

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI K. N CHARY, JUDICIAL MEMBER**

ITA No. 3054/DEL/2011 [A.Y 2004-05]

ITA No. 1117/DEL/2012 [A.Y 2005-06]

The J.C.I.T  
Noida Range  
Noida

Vs. Colwell & Salmon Communications [I] Ltd  
C - 39, Sector, 58, Noida

PAN: AACCC 0322 Q

[Appellant]

[Respondent]

Assessee by : Shri Ajay Vohra, Sr DR,  
Shri Neeraj Jain, Adv  
Shri Abhishek Aggarwal, Adv

Revenue by : Shri Akhilesh Kumar Yadav-DR

**Date of Hearing : 20.10.2020**

**Date of Pronouncement : 28.10.2020**

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

Both these appeals by the Revenue are preferred against the order of the Id. CIT(A), Ghaziabad dated 15.03.2011 pertaining to A.Y 2004-05 and 2005-06. Since common issues are involved in both the appeals, these are being disposed of together for the sake of convenience and brevity.

ITA No. 3054/DEL/2011 [A.Y 2004-05]

2. Grievances of the Revenue read as under:

"(i) That the Ld. CIT (A) has erred in law and on facts by allowing relief of Rs. 20,91,000/ on account of domestic sales without appreciating that exemption under section 10A is allowable for exports sales only and the facts mentioned elaborately in the assessment.

(ii) That the Ld. CIT (A) has erred in law and on facts by allowing relief of Rs. 30,04,822/- on account of Foreign Traveling expenses without appreciating the facts mentioned

elaborately in the assessment order that the travel was not undertaken by the employees of the company and that the expenses related to finding business for the holding company and not for the assessee company.

(iii) That the Ld. CIT(A) has erred in law and on facts by allowing relief of Rs. 1,11,15,572/- on account of legal & Professional expenses without appreciating the facts mentioned elaborately in the assessment order and ignoring that there was no company that was merged or acquired by the assessee company, hence expenses were made for holding company and not allowable.

(iv) That the Ld. CIT (A) has erred in law and on facts by allowing relief of Rs. 2,89,59,306 /- on account of addition made by the Assessing Officer relying the order of TPO u/s 92CA(3) without appreciating the facts mentioned elaborately in the assessment order.

(v) On fact and circumstances of the case and in law, Ld. CIT(A) violated provisions of Rule 46A by not giving opportunity to the AO/TPO.

(vi) Thus, Ld. CIT(A) violated principles of natural justice.

(vii) The appellant craves to be allowed to add any fresh ground(s) of appeal and/or delete or amend any of the ground(s) of appeals."

3. The underlying facts in issue are that the appellant company is a 100% subsidiary company of Gujrat Heavy Chemicals Limited (GHCL) and is engaged in the business of Information Technology Services [ITES] and provides call centre services to GHCL's subsidiary in the US, i.e. Collwell and Salmon Communications Inc., USA.

4. It has entered into sub-contracting arrangement with USA for providing back office tele-calling services for lead generation, market research, and tele- sales. The appellant company was incorporated in December, 2002, but commenced operations from July 2003 and this is the first year of operation. The appellant has established a STP 100% EOU at Noida for providing ITES and eligible for deduction u/s 10A of the Act.

5. During the course of scrutiny assessment proceedings, the assessee was asked to justify its claim of deduction u/s 10A of the Act. The assessee explained that it has entered into a Master Outsourcing Agreement with C&S, USA to provide ITES and also entered into an agreement called Master Outsourcing Agreement with GHCL. In view of the said agreement, the assessee has received export services at Rs. 4.94 crores and domestic receipt at Rs. 1.68 crores totalling to Rs.6.62 against which net loss of Rs.4.73 crores has been disclosed.

6. The Assessing Officer observed that the assessee has bifurcated the expenditure against the domestic income as well as export income. The Assessing Officer was of the firm belief that profit from domestic sale at Rs.20.91 lakhs does not qualify either adjustment of loss from export business u/s 10A of the Act and accordingly, disallowed benefit of section 10A of the Act on domestic profit of Rs.20.91 lakhs.

7. When the matter was agitated before the CIT(A), the assessee justified its claim of deduction and it was strongly contended that Section 10A of the Act is not an exemption, but it is a deduction section, and there is a well-defined formula given in Section 10A(4) of the Act for calculating deduction u/s 10A of the Act in respect of the

undertaking registered with STPI. It was further explained that there is no provision in Section 10A of the Act for separately calculating profit in respect of domestic sales and export sales even if segmental accounts are available.

8. After considering the facts and submissions, the CIT(A) found that u/s 10A(4) of the Act, a formula has been given, wherein the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

9. After analysing the formula given the CIT(A) observed that :

*“if we go with the reasoning of the Assessing Officer, then in the case of loss in domestic sales and profit in export sales on the basis of segmental account of the undertaking, then loss of the domestic sales need to be carried further and 100% deduction on profit of the export sales to be allowed which is not as per the provisions of the Act”.*

10. The CIT(A) accordingly allowed the appeal of the assessee and directed the Assessing Officer to allow the deduction u/s 10A of the Act.

11. Before us the ld. DR strongly supported the findings of the Assessing Officer.

12. Per contra, the ld. counsel for the assessee reiterated what has been stated before the lower authorities.

13. We have carefully perused the orders of the authorities below. Provisions of section 10A(4) of the Act have been explained elsewhere. In our understanding of the present facts and law, as both the export sales and domestic sales were done by the same undertaking, therefore, profit or loss of the undertaking needs to be calculated as a whole and profit from domestic sales cannot be charged separately to tax and adjusted against loss from export business in the present case. We, therefore, do not find any error or infirmity in the findings of the CIT(A). Ground No. 1 is accordingly, dismissed.

Ground No. 2

14. While scrutinising the return of income and on perusal of the details of travelling and conveyance expenses of Rs. 70.45 lakhs, the Assessing Officer noticed that the assessee has incurred staff travel foreign expenses at Rs.46.81 lakhs besides foreign travelling other expenses of Rs. 88.35 lakhs. The assessee was required to give nexus between travelling expenses incurred and business receipts as a whole and the designation of the employees who made the travelling.

15. The assessee furnished the requisite details and on perusal of the same, the Assessing Officer was of the opinion that the assessee has incurred expenses on behalf of other persons who come to India and went outside, though there was no business nexus for the same. The Assessing Officer disallowed 50% of Rs. 46.81 lakhs and made further disallowance in respect of expenses incurred for Brian W Smith of Rs.4.07 lakhs and Nikhel Sen of Rs. 2.56 lakhs and made total disallowance of Rs.30.04 lakhs.

16. The assessee strongly agitated the matter before the CIT(A). It was explained that the expenses were incurred by the employees of the appellant company and were incurred towards business objectives of the assessee. It was explained that the expenditure was incurred for training to remain in competitive business.

17. After considering the facts and submissions, the CIT(A) observed that the Assessing Officer did not question the genuineness of these transactions and as the expenses were incurred by the assessee for business development and training of employees for call centre business, expenses were allowable and accordingly, directed the Assessing Officer to delete the disallowance.

18. Before us, the ld. DR strongly supported the findings of the Assessing Officer.

19. Per contra, the learned counsel for the assessee reiterated what has been stated before the lower authorities.

20. We have carefully perused the orders of the authorities below. We find that the foreign travel expenses related to employees of the appellant company, which include CFO, CEO, CCEs Head Technology, team leaders and Manager, Business development and places visited like USA, UK and Thailand for the purposes of business development, business meetings, for attending seminars and training.

21. In our considered opinion, as the company is in export of call centre services, setting up a successful international call centre requires up-to-date technology, quality assurance, data analysis and continuous training of employees, international level of communication, skills, continuous business development and for this purpose, the top management and the other related employees went abroad to gain knowledge of the call centres to have international standards. As mentioned elsewhere, this is the first year of the business. Therefore, it is more important for the appellant company to update its key employees with advanced technology.

22. As the genuineness of the expenses have not been questioned and the Assessing Officer has merely questioned the legitimacy of the expenses which, in our opinion, is not correct. It is for the businessman to decide which expenses are necessary to further its business. Considering the facts in totality, we do not find any error in the infirmity in the findings of the CITA. Thus, Ground No. 2 is dismissed.

### Ground No. 3

23. While scrutinising the return, the Assessing Officer found that under the head “Legal and Professional Expenses” the assessee has claimed expenses of Rs. 1.36 crores. On perusal of the details, the Assessing Officer formed a belief that the assessee has claimed expenditure under this head, which does not have any business nexus, and purpose for payment of legal and professional expenses are not justified and accordingly, made disallowance of Rs.1.11 crore.

24. The assessee carried the matter before the CIT(A) and filed details of expenses incurred under the ‘Legal and Professional Expenses’ head. The CIT(A) accordingly examined each and every

payment and finally came to the conclusion that disallowance is not justified and directed the Assessing Officer to delete the addition.

25. Before us, the Id. DR strongly supported the findings of the Assessing Officer and the learned counsel for the assessee reiterated what has been stated before the CIT(A).

26. We have carefully perused the orders of the authorities below. Once again, the Assessing Officer fell into error in holding that the expenditure under this head does not have any business nexus. As mentioned in the earlier ground that the Assessing Officer should not decide which expenses are necessary for the purpose of carrying on the business and it is for the business-man to decide. Moreover, legal and professional expenses are paid to professionals for their legal and commercial advice which are necessary for carrying on business. We find that the CIT(A) has analysed each and every item from para 6.3 to the findings.

27. We have also gone through the details which are as under:

<p>Aventus Advisor s Pvt Ltd. Mumbai</p>	<p>The assessee engaged Aventus to identify prospects in overseas market which suit the strategic growth objectives of Colwell. The objective is clear from the Agreement attached at Page No. 148 of Paper Book (PB)-I. Thus this expenditure is for development of business of the Company and not for merger or acquisition as such. As Colwell is engaged in the service sector i.e. providing Voice based BPO therefore the purpose of acquiring any business is to increase the client base and the company is not interested in setting up and infrastructure of the acquire company. As in service sector there is no big business set up or infrastructure but the client base which is important for any company who is acquiring the business. Thus the said expenditure is normal marketing business expenditure incurred for development of the business of the Company and allowable as such. The AO has fully verified this expenditure and the same is fully as per audited accounts but the AO has only issue regarding the nature of the same.</p>	<p>6,76,510</p>
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c. Colwell % Salmon Communica- tions Inc., USA	These expenses are towards Deputation Charges of Brian W Smith who was acting as COO of the Company and looking after the operations of the Company and his recruitment charges. Please refer Page No. 151 to 153 of the Paper Book-I. These expenses are normal business expenses, duly verifiable and audited and allowable in toto.	42,33,244
d. DLA, UK	The assessee engaged the services of DLA for the Establishment of Company Corporate Presence in UK as it is clear from the copy of agreement at Page No. 155 of the Paper Book-I. This expenditure is for development of the assessee's business in UK. The assessee has one client of UK during the year and these clients have increased to 6 clients in future years. Also the Company established its Branch Office in UK during the year, the proof of the same is in the Paper Book. So this expenditure is solely incurred for the purpose of the business and for business development therefore allowable as such.	8,90,618
18. G 4H Limited, UK	Please refer to the agreement at Page 174 in Paper Book-I. The services of G4H was taken to carry out a Value Chain Analysis for the Colwell's Product offerings in UK and for test marketing of the Colwell's existing business propositions in five sectors of the UK market place. It is clear from it that the expenditure is purely marketing in nature and incurred for the development of assessee's business in UK. The assessee would able to capture 6-7 clients in next years because of these initial marketing efforts. So as the said expenditure is allowable as a business expense.	11,42,687

19. Merchant Capital, UK	The services of Merchant Capital pic was hired by the assessee only for the purpose of development of the assessee business as is clear from the copy of agreement at Page No. 164 of the Paper Book-I. The expenditure is towards identifying the business for the assessee and assessing their financials and credit worthiness and risk etc. Therefore, this expenditure is wholly and exclusively for the business of the assessee and allowable.	8,32,500
20. Avista Advisory Associates* Pvt Ltd, Mumbai	The assessee engaged Avista to identify prospects in overseas market which suit the strategic growth objectives of Colwell. The objective is clear from the Agreement attached at Page No. 144 of Paper Book (PB)-I. Thus this expenditure is for development of business of the Company and not for merger or acquisition as such. As Colwell is engaged in the service sector i.e. providing Voice based BPO therefore the purpose of acquiring any business is to increase the client base and the company is not interested in setting up and infrastructure of the acquiree company. As in service sector there is no big business set up or infrastructure but the client base which is important for any company who is acquiring the business. Thus the said expenditure is normal marketing business expenditure incurred for development of the business of the Company and allowable as such. The AO has fully verified this expenditure and the same is fully as per audited accounts but the AO has only issue regarding the nature of the same.	7,70,000

7.O.P. Kahaitan & Co., Delhi	O.P. Kahaitan & Co. is a firm of Solicitors & Advocates and their services were hired by the assessee to finalise various agreements in UK in respect of services hired by the assessee of various consultants and agreements with customers of the company. Please refer Page No. 177 of Paper Book-I	5,27,540
8. The 1 Group Pic, UK	Professional charges for UK office set up & other services and during the year the assessee set up a Branch in UK. copy of the Proof of the same is in Paper Book. The same is normal business expenditure and allowable as such.	19,42,473
9. Trendsetter Computer Software Pvt Ltd, Delhi	The assessee engaged Trendsetter to identify prospects in overseas market which suit the strategic growth objectives of Colwell. As Colwell is engaged in the service sector i.e. providing Voice based BPO therefore the purpose of acquiring any business is to increase the client base and the company is not interested in setting up and infrastructure of the acquiree company. As in service sector there is no big business set up or infrastructure but the client base which is important for any company who is acquiring the business. Thus the said expenditure is normal marketing business expenditure incurred for development of the business of the Company and allowable as such. The AO has fully verified this expenditure and the same is fully as per audited accounts but the AO has only issue regarding the nature of the same.	1,00,000
	Total Disallowance by AO	1,11,15,574

28. On a bare perusal of the aforestated details, it can be found that these are self-explanatory. No error or infirmity has been brought on record by the revenue. We, therefore, decline to interfere with the findings of the CIT(A). Ground No. 3 is dismissed.

Ground No. 4

29. The underlying facts show that during the year under consideration, the assessee has undertaken international transactions of provision of voice based call centre services amounting to Rs. 461.92 lakhs with C&S, USA. For benchmarking the international transactions of provision of voice-based call centre services, the assessee applied TNMM and considered the Associated Enterprises, that is, C & S, USA as tested party. As the AE was less complex entity in the transaction, results of benchmarking analysis was as under:

Particulars	OP/OC%
OP/OC of C&S USA	2.17%
Average OP/OC of 6 comparable companies	2.85%

30. During the TP assessment proceedings, the Assessing Officer questioned the selection of the tested party and was of the firm belief that the assessee should be tested party for the purpose of benchmarking analysis and accordingly, undertook fresh search of comparable companies and arrived at a set of 12 companies with operating profit to cost ratio of 9.52% and accordingly, an adjustment of Rs. 3.64, crores towards the difference in ALP was made.

31. Before the CIT(A), the assessee justified the ALP of the international transaction with multiple possibilities. Firstly, the assessee justified its AE as tested party. Secondly, the assessee justified its international transaction to be at ALP on the basis of under-utilisation of the capacity and further justified with internal comparables. Though the CIT(A) considered the submissions made by the assessee, but finally adjudicated upon under-utilisation of capacity.

32. While coming to his conclusion, the CIT(A) forwarded the reply of the assessee to the Assessing Officer and the Assessing Officer was asked to file his reply on the submissions made by the assessee in the paper book.

33. We find that multiple opportunities were given by the CIT(A) but in spite of more than sufficient time, no response was received from the Assessing Officer. As mentioned elsewhere, the CITA finally adjudicated on the alternative TP study relating to adjustment of unutilised capacity and allowed the appeal of the assessee.

34. Before us, in addition to supporting the findings of the TPO/Assessing Officer, the DR has also filed written submissions which have been duly considered by us.

35. In the written submissions, the ld. DR mainly addressed to the selection of the tested party. It has been contended by the revenue that the FAR analysis mentioned in the TP documentation has been altered to suit the requirement of the assessee so the AE can be selected as tested party and therefore, the AE of assessee should not be selected as tested party and instead the assessee should be selected as tested party as rightly done by the TPO.

36. On capacity utilisation, the ld. DR submitted that the TPO did not discuss the impact of considering the capacity utilisation in alternative TP study. It has been contended that the assessee has undertaken

capacity utilisation on its own financial results rather than those of comparable financial results. Reliance has been made in the decision of the Tribunal in the case of Claas India Ltd ITA 1783/DL/2011.

37. On internal CUP, the revenue contends that comparability criteria laid down under CUP is very strict and there has to be exact comparability in terms of the nature etc. any variation in nature of services should render such analysis useless.

38. Per contra, the ld. counsel for the assessee reiterated what has been stated before the CIT(A). It is the say of the ld. counsel for the assessee that in terms of Rule 27A the assessee is entitled to defend the order of the CIT(A) on all grounds including the grounds which have either not been decided by the CIT(A) or have been decided against the assessee. For this proposition, reliance was placed on the decision of the Hon'ble Delhi High Court in the case of Sanjay Sawhney 273 Taxman 332 the Hon'ble Bombay High Court in the case of B.R. Bhamasi 83 ITR 233.

39. We have given thoughtful consideration to the rival submissions and have carefully perused the orders of the authorities below. It is true that the assessee has justified its international transaction to be at ALP from multiple angles before the CIT(A). It is equally true that though the CITA has considered all the alternative submissions made by the assessee, but has finally adjudicated upon the under-utilisation of the capacity. As mentioned elsewhere, this being the first year of business and the business was run only for 9 months in the F.Y. under consideration, obviously the assessee has not achieved optimum level of capacity utilisation.

40. Moreover, the assessee has to absorb certain start up costs and fixed operating costs. In the absence of optimum utilisation of its capacity it has suffered average loss during the year. On the other hand, the net profit margin of the comparable cases who are already into business from past many years unutilised capacity can be understood from the following chart:

Particulars	Year Ended March 31, 2004				
	Export Sales		Domestic Sales	Unutilized	Total
	CSU	Others			
Sales / Operating Income	461.92	32.62	168.30		662.84
Personnel Expenses	147.12	35.50	126.50	164.22	473.35
Commission on Exports	-	0.37	-		0.37
Lead List Data	-	7.47	-		7.47
Exchange Rate Fluctuation	7.49	(0.23)	-		7.26
Other Opera/and Administrative expenses	260.78	62.93	20.90	291.10	635.71

TOTAL COST	415.40	106.03	147.40	459.40	1128.23
OPERATING PROFIT BEFORE INTEREST	46.51	(73*41)	20.91	(459.40)	(465.39)
Operating profit / Total Cost	11.20%	(69.23%)	14.18%		(41.25%)
Total Billed Hours	82051	19800	101851		
Revenue rate in USD per Hour	13.48	3.48			

Total Man Hours Available of staff at operation level	1,93,440
Total Billed Hours	1,01,851
Utilized Capacity	52.65%
Unutilized Capacity	47.35%

41. From the above chart, it can be seen that total available man hours for calling during the year was 1,93,440 and total billed hours were 1,01,851/-. Thus, the idle hours of calls 91,589 which makes unutilised capacity at 47.35%. In the subsequent years, capacity

utilisation has been increased from 50% to 100%. We, therefore, do not find any infirmity in deciding this issue on unutilised capacity by the CIT(A).

42. We are of the opinion that the alternative TP study done by the assessee fulfils the requirements of TP regulations and is found to be correct. OP/TC with C&S USA is 11.20% which is more than the average OP/TP of the comparable companies at minus 6.89%. Assuming that the OP/TC of the comparable companies as per the TPO is correct, which is at 9.52%, the assessee's OP/TC being 11.20%, we are of the considered view that the international transaction is at ALP and needs no further adjustment and accordingly, no interference is called for in the findings of the CIT(A). Ground No. 4 is dismissed.

43. In the result appeal filed by the revenue is dismissed.

ITA No. 1117/DEL/2012

44. The grounds of appeal in Assessment Year 2005-06 are identical to grounds in Assessment Year 2004-05, though the quantum may differ. For our detailed discussion given hereinabove, this appeal of the Revenue is also dismissed.

44. In the result, the appeals of the Revenue in ITA No. 3054/DEL/2011 and 1117/DEL/2012 are dismissed.

**The order is pronounced in the open court on 28.10.2020.**

Sd/-

**[K. N. CHARY]  
JUDICIAL MEMBER**

Sd/-

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

Dated: 28<sup>th</sup> October, 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	
Date on which the typed draft is placed before	
Date on which the approved draft comes to	
Date on which the fair order is placed before	
Date on which the fair order comes back to	.10.2020
Date on which the final order is uploaded on	.10.2020
Date on which the file goes to the Bench Clerk	.10.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the	
Date of dispatch of the Order	