

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "K", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA No.1352/M/2017
Assessment Year: 2012-13**

M/s. Convergys Stream Pvt. Ltd. (Now known as Convergys Services India Pvt. Ltd.), PAN: AAEC8569F	Vs.	ACIT CIT 8(2)(2), Erstwhile DCIT 8(2)(2), R.No.27, B Wing, Ashar IT Park, Wagle Estate, Thane
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Dhanesh Bafna, A.R.
Shri Nishant Shah, A.R.

Revenue by : Shri Sunil Deshpande, D.R.

Date of Hearing : 07.12.2020

Date of Pronouncement : 28.12.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 28.11.2016 of the Dispute Resolution Panel [hereinafter referred to as the DRP] relevant to assessment year 2012-13.

2. The various grounds taken by the assessee are reproduced as below:

“The grounds mentioned herein are without prejudice to one another.

(1). On the facts and circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('DRP') erred in confirming the action of the Learned Assessing Officer ('AO') / Learned Transfer Pricing Officer ('TPO') in determining the arm's

length price of provision of Information Technology enabled Services at Rs.55,28,64,352 and thereby making an adjustment of Rs. 5,43,26,044.

The Appellant therefore prays that the Learned AO / Learned TPO be directed to treat the value of international transaction at arm's length and delete the transfer pricing adjustment of Rs. 5,43,26,044 be deleted.

- 2). On the facts and circumstances of the case and in law, the Hon'ble DRP / Learned AO / Learned TPO erred in:
- a) rejecting the Transfer Pricing ("TP") documentation;
 - b) rejecting the comparability analysis carried out by the Appellant in the TP documentation for determining the arm's length price;
 - c) adopting and rejecting filters while performing comparability analysis;
 - d) including comparables which are not functionally comparable to the Appellant;
 - e) excluding comparables which are functionally comparable to the Appellant;
 - f) using the data available at the time of assessment proceedings instead of those available as on the date of preparing the TP documentation; and
 - g) not applying multiple year data for comparable companies and using data for the financial year 2011-12 alone.

The Appellant therefore prays that the Learned AO / Learned TPO be directed to treat the value of international transaction at arm's length and delete the transfer pricing adjustment of Rs. 5,43,26,044 be deleted."

3. The facts in brief are that the assessee is engaged in providing IT enabled back office services and it has call centres in India which provide customer care services to its AEs. During the year the operating revenue of the company from ITEs was Rs.49,85,38,308/- and operating expenses were Rs.43,28,38,293/-. The PLI worked out to 15.18%. There is no dispute as to method for determining ALP of the transactions of providing BPO services. The arithmetic mean on the basis of final set of comparable namely Excel Infoways Ltd. and Jindal Intellicom Ltd., was calculated at 27.73% thereby making an adjustment of Rs.5,43,26,044/- by determining the ALP of the international transaction at Rs.55,28,64,352/- as against Rs.49,85,38,303/- shown by the assessee.

4. The issue raised in ground No.1 is against the order of DRP confirming the action of AO/TPO in determining the arm length price of information technology enabled services and thereby making adjustment of Rs.5,43,26,044/- as discussed above.

5. At the time of hearing, the Ld. A.R. submitted that the DRP has issued a direction to the TPO to compute the ALP of the comparables by applying a margin of 1.4% which is calculated in para 5 of the DRP order. The Ld. A.R. submitted that the AO/TPO may be directed to give effect to the said direction of DRP.

6. The Ld. D.R. also fairly agreed to the contentions of the Ld. A.R. and submitted that he has no objection if the direction of the DRP is given effect to AO/TPO by applying a margin of 1.4%. Accordingly, we direct the AO/TPO to compute the arm length price by applying a margin of 1.4%. Consequently ground No.1 is allowed.

7. In the 2nd ground of appeal, the assessee has emphasized before the Bench that DRP has erred in upholding the order of TPO/AO wherein a comparable namely Excel Infoways Ltd. Has been included. The Ld. A.R. prayed before the Bench that the said comparable may be excluded as the same is not functionally comparable. The Ld. A.R. submitted before the Bench that the said comparable should be excluded for various reasons such as low employee cost, diminishing revenue/fluctuating margin and lastly that the company is in

the process of closing down its operation. The Ld. A.R. relied on a series of decisions in support of his arguments as under:

- 1 Convergys India Services Private Limited vs. DOT ITA No. 958/Mum/2014 (Mum. Trib.) (AY 2009-10)
2. M Modal Global Services Pvt. Ltd. vs ACIT ITA No. 970/Mum/2017 (Mum. Trib.) (AY 2012-13)
- 3- Ban Tec TPS India Pvt. Ltd. vs ACIT ITA No. 2074/Mum/2017 (Mum. Trib.) (AY 2012-13)
- 4- Tech Mahindra Business Services Ltd. vs DCIT ITA No. 977/Mum/2017 (Mum. Trib.) (AY 2012-13)

8. The Ld. D.R., on the other hand, relied on the order of authorities below by submitting that TPO has examined the comparable in great detail and only after carrying out the detailed analysis, included the same in the said report in order to determine the ALP of the international transactions. The Ld. D.R. prayed before the Bench that the order of Ld. DRP may kindly be upheld.

9. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the Ld. A.R. in support of his contentions. We find that in the case of M. Modal Global Services Pvt. Ltd. vs. ACIT ITA No.970/M/2017 A.Y. 2012-13 the co-ordinate bench of the Tribunal has excluded the Excel Infoways Ltd. from the list of final comparable for various reasons. The said observations of the coordinate bench are as under:

“13.Further, the co-ordinate bench of Mumbai Tribunal in International Specialty Products (India) Pvt. Ltd. vs. ACIT (supra) while considering the turnover filter and extraordinary event for acquisition of foreign entity excluded Infosys BPO Ltd. by holding as under:

“3.6.3 Infosys BPO Ltd.

It has been submitted that the operating income of this entity is more than 138 times than that of the assessee and therefore, it could not be termed as good comparable in terms of the decision of Hon'ble Bombay High Court in CIT V/s Pentair Water India (P.) Ltd. [2016 69 taxmann.com 180] as followed by Mumbai Tribunal in Integreon Managed Solutions India Pvt. Ltd. Vs ACIT [2019 101 Taxmann.com 289]. Further reliance has been placed on the decision of Delhi Tribunal in Baxter India Pvt. Ltd. V/s ACIT [2017 85 Taxmann.com 285]. It has further been submitted that there was an extraordinary event in this entity since it acquired an Australian based Company namely M/s Portland Group Pty. Ltd. as noted by Bangalore Tribunal in Mobily Infotech India Pvt. Ltd. Vs DCIT [2018 97 Taxmann.com 2].

Applying the ratio of decision of Hon'ble Bombay High Court in CIT V/s Pentair Water India (P.) Ltd. [supra], in similar manner, we direct for exclusion of this entity. This is further fortified by the decision of Delhi Tribunal in Baxter India Pvt. Ltd. V/s ACIT [supra], for same AY, wherein the co-ordinate bench directed for exclusion of this entity on account of functional dissimilarity and extra-ordinary events which took place during the year. Similar is the view of Bangalore Tribunal in Mobily Infotech India Pvt. Ltd. Vs DCIT [supra].”

14. The Hon'ble Bombay High Court in CIT vs. Principle Global Services (P.) Ltd. while considering the question of law whether Tribunal was right in excluding on turnover basis held as under:

“8. Re Question (d):—

(i) M/s. Infosys BPO Ltd., was excluded by the Tribunal from the list of comparable to determine ALP in respect of International Transaction of the Respondent's activity of rendering of back office support services to its AE. (ii) The impugned order of the Tribunal noted the facts that turnover of the comparable was to the tune of R.9028 Crores while the turnover of the Respondent-Assessee, as noted by the TPO was only Rs.18 Crores.

(iii) The impugned order further records that in view of the difference in turnover between M/s. Infosys BPO Ltd., and the Assessee, the two are not comparable. In fact, the impugned order placed reliance upon the decision of the Delhi High Court in CIT v. Agnity India Technologies (P.) Ltd. [2013] 36 taxmann.com 289/219 Taxman 26 wherein, it was held that the huge turnover difference between the comparable in that case, M/s. Infosys Technologies Ltd., with the Assessee therein, coupled with the fact that the Assessee therein was providing only services to its AE while M/s. Infosys Technologies (P) Ltd., provided services to outsiders, make it not comparable. These facts are identical to the present facts and would make Infosys BPO Ltd., not comparable. No difference is shown to us which would warrant a different view in the present facts. Moreover, this Court in CIT v. Pentair Water India (P.) Ltd. [2016] 69 taxmann.com 180/381 ITR 216 has taken a view that huge difference in turnover between the tested party and the comparable would

necessarily require the proposed comparable to be excluded from the list of comparables.

(iv) We find that the view taken on the aforesaid finding of fact is a possible view.

(v) Therefore, the question No.(d) as proposed does not give rise to any substantial question of law. Thus, not entertained.

15.Considering the aforesaid factual and legal discussion, this comparable i.e. Infosys BPO Ltd. due to high turnover and extraordinary event of acquisition as well as brand value, is not comparable with the assessee, who is providing medical transcription services, information technology quality assurance in the nature of back office support services to its AE. Therefore, we direct the Assessing Officer/TPO to exclude this comparable.

16.So far as exclusion/inclusion of Excel Infoways Ltd. is concerned, the TPO included this comparable by taking view that assessee ignored the fact that he has adopted IT segment of this comparable. The assessee has computed the employee percentage without excluding the purchase of stock-in-trade, which is for its infra segment and not IT segment. The assessee has not demonstrated how difference in asset profile of the assessee and the comparable impact on comparability. The DRP rejected the objection of assessee by taking view that this company is comparable with assessee as it is engaged in the business of BPO and/or and ITeS provider and development of infrastructure facility. On the employee cost filter, the DRP concluded that out of total salary cost of Rs. 2.02 crore, bulk of this will be attributable to ITeS/BPO as it is universally acknowledged that ITeS/BPO is more work force intensive as compare to infra activity. Therefore, allocation of manpower expenses on the basis of ITeS/BPO segment and infra segment is not correct. On asset turnover ratio, the DRP concluded that once company is functionally comparable, is cannot be rejected on the ground of difference of fixed asset to operating income, low employee cost, unless the assessee demonstrate how these factors have impacted profitability and also quantify the difference in profitability. The Id. AR of the assessee vehemently submitted that this comparable cannot be comparable as its Director were considering closing of its ITeS/BPO segment and diversify in new area of construction, development of property and real estate. The Id. AR also demonstrated that the fluctuating margin of this comparable in different Financial Year in the following manner:

Financial Year	OP/TC (%)	Revenue (Rs.)
2008-09	247.74%	1,86,040.74
2009-10	267.31%	2,04,161.34
2010-11	238.71%	2,03,526.40
2011-12	41.48%	79,096.95
2012-13	75.70%	76,098.54
20013-14	30%	52,972.12
2014-15	2%	22,994.38

17. The Id. AR for the assessee strongly relied on the decision of co-ordinate bench in Clear Info Analytics Private Ltd. vs. ACIT (supra) wherein this comparable was held to be not comparable with captive service provider holding as under:

"6. We have heard rival contentions and perused the record. We noticed that the Pune Bench of the Tribunal examined the comparable company, M/s. Excel Infoways Ltd., in the case of M/s. Ocwen Financial Solutions Private Limited Vs. ACIT in ITA No. 2669/PUN/2016, dt. 21-01-2019. For the sake of convenience, we extract below the relevant discussions made by the Pune Bench of the Tribunal in the above said case:

"12. With regard to Excel Infoways Limited, we find that the Co-ordinate Bench of the Tribunal in the case of Emerson Climate Technologies (India) Pvt. Ltd. Vs. DCIT (supra.) has decided whether Excel Infoways Limited can be comparable company or not by observing as under: \

"18. We have heard rival contentions and perused the record. The limited issue which arises is against benchmarking of ALP of the IT(TP)A No. 2299/Mum/2017 international transactions on account of provisions of Oracle Support Services (JT-enables services) by assessee to its associated enterprise and for benchmarking of ALP of the international transactions to the said concern ie. Excel Infoways Ltd. which has been finally selected by the DRP, is to be excluded since it is showing fluctuating margins. It is further observed that the operating margin of the company had shown drastic fluctuations ranging from 247.74% in F.Y. 2008-09 to 2% in FY 2014-15. The assessee has pointed out the margins shown by the said concern were as under:

Financial Year	OP/TC margin
2008-09	247.74%
2009-10	267.31%
2010-11	238.71%.
2011-12	41.48%
2012-13	75.70%
2013-14	30%
2014-15	2%

19. We find that the Tribunal in assessee's own case in assessment years 2011-12 & 2012-13 vide para 16 & 17 of the order of Tribunal has excluded Excel infoways Ltd., because of its fluctuating margins shown by the said concern. The Tribunal held that the said concern i.e. Excel Infoways Limited which is in the process of closing down its ITES segment and also because of the factum of fluctuating margins, could not be selected as functionally comparable to the assessee. Following the same parity of the reasons, we hold that the said concern i.e. Excel Infoways Limited, because of different factors and also fluctuating to be excluded from final set of comparables. Accordingly, we hold The Assessing Officer is directed to recompute mean margin of the comparables and determine ALP of the international transactions of provision of Oracle support services (ITes) by the assessee to its AEs after affording reasonable opportunity of hearing to the

assessee. Thus, ground No. 3 raised in appeal by assessee is allowed." In the case of Excel Infoways Limited, a chart provided before us wherein we have seen that there is fluctuating profit margins and IT(TP)A No. 2299/Mum/2017 following the same parity of reasoning, Excel Infoways Limited because of fluctuating profit margin, is to be excluded from the final set of comparables.

13. Further, the TPO has applied diminishing revenue filter to exclude the companies from the comparable set whereas, the revenue of Excel Infoways Limited also clearly demonstrated diminishing revenue trend. In such situation, we refer to the decision of Co-ordinate Bench of the Tribunal, Delhi in the case of Baxter India Pvt. Ltd. Vs. ACIT (supra.) where the Tribunal has held as follows: "24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/ loss making filter wherein the companies with losses/ diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/ diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing ITA No.6158/Del/2016 revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume -1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 2014-15 are as under:-

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25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue has decreased consistently from financial years 2009-10 to IT(TP)A No. 2299/Mum/2017 2011-12 ie. including the year under consideration. Further, the above company has super normal profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of DCIT vs. Willis Processing Services (India) Pvt. Ltd. vide ITA No.2152/Mum/2014 has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year.

25.1 Further, from the order of the TPO we find he has obtained the employee cost and the sale for the 1TES segment by exercise of his powers u/s. 133(6), wherein the said company has allocated entire employee cost to IT - BPO segment with no

allocation to Infra Activity segment which accounts to 49% of Excel's total revenue. In our opinion, it is highly impractical that no employee has been hired by Excel for Infra Activity segment. We, therefore, find merit in the argument of the Id. counsel for the assessee that the information provided as per section 133(6) by Excel Infoways Ltd. is unreliable and should not be used to compute employee cost for ITES segment. The Delhi Bench of the Tribunal in the case of Motorola Solutions India Private Limited vide ITA No.5637/Del/2011 has held that a company should be rejected as comparable in case there is contradiction in the facts or data sourced from annual report and as per the information gathered u/s. 133(6). In view of above discussion, we hold that Excel Infoways Ltd. cannot be considered as comparable and should be excluded from the list of comparables. We hold and direct accordingly."

Therefore, it is examined that both, Universal Print Systems Limited and Excel Infoways Limited cannot be considered as comparable companies with that of the assessee company. Hence, ground No. 4 is, thus, allowed".

7. We notice that M/s Excel Infoways Ltd was not considered as a comparable company for the reason that the profits of the company was declining and it was having super normal profits. The year-wise profit percentage would show IT(TP)A No. 2299/Mum/2017 that the same was consistently declining from 364.14% in FY 2009-10 to 0.43% in FY 2014-15. In view of the fluctuating profit, i.e., diminishing profit, the above said company was not taken as a comparable. Even though the Ld D.R contended that the decision in the case of Emerson Climate Technologies (India) Pvt. Ltd, which was followed by the Pune bench of Tribunal in the case of Ocwen Financial Solutions P Ltd (supra) was related to different assessment year and further the functions of M/s Emerson Climate Technologies (India) Pvt. Ltd. were different, yet we are of the view that the principle laid down in the above said case with regard to diminishing revenue and fluctuating profit can be adopted in the instant case. Further the Ld A.R has pointed out that there is difference in the functions performed between the assessee company and M/s Excel Infoways Ltd. In view of the above, we agree with the contentions of the assessee that M/s Excel Infoways Ltd cannot be considered as a comparable company in the hands of the assessee."

18. The co-ordinate bench of Delhi Tribunal in BT e-Services (India) (P.) Ltd. vs. ITO (supra) while considering this comparable with the assessee company who is providing IT, ITeS, back office support and other related services to its group entity excluded this comparable holding as under:

5.3 Excel Infoways Limited With respect to this company, it has been submitted that this company was also functionally dissimilar as it was engaged in IT enabled BPO services and development of infrastructure facility. It has also been submitted that this company fails the employee cost filter as well as the diminishing revenue filter. We find that Excel Infoways Ltd was directed to be excluded by ITAT Delhi Bench in the case of Baxter India Pvt. Ltd vs. ACIT in ITA ITA 6690/Del/2016 Assessment year 2012-13 6158/Del/2016 which also provided captive IT Enabled Services to its AE. The year under consideration before the ITAT in the case of

Baxter India (P) Ltd was also AY 2012-13. The relevant observations are contained in Para 24 and 25 of the said order and are being reproduced for a ready reference:

"24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. Counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/loss making filter wherein the companies with losses/diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume - 1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 201-15 are as under :-

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.....

25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue has decreased consistently from financial years 2009-10 to 2011-12 i.e. including the year under consideration. Further, the above company has super normal profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of Willis Processing Services (India) Pvt. Ltd. (supra) has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year."

5.4.1 Respectfully following the order of the co-ordinate Bench, on identical facts, we direct the AO/TPO to exclude Excel Infoways Ltd from the final set of comparables."

10. We also note that similar ratio has been laid down in the other decisions also by the coordinate benches. We, therefore, respectfully following the decision of the co-ordinate bench of the Tribunal direct the AO/TPO to recompute the ALP of IT

support services with its AE after excluding Excel Infoways Ltd. Consequently, the second ground of appeal is allowed.

11. The issue in ground No.3 is against the double disallowance of Rs.20,39,810/- under section 14A of the Act.

12. The facts in brief are that while computing the income, the assessee suo-moto disallowed Rs.20,39,810/- as expenses relating to earning of exempt income u/s 14A of the Act and filed the return of income accordingly. Thereafter, AO while framing the assessment again disallowed and added Rs.20,39,810/- the said amount again. This is apparent from the page No.330 of the paper book which is a statement of computation of total taxable income in which after adding Rs.20,39,810/- suo motto disallowance u/s 14A, the total taxable income was calculated at Rs.14,91,74,431/-. This income has been taken by the AO in the assessment order and thereafter again disallowance of Rs.20,39,810/- was made u/s 14A of the Act. The Ld. A.R. prayed before the Bench that the double disallowance may kindly be directed to be deleted. The Ld. D.R. fairly agreed to the contentions of the Ld. A.R. that there has been double disallowance by mistake. Accordingly, we direct the AO to delete the disallowance of Rs.20,39,810/-. Ground No.3 is allowed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28.12.2020.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 28.12.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.