) held that where it was possible to recast the financial results of the, such comparable may be accepted but all the same held that wherein the accounting periods under consideration are affected by extraordinary events, such recasting of financial was not permissible. It was submitted that the Ld. CIT (A) had observed that net margin in this company for the year ended 31<sup>st</sup> December, 2019 was 21.16% whereas for year ended 31<sup>st</sup> December, 2010 it was 11.04% and, therefore, the decrease in profitability from 21.16% to 11.04% was a sufficient extraordinary event. The Ld. AR submitted that although this company has been excluded on the ground of extraordinary event, no such specific extraordinary event has been pointed out by the Ld. CIT (A). The Ld. Authorized Representative highlighted the fact

that there was no disclosure of any extraordinary/exceptional items requiring a separate disclosure in the statement of profit and loss of the said company. The Ld. AR also argued that this company was functionally similar to the assessee company and that the functional similarity of this company with the assessee company had not been disputed either by the TPO or by the Ld. CIT (A).

(iv)            The Ld. AR submitted that as per the appeal memo, the company Datamatics Financial Services Ltd. was being challenged for non inclusion in ground No.3 but the same was not been pressed in view of the fact that the same had become academic in nature.

(v)            The Ld. Authorized Representative further argued that in Ground No. 6, the assessee was challenging the incorrect computation of operating margin of e4e Health Care Business Services Pvt. Ltd. at 31.03% instead of 19.52%. The Ld. AR submitted that at the TPO in the case of this company treated provision for bad debts as non-operating in nature and the Ld. CIT (A) had affirmed the action of the TPO. It was submitted that the

lower authorities had placed reliance on Rule 10 TA of Safe Harbor Rules, 2013 to hold that the provision for ascertained liability was specifically excluded from the definition of operating expenses under the said rule. It was submitted that Safe Harbor Rules were not applicable to the assessment year under consideration i.e. Assessment Year 2010-11 as they are to apply from Assessment Year 2013-14 onwards only. The Ld. AR also argued that the treatment of provisions of doubtful debts as non-operating in nature was not tenable in light of general accepted accounting principles. The Authorized Representative placed reliance on numerous orders of the Tribunal to buttress that provision for doubtful debts is a part of normal operating activities of business. The Ld. Authorized Representative referred to a chart placed at page 23 of his written submissions and submitted that if the provision for bad debts as treated as operating in nature, the profit margin of this company would come to 19.52% only.

(vi)              The Ld. Authorized Representative further submitted that in ground No.7 of the appeal, the assessee was challenging the

erroneous computation of the margin in the case of ICRA Techno Analytics Ltd. It was submitted that the same had been computed at 28.66% instead of 24.96% by deducting loss on account of foreign exchange fluctuation twice. It was submitted that the TPO's action of separately reducing the foreign exchange loss from total expenses amounted to double deduction thereby resulting in higher margins of the comparables.

(vii) With respect to Ground No.8, challenging the erroneous computation of margin in the case of Cosmic Global Ltd., the Ld. Authorized Representative submitted that the same was not being pressed.

4.0 In response, the Sr. Departmental Representative (DR) submitted that Infosys BPO Ltd. was assessee's own comparable and, therefore, the assessee should not be permitted to seek exclusion of these comparables at this stage. It was submitted that Infosys BPO Ltd. cannot be excluded on the ground of high turnover as application of turn over filter (upper limit) is not relevant in the service sector.

(ii) With respect to assessee's arguments on inclusion of R-System International Ltd., the Ld. Sr. DR submitted that although companies with different accounting year can be accepted, the Ld. CIT (A) has raised concerns on the authenticity of the audited financial results of the company.

(iii) With respect to Caliber Point Business Solutions Ltd., the Ld. Sr. DR submitted that although no extraordinary event has been specifically pointed out, fall in profitability from 21.16% to 11.04% indicated a sufficient extraordinary event.

(iv) With respect to assessee's claim of incorrect computation of margins in the case of ICRA Techno Analytics Ltd., and e4e Health Care Business Services Pvt. Ltd., the Sr. DR placed reliance on the findings of the Ld. CIT (A).

5.0 We have heard the rival submissions and also perused the material on record. We have also gone through the relevant portions of the paper books filed by the assessee. We now take up grounds one by one for adjudication:

(i) Ground No.1 is general in nature, not requiring any separate adjudication.

(ii) Ground No.2 challenges the rejection of the comparable Caliber Point Business Solutions Ltd. In this regard, it is seen that this comparable, selected by the assessee company, was rejected by the TPO on the ground that this company followed a different accounting year. The Ld. CIT (A) has upheld the rejection by noting that although companies with different accounting year may be accepted but a comparable cannot be considered as a good comparable if in the year under consideration there are extraordinary events. The Ld. CIT (A) observed that there was a fall in the rate of profitability from 21.16% in the preceding assessment year to 11.04% in the present year which indicated that there was an extraordinary event. However, we note that there is no reference to any extraordinary event in the annual report of this company. It is well known that the extraordinary/exceptional items require a separate disclosure. However, no such disclosure is apparent in the annual report of the company and, therefore, we are of the

considered opinion that this company cannot be excluded only on an inference that some extraordinary event might have occurred. We also note that the functional comparability of this company has not been disputed either by the TPO or by the Ld. CIT (A). Further, it is now settled law that a company cannot be excluded as a comparable solely for the reason that its financial year is different without considering whether the data for the financial year adopted by the assessee can be compiled from the audited statements of such company. The ITAT Delhi Bench in the case of *Xchanging Technology Services India Pvt. Ltd. vs. DCIT* (ITA No.1222/Del/2015) directed that this company be included as a comparable wherein it had been rejected only on the ground of having different financial year any. Accordingly, this company is directed to be included in the final set of comparables after verifying that the margin can be recomputed to work out the proportionate working margins if the financial data are duly audited and are available in the public domain, of course with the rider that during that period there were

no other factors affecting the operating margin, thus, ground No.2 stands allowed for statistical purposes.

(iii). Ground No.3 challenges the rejection of the comparable Data Matics Financial Services Ltd.. It has been submitted by the Ld. Authorized Representative that this ground is not being pressed in view of it becoming academic. Accordingly, Ground No.3 is dismissed as not pressed.

(iv). In Ground No.4, the assessee has challenged the rejection of the comparable R-System International Ltd. It is seen that this company was also rejected on the ground that this company followed a different accounting year. The Ld. CIT (A), however, accepted the assessee's contention that companies with a different accounting year may be accepted but he raised concerns on the authenticity of the audited financial results of the company. The Ld. CIT (A), however, has not pointed out how the authenticity of the financial results of this company was being doubted. Thus, the rejection of the comparable by the Ld. CIT (A) is more on some kind of suspicion rather than being supported by any

cogent data. As we have already mentioned in the preceding paragraphs, a comparable cannot be rejected merely because of a different financial year ending and now there are numerous orders of the Tribunal in this regard. We again refer to order of the ITAT Delhi Bench in the case of *Xchanging Technology Services India Private Limited vs. DCIT (ITA No.1222/Del/2015)* wherein this company was directed to be included. Since, the Ld. CIT (A) has not indicated any basis for suspecting the reliability of the financial results for this company, we direct that this company be included in the final set off comparables subject to the verification that the relevant data can be easily compiled from the audited statements of the company, of course with the rider that during that period there are no other factors affecting the operating margin. Accordingly, Ground No.4 stands allowed for statistical purposes.

(v)              In Ground No.5, the assessee is praying for exclusion of Infosys BPO as a comparable. Undisputedly, this comparable was selected by the assessee in its original set of comparables but now the assessee is seeking its exclusion on the ground that this

company is a giant as compared to the assessee. The Ld. Departmental Representative (DR) has argued that the comparable which has initially been selected by the assessee cannot be excluded subsequently by the assessee. However, we note that the Mumbai Bench of the ITAT in the case of *Stream International Services (P.) Ltd. vs. ADIT (International Taxation)*, 7(2), Mumbai ITA NO.8997/Mum/2010 held that there can be no escape from the proposition that the assessee is entitled to argue at least before the Appellate Authorities that a wrong stand taken at the time of filing of the return should be allowed to be modified. Similarly, the Special Bench of the Tribunal in the case of *DCIT vs. Quark Systems (P.) Ltd.* [2010] 38 SOT 307 (Chd.) also allowed the assessee to claim exclusion of certain companies from the list of comparables which were inadvertently included by it in its transfer pricing study. Therefore, we agree with the contention of the Ld. Authorized Representative that assessee has a right to argue for the exclusion of comparable even if originally it was included by the assessee in the transfer pricing study. Coming to the arguments for exclusion of

this company, it is the assessee's contention that this company is a giant as compared to the assessee company having its revenue more than 12 times of the revenue of the assessee company. Apart from this it had also been argued that this company has fixed assets which are 18 times more than assets of the assessee company. The employees strength is also 44 times more than that of the assessee company. We note that now there are numerous case laws to support the view that Infosys BPO Ltd. is not to be taken as a comparable on the ground of being a giant company. The Hon'ble Delhi High Court in the case of *CIT vs. Sanvih Info Group Pvt. Ltd. in ITA 420/2019*, for the same assessment year as the captioned assessment year, upheld the order of the ITAT in rejecting Infosys BPO Ltd. as a comparable on the ground of being a 'giant' company. In this case, the Tribunal, while ordering exclusion of this company, had relied on decision of the Hon'ble Delhi High Court in *Agnity India Technologies Pvt. Ltd.* The Hon'ble Delhi High Court noted that Infosys BPO Ltd. was a giant corporation. Similar observations were made by the Hon'ble Delhi High Court in the case

of Avaya India Pvt. Ltd. (ITA No.532/2019 for Asst. Year 2010-11) wherein M/s TCS E-Serve Limited and M/s TCS E-Serve International Limited were held to be having high brand value and operating on a huge economic upscale and were, therefore, able to command and generate better profits making them functionally dissimilar to the assessee. The Hon'ble Delhi High Court noted that Infosys BPO Ltd. had been excluded by the ITAT for the very same reason. Similarly, ITAT Delhi Bench in the case of *Cengage Learning India Pvt. Ltd. vs. DCIT (ITA No.6484/Del/2012)* held that Infosys BPO Ltd. had huge turnovers, owns IPR and brand value on products and provides services to vast clientele. Under such circumstances this company cannot be accepted to be a fit comparable in case of assessee who is a captive service provider providing services only to its group concerns. The Judicial precedents where Infosys BPO Ltd. has been excluded for the reason of being a giant company, having huge turnover, brand value, ownership of IPRs etc. can be multiplied. Therefore, in over all view of the matter, considering the size and service being

rendered by the assessee company as compared to Infosys BPO Ltd., we hold that this company is not a good comparable. Accordingly, we direct the exclusion of this company from the final set of comparables. Thus Ground No.5 stands allowed.

(vi).            In Ground No.6, the assessee is challenging the incorrect computation of operating profit margin of e4e Healthcare Business Services Pvt. Ltd. It is the assessee's contention that the margins have been incorrectly computed as the provision for doubtful debts has been treated as non-operating in nature by considering it as an unascertained liability. However, we note that the Delhi Bench of the ITAT in the case of Sony India Pvt. Ltd. vs. DCIT, (ITA No.1189/Del/2005, 815/Del/ 2007 and 820/Del/2007) has held that provision for doubtful debts is part of normal operating activity of the business and, similarly, any write back of provision is also to be treated as operating in nature. Similar views have been taken by the Bangalore Bench of ITAT in the case of *Outsource Partners International (P.) Ltd. vs. DCIT (IT (TP) Appeal No.337 (Bang.) of 2015)* and Hyderabad Bench of the Tribunal in the case of *Sum*

*Total Systems India Pvt. Ltd. (ITA No.255/Hyd/2015)*. Accordingly, we direct that the provision for bad and doubtful debts of this company be treated as a part of the operating expenses and the margins of this company be recomputed after giving proper opportunity to the assessee to present its case. Thus, Ground No.6 stands allowed for statistical purposes.

(vii)            In Ground No.7, the assessee submits that the operating profit margin of ICRA Techno Analytics Limited has been incorrectly computed at 28.66% instead of the correct operating profit margin of 24.96%. It is the assessee contention that this computational error occurred because the foreign exchange fluctuation loss was deducted twice by the TPO. In this regard a chart has also been submitted. In our considered opinion this claim of the assessee needs to be re-examined by the TPO after giving proper opportunity to the assessee. Accordingly, Ground No.7 is restored to the file of TPO for verification of the assessee's claim and pass order in accordance with law after giving due opportunity to the assessee. Ground No.7, thus stands allowed for statistical purposes.

(viii).              With respect to Ground No.8 challenging the incorrect computation of operating profit margin of Cosmic Global Limited, since it has been submitted by Ld. Authorized Representative that this ground is not being pressed, the same is being dismissed as not pressed.

(ix).                Ground No.9 challenges the action of the levying interest u/s 234B of the Act. This Ground is consequential not requiring any specific adjudication.

(x)                 Ground No.10 challenges the initiation of penalty proceedings u/s 271(1)(c) of the Act. This ground is dismissed as being premature at this stage.

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

Order pronounced on 22/06/2020

Sd/-  
**(O.P.KANT)**  
**ACCOUNTANT MEMBER**  
Dated: 22/06/2020  
PK/PS

Sd/-  
**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI