

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.2072/DEL/2015
Assessment Year: 2004-2005

M/s. HCL Technologies Limited (as successor in the interest of HCL Technologies BPO Services Ltd.), 806, Siddhartha, 96, Nehru Place, New Delhi.	vs.	Asst. Commissioner of Income Tax, Central Circle-2, New Delhi.
TAN/PAN: AAACH1645P		
(Appellant)		(Respondent)

Appellant by:	Shri Ajay Vohra, Sr.Adv. & Shri Abhishek Agarwal, Adv.		
Respondent by:	Shri Bhavnesh Kulshrestha, CIT-DR		
Date of hearing:	10	03	2021
Date of pronouncement:	04	06	2021

ORDER

PER AMIT SHUKLA, JM:-

The aforesaid appeal has been filed by the assessee against the impugned order dated 22.01.2015, passed by Id. CIT(A)-XLIV, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Year 2004-05. In various grounds of appeal as raised in original memo of appeal, the assessee has challenged the addition of Rs.20,28,86,264/- on the provision for IT enabled services (BPO Services). The assessee in its revised Form no.36 has also raised additional ground which reads as under:

“1. That on the facts and circumstances of the case and in law, the order under section 92CA(3) of the Act passed by the Transfer pricing officer on the non-existing amalgamating entity, is unlawful, void-ab-initio and liable to be quashed.

2. That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer under section 143(3) of the Act on the non-amalgamating /amalgamated entity, is unlawful, void-ab-initio and liable to be quashed..”

2. The facts in brief for the purpose of our adjudication are that, the erstwhile assessee company, HCL Technologies BPO Services Ltd. was engaged in providing ranging of voice/web based contact and front officer services, i.e., involved in providing the processing outsourcing service (IT enabled services). This company was later amalgamated with **HCL Technologies Ltd.** vide order dated 20th October, 2005 by the Hon'ble Delhi High Court passed in terms of Section 394 of the Companies Act, 1956. The appellant-company under the segment of IT enabled services, the international transaction with the AE as reported in form no.3CB was at Rs.78,18,16,249/-. In The TP study report, the assessee had adopted TNMM to analyze international transaction by taking OP/TC as PLI. The assessee's margin was computed by the TPO at (-) 2.94% in his order, whereas the weighted average margin of the comparables taken for the financial years 2001-02 and 2002-03 was arrived at 13.56%. However, the

assessee in his TP study report had given the following benchmarking analysis:-

S. No.	Name of the Company	Margins (OP/TC)		Weighted average
		2003	2002	
1.	Twinstar Software Exports Limited	(73.35)%	(25.81)%	(45.80)%
2.	Nucleus Netsoft and GIS India Limited	(17.70)%	(10.37)%	(13.92)%
3.	Zigma Software Limited	0.78%	17.05%	6.96%
4.	Allsec Technologies Ltd.	12.55%	9.53%	11.65%
5.	Ace Software Exports	11.64%	17.63%	14.88%
6.	Apex Logical Data	14.30%	22.26%	17.80%
7.	Compudyne Winfosystems Ltd.	0.18%	52.78%	20.05%
8.	Fortune Infotech Limited	107.46%	68.03%	96.87%
	Mean	6.98%	18.89%	13.56%
	Appellant's margin for FY 2004-05			15.79%

3. The TPO has mainly taken the same set of comparables, as shortlisted by the assessee, but he has taken the current year margin as (-) 2.94% in the following manner:-

<u>Income</u>	879,954,569
Service Income	40,099,501
Other Income	
<u>Less: Non Operating Income</u>	
Interest income- gross on fixed deposits	747,129
Interest income – loans to employees	47,747
Profit on sale of leased assets	65,658
Total Operating income	919,193,536

<i>Expenditure</i>	
<i>Personnel expenses</i>	413,225,163
<i>Administration and other expenses</i>	395,081,640
<i>Finance charges</i>	14,318,446
<i>Depreciation</i>	130,077,838
<i>Miscellaneous expenditure written off</i>	3,771,203
<i>Less: non operating expenditure</i>	
<i>Interest on foreign currency loan from Bank</i>	9,292,781
<i>Interest others</i>	126353
<i>Total Operating cost</i>	947,055,155
<i>Operating Profit</i>	27,861,618
<i>Operating Profit/Operating Cost</i>	-2.94%

4. Since the operating profit margin of the appellant was taken at (-) 2.94% and the margin of the same set of comparables by taking weighted average of Financial Years 2001-02 and 2002-03 was arrived at 13.56%, the TPO made adjustment of Rs.20,28,86,264/-.

5. The said adjustment has also been confirmed by the Id. CIT (A).

6. Before us, the Id. Senior Counsel, Mr. Ajay Vohra, first of all, submitted that the TPO has passed the order in the name of 'HCL Technologies BPO Service Ltd.' vide order dated 04.12.2006, whereas this company was amalgamated by the order of Hon'ble Delhi High Court on 20th October, 2005 almost more than a year back. Thus, the TPO has passed the order and has determined the TP adjustment of more than of Rs.20.29 crore on a non existing entity. Since, TPO's order is

an independent order; therefore, order passed by him on a non-existing entity is invalid and unsustainable in law. In support, he strongly relied upon the judgment of Hon'ble Supreme Court in the case of **PCIT vs. Maruti Suzuki India Ltd.** reported in **416 ITR 613 (SC)**; and the decision of **CIT vs. Spice Infotainment Ltd. of Hon'ble Delhi High Court** which has been confirmed by the Hon'ble Supreme Court in Civil Appeal No. 215/2014.

7. On merits, he submitted that, in terms of Rule 10 B(4), the TPO ought to have considered the operative profit margin of the comparable companies only for the year under consideration, and if that exercise is done by taking the current year data, then the mean margin of the comparable companies with the available data in the public domain would be (-) 12.76%. Thus, if such an exercise is done as per the Rules, then the operating profit margin of the appellant would be higher. In support, he has given the following chart of the current year data with the comparable companies which were available in the public domain:-

S. No.	Name of the Company	FY Ended	OP/OC
1	Twinstar Software Exports Limited	30.06.2004	Data N.A.
2	Nucleus Netsoft and GIS India Limited	31.03.2004	17.01%
3	Zigma Software Limited	31.03.2004	16.29%
4	Allsec Technologies Ltd	31.03.2004	-37.71%
5	Ace Software Exports	31.03.2004	-0.08%
6	Apex Logical Data	31.03.2003	Data N.A.
7	Compudyne Winfosystems Ltd.	31.03.2004	-106.09%
8	Fortune Infotech Limited	31.03.2004	34.02%
	Mean		-12.76%
	Appellant's margin as per TPO		-2.94%

8. Without prejudice, he submitted that one comparable company, namely, Fortune Infotech Ltd. should be excluded from the final set of comparables, because this comparable has developed its own software namely, “Finepram and image index” which is functionally different from captive ITeS/ BPO Service provider. In that case, even if weighted average margin is to be taken for the Financial Years 2001-02 and 2002-03, then margin will come to be 1.66% which will fall within range of +/- 5% as provided under 2nd proviso to Section 92C(2).

9. On the other hand, ld. CIT-DR objected for revising the ground of appeal along with additional ground of appeal. He has given following dates and event to demonstrate that, *firstly*, before the ld. CIT (A) the assessee had not made any proper compliance and *secondly*, earlier the appeal was filed by the assessee before this Tribunal in the name of erstwhile company, i.e., HCL Technologies BPO Service Ltd. now stands amalgamated with HCL Technologies Ltd. This appeal was dismissed by the Tribunal due to non appearance but later on was recalled. Thus, at this stage, the assessee cannot raise the legality of the TPO’s order.

<i>Date</i>	<i>Event</i>
1.4.2005	<i>Date from which , amalgamation of assessee company with HCL Technologies is effective.</i>
28.10.2005	<i>Date of order of hon.ble High Court approving amalgamation.</i>
19.12.2006	<i>Assessment Order passed</i>
19.01.2007	<i>Appeal filed before the CIT(A)</i>
07.01.2008 to 19.01.2015	<i>During these 7 (seven) years, CIT(A) kept fixing hearing but no proper compliance was made by the</i>

	<i>assessee.</i>
<i>22.01.2015</i>	<i>Order passed by CIT(A)</i>
<i>1.4.2015</i>	<i>Appeal filed by the assessee before Hon'ble ITAT Delhi in the name of HCL Technologies BPO Services (Now stands amalgamated with HCL Technologies Ltd)</i>
<i>Oct 2018</i>	<i>Appeal dismissed by Hon'ble ITAT, Delhi, apparently due to non appearance by the assessee.</i>
<i>08.07.2020</i>	<i>Appeal Heard. (apparently earlier it was recalled)</i>
<i>15.11.2020</i>	<i>Again appeal filed by assessee vide letter dated 14.9.2020, in the name of HCL Technologies Ltd(as successor in interest of HCL Technologies BPO Services Ltd). Additional grounds were also included.</i>

10. Regarding use of multiple year data, he submitted that the assessee in its own TP Study report has taken the weighted average margin of two years and thus, assessee cannot take a different plea in the appellate proceedings.

11. We have heard the rival submissions and material referred to before us at the time of hearing. It is an undisputed fact that at the time of passing of the order u/s.92CA(3) by the TPO, i.e., 04.12.2006, HCL Technologies BPO Service Ltd. already stood amalgamated with 'HCL Technologies Ltd.' under the scheme of amalgamation approved by the Hon'ble Delhi High Court vide order dated 20th October, 2005. It is now well settled and trite law that any order passed on non existing entity or the company which has been amalgamated with the successor company, is null and void and framing of an assessment or passing any order in the name of such non existing entity is not procedural defect or irregularity which could be cured, but is fatal and non-est which cannot be enforced. This principle has been

well settled and upheld by the Hon'ble Apex Court in the case of **PCIT vs. Maruti Suzuki India Ltd. (supra)**, wherein the Hon'ble Supreme Court has upheld that where during the pendency of assessment proceedings, assessee-company was amalgamated with other company and thereby loss its existence, assessment order passed subsequently in the name of said non existing entity could be without jurisdiction and is to be set aside. Thus, if we follow the binding precedent of the Hon'ble Apex Court, then here in this case also, the Transfer Pricing Adjustment made vide the order dated 04.12.2006 which has been passed in the case of non-existing entity is to be set aside.

12. Without prejudice, on merits also, we agree with the argument made by the ld. Senior Counsel that in the relevant assessment year as per Rule 10B(4), the operating profit margin of the comparable company has to be taken from the data relating to the financial year in which international transaction has been entered into. Before us, following analysis of the comparables from the data pertaining to the financial year ending on 31st March, 2004 are as under:

S. No.	Name of the Company	Margins (OP/TC)		Weighted average
		2003	2002	
1.	Twinstar Software Exports Limited	(73.35)%	(25.81)%	(45.80)%
2.	Nucleus Netsoft and GIS India Limited	(17.70)%	(10.37)%	(13.92)%
3.	Zigma Software Limited	0.78%	17.05%	6.96%

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7.	Compudyne Winfosystems Ltd.	0.18%	52.78%	20.05%
8.	Fortune Infotech Limited	107.46%	68.03%	96.87%
	Mean	6.98%	18.89%	13.56%

13. Thus, the operating profit margin of the appellant (-) 2.94% is higher than the determined arms length margin after taking the current year data with the comparable companies is at (-) 12.76%. Accordingly, the entire adjustment relating to international transaction of rendering of BPO Services deserves to be deleted.

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

Order pronounced in the Open Court on 4th June, 2021

Sd/-
[PRASHANT MAHARISHI]
[ACCOUNTANT MEMBER]

DATED: 04/06/2021

PKK:

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER