

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

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT)
AND
SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

I.T.A. No.2136/Mum/2012
(Assessment year 2007-08)

Deputy Commissioner of Income-tax-8(1), Mumbai	vs	DBOI Global Services Pvt Ltd (successor to M/s Deutsche Networks Services Pvt Ltd), Logitech Park M.V. Road, Sakinaka, Andheri (E) Mumbai-400 072 PAN : AABCD7378L
APPELLANT		RESPONDENT

I.T.A. No.2254/Mum/2012
(Assessment year 2007-08)

DBOI Global Services Pvt Ltd (successor to M/s Deutsche Networks Services Pvt Ltd), Logitech Park M.V. Road, Sakinaka, Andheri (E) Mumbai-400 072 PAN : AABCD7378L	vs	Deputy Commissioner of Income-tax-6(1), Mumbai
APPELLANT		RESPONDENT

Assessee by	Shri Sunil Deshpande / Shri Sushil Kumar Mishra (DCIT)
Revenue by	Shri Jehangir D Mistry / Ms Riddhi Bhatt

Date of hearing	15-07-2021
Date of pronouncement	11-08-2021

ORDER

Per : Saktijit Dey (JM) :

Captioned cross appeals arise out of order dated 27-01-2012 of learned Commissioner of Income Tax (Appeals)-15, Mumbai for the assessment year 2007-08.

ITA 2254/Mum/2012 (Assessee's appeal)

2. In grounds 1 to 10 assessee has challenged the addition made on account of transfer pricing adjustment. Though, the assessee has raised various issues concerning the transfer pricing adjustment; however, the dispute before us is mainly with regard to selection/rejection of certain comparables.

3. Shri J. D. Mistry, learned senior counsel appearing for the assessee submitted, if some of the comparables selected by the TPO are excluded, in any case, which are not comparables to the assessee, as held in assessee's own case in other assessment years and even in case of various other assesses, the profit margin shown by the assessee would be within the acceptable range of the average profit margin of the rest of the comparables. However, before we proceed to deal with the substantive issue relating to selection/rejection of comparables, it is necessary to briefly deal with the relevant facts.

4. The assessee, a resident company, is a wholly owned subsidiary of Deutsche Asia Pacific Holdings Pte Ltd, Singapore. As stated by the transfer pricing officer (TPO), the assessee is basically engaged in providing data processing and back office support services, including, payment processing, data processing, documentation processing, investigation related services and trade central processing services to its overseas associated enterprises (AE). During the year

under consideration, the assessee had entered into various international transactions with its AE. However, insofar as provision of data processing and back office operation is concerned, the assessee reported revenue of Rs.112,84,66,814/-. In the transfer pricing study report, assessee benchmarked the aforesaid transaction with AE adopting transactional net margin method (TNMM). Treating itself as the tested party, assessee made a search in the databases and shortlisted twelve companies as comparables with arithmetic mean of 14.91%. Since, margin shown by the assessee at 11.20% was within (+)/(-) 5% variation, the transaction with AE was considered to be at arm's length. After analyzing the transfer pricing study of the assessee, the TPO, though, accepted TNMM as the most appropriate method; however, he was of the view that the assessee did not apply the qualitative and quantitative filters properly. Applying his own filters, the TPO accepted five of the comparables selected by the assessee, whereas, he rejected the balance seven comparables. Having done so, the TPO proceeded to select fresh comparables on his own and finally he selected twenty seven companies as comparables with arithmetic mean of 30.67% as against the margin shown by the assessee at 11.20%. Applying the arithmetic mean of the selected comparables, the TPO determined the arm's length price (ALP) of the international transaction with AE and proposed an adjustment of Rs.19,98,46,156/-. Based on the adjustment proposed by the TPO, the assessing officer passed the assessment order. The assessment order so passed was challenged before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) granted partial relief to the assessee. Still aggrieved, the assessee has filed the present appeal.

5. Opening his argument, learned senior counsel for the assessee submitted, out of the twenty seven comparables finally selected by the TPO, if eleven comparables are excluded, assessee's margin would be within the acceptable range of the arithmetic mean of the rest of the comparables. Proceeding further, he drew our attention to the tabular chart and submitted that Asit C Mehta, Infosys BPO Ltd, Apex Knowledge Solutions Pvt Ltd and Vishal Information Technologies Ltd are not at all comparable to the assessee due to functional dissimilarity and other factors. He submitted, these comparables have been rejected in assessee's own case in earlier as well as subsequent years either by the Tribunal or by the Dispute Resolution Panel (DRP) or even by the TPO himself. Thus, he submitted, these comparables have to be excluded. As regards eClerx Services Ltd, Mold-tek Technologies Ltd, Informed Technologies India Ltd are concerned, they are not comparable to a ITES/BPO service provider, as held in case of various other assesseees involved in similar line of business. In this context, he drew our attention to the relevant judicial precedents. Insofar as Caliber Point Business Solutions Ltd and HCL Comnet Systems Ltd (Seg) are concerned, learned senior counsel submitted, they cannot be treated as comparable, as they do not qualify the related party transaction (RPT) filter. Finally, he submitted, I services India Pvt Ltd cannot be considered as comparable as it is functionally dissimilar and financial data relating to this comparable are not available in public domain. Further, he submitted, this comparable has shown super normal profit in the year under consideration which makes it incomparable. In support of his contention, the learned counsel relied upon the following decisions:-

1. *DBOI Global Services Pvt Ltd (2018) 98 taxmann.com 52 (Mum-Trib)*
2. *Stream International Services Pvt Ltd vs The ADIT (International Taxation)-7(2), Mumbai (ITA No.8290/Mum/2011)*

3. *Zavata India Private Limited vs The DCIT, Cir.3(3), Hyderabad (ITA No.178/Hyd/2011)*
4. *Flextronics Technologies India (P) Ltd (TS-641-ITAT-2015 (Bang-TP)*
5. *AOL Online India Pvt Ltd vs Dy.CIT, circle-11(1), Bangalore IT(TP)A.No.1036/Bang/2011*
6. *Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (2016) 70 taxmann.com 318 (Bangalore-Trib)*
7. *The ACIT, Cir.6(3) vs Maersk Global Service Centre (India) Pvt Ltd ITA No.3774(MUM) of 2011 C.O. No.111(MUM) of 2011)*
8. *Capgemini India Pvt Ltd vs ITO(ITA No.7099/Mum/2012)*
9. *CIT vs Pentair Water India Pvt Ltd 69 taxmann.com 180 (Bom)*
10. *Calibrated Healthcare Systems India Pvt Ltd vs ACIT(OSD), cit-1, New Delhi ITA No.527/Del/2012*
11. *Capital IQ Information Systems Pvt Ltd vs Dy.CIT (Int.Taxation), Hyderabad (ITA 1961/Hyd/2011)*
12. *iQor India Services Private Ltd vs ITO, Ward 11(4) ITA No.6034/DEL/2012 & ITA NO.5934/DEL/2012*
13. *Avaya India (P) Ltd ITA No.5528/Del/2011*
14. *Capital IQ Information Systems (India) Pvt Ltd vs Dy.CIT(Int.Taxation), Hyderabad (ITA No.1961/Hyd/2011)*
15. *M/s Avineon India Pvt Ltd vs Dy.CIT,Cir.1(1), Hyderabad (ITA No.1989/Hyd/2011)*
16. *Cognizant Technology Services Pvt Ltd vs ACIT,Cir.1(2), Hyderabad (ITA Nos 2106 &*
17. *Tech Book Electronics Services P Ltd (2016) 67 taxmann.com 169*
18. *Maersk Global Centres (India) Private Limited vs ACIT,Cir.6(3) ITA No.7466/Mum/2012*
19. *Willis Processing Services (I) P Ltd (TS-49-ITAT-2013(Mum)-TP*

6. Strongly relying upon the observations of the TPO and learned Commissioner (Appeals), learned departmental representative submitted, the assessee has cherry-picked the comparables and in the process, has left out many companies which are otherwise comparable to the assessee. He submitted, the TPO has undertaken a thorough analysis and has finally selected comparables to determine the ALP. He submitted, both the TPO and learned Commissioner

(Appeals) have provided valid reasons for retaining the comparables challenged by the assessee. Therefore, there is no need to interfere with the decision of learned Commissioner (Appeals).

7. We have considered rival submissions in the light of decisions relied upon and perused materials on record.

Asit C Mehta

7.1 The contention of the assessee for excluding this company is, the company is having more than one segment. Whereas, separate segmental data is not available in the public domain. Further, he submitted, the employee cost of the company works out to 22.78% of the total cost as compared to assessee's employee cost of 48.27%. Further, the turnover of the assessee is more than eighty times of the turnover of the company. It is observed, in assessee's own case for assessment year 2006-07, the Tribunal, while considering the acceptability of the aforesaid company as a comparable, has rejected this company as a comparable due to low employee cost. It is further observed, due to non availability of segmental data and low employee cost, this company was rejected.

7.2 In case of DBOI Global Services Pvt Ltd (supra), Stream International Services Pvt Ltd (supra), Zavata India Private Limited (supra), there being no material difference in the factual position in the impugned assessment year, following the decision of the co-ordinate bench in assessee's own case as well as in case of other assesses, as referred to above, we exclude this company from the list of comparables.

Infosys BPO Ltd

7.3 This company is sought to be removed on the ground that it provides end-to-end knowledge business process services which is comparable to the assessee. Further, the turnover of this company is more than six times of the assessee. Notably, while considering the issue of comparability of this company in assessee's own case in assessment year 2008-09, learned DRP has rejected it due to heavy marketing and selling expenses. We have further noticed that the TPO himself has rejected this company in assessee's own case in assessment year 2009-10 for the fore stated reasons. In fact, various other decisions of the coordinate benches cited before us, this company has been rejected as comparable to a routine BPO service provider. Facts being identical, following the decision cited before us, we exclude this company from the list of comparables.

Apex Knowledge Solution Pvt Ltd

7.4 The assessee has sought exclusion of this company on the ground of functional dissimilarity and scale of operation. We find that in assessee's own case in assessment year 2006-07 cited supra, the Tribunal has excluded this company for the reason that it is engaged in rendering software development and related technical activities. We have also found from record that the facts based on which the company was rejected in assessment year 2006-07 are no different in the impugned assessment year. In view of the aforesaid, we exclude this company from the list of comparables.

Vishal Information Technologies Ltd

7.5 This company was sought to be excluded primarily on the reasoning that the company has very low employee cost since it mostly outsources its activities to third party vendors. We have found that in assessee's own case in assessment

year 2005-06 this company was rejected for the reason that it outsources its activities. We have also noticed, the DRP has excluded this company in assessee's own case for the very same reason in assessment years 2006-07 & 2008-09. In fact, in various other decisions cited before us, this company has been excluded for the reason that instead of performing the work itself, it outsources the work to third party vendors. The facts in the impugned assessment year are more or less identical. In view of the aforesaid, we exclude this company from the list of comparables.

Wipro Limited (Seg)

7.6 The assessee has sought exclusion of Wipro Limited (Seg) on the ground that it has exceptionally high turnover compared to assessee's turnover. On perusal of facts on record, we find, as against the turnover of the assessee at 114.12 crores, the turnover of Wipro Limited (Seg) for the year under consideration is Rs. 13,684 crores, almost 120 times of assessee's turnover. Notably, in assessee's own case in assessment year 2005-06, the Tribunal, while deciding the comparability of this company with the assessee in ITA No.812/Mum/2012 dated 24-08-2016, taking note of the excessively high turnover of the comparable in comparison to assessee has excluded it. Further in a number of decisions of the co-ordinate benches rendered in case of other assesses, this company has been excluded not only because of high turnover but also because of its brand value, size, etc. In this context, we may refer to the following decisions:-

1. *DBOI Global Services Pvt Ltd (supra)*
2. *Capgemini India Private Ltd vs ITO (supra)*
3. *CIT vs Pentair Water India Pvt Ltd (supra)*
4. *Stream International Services Pvt Ltd (supra)*

5. *Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (supra)*
6. *Calibrated Healthcare Systems India Pvt Ltd vs ACIT(OSD), cit-1, New Delhi (supra)*
7. *Stream International Services Pvt Ltd vs The ADIT (International Taxation)-7(2), Mumbai (supra)*
8. *Zavata India Private Limited vs The DCIT, Cir.3(3), Hyderabad (supra)*
9. *Flextronics Technologies India (P) Ltd (supra)*
10. *AOL Online India Pvt Ltd vs Dy.CIT, circle-11(1), Bangalore (supra)*
11. *Capital IQ Information Systems Pvt Ltd vs Dy.CIT (Int.Taxation), Hyderabad (supra)*
12. *Telcordia Technologies India Pvt Ltd vs ACIT (supra)*

7.7 Thus, keeping in view the decisions of the co-ordinate benches in assessee's own case as well as in case of other assessee's, we exclude this company from the list of comparables.

eClerx Services Ltd

7.8 It is the submission of the assessee that this company is functionally different; hence, not comparable. On perusal of facts on record we find that eClerx Services Ltd is basically engaged in knowledge process outsourcing (KPO) services. Further, this company has incurred a major part of its expenses towards outsourcing of services, whereas, the assessee is a routine BPO service provider without outsourcing any of its activities. Thus, in our view, this company cannot be comparable to the assessee. This view of ours is further fortified by the following decisions of the Tribunal:-

1. *Maersk Global Centres (India) Private Limited vs ACIT (supra)*
2. *Stream International Services Pvt Ltd vs The ADIT (supra)*
3. *Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (supra)*
4. *iQor India Services Private Ltd vs ITO, Ward 11(4) (supra)*
5. *Avaya India (P) Ltd (supra)*
6. *Capital IQ Information Systems Pvt Ltd vs Dy.CIT (Int.Taxation), Hyderabad (supra)*

7. *Avincon India Pvt Ltd vs Dy.CIT-1(1),Hyderabad (supra)*
8. *Zavata India Private Limited vs The DCIT, Cir.3(3), Hyderabad (supra)*
9. *Cognizant Technology Services Pvt Ltd vs ACIT Circle-1(2), Hyderabad (supra)*

Moldtek Technologies Ltd

7.9 The assessee has sought exclusion of this company because of functional dissimilarity, abnormal profit margin and low employee cost. On perusal of facts and materials on record, we find that this company is providing structural engineering and design services of construction of building. Further, the company has undertaken expansion vigorously. Thus, there is extraordinary growth which could have resulted in abnormal profit margin of 113.49%. Further, the employee cost of the company as a percentage of the total cost works out to meager 8.41% as compared to assessee's employee cost of 48.27%. Thus, these factors, in our view, do not make the company comparable to the assessee. In this regard, we find support from the following decisions of the Tribunal:-

1. *Tech Book Electronics Services P Ltd (supra)*
2. *Maersk Global Centres (India) Private Limited vs ACIT (supra))*
3. *Stream International Services Pvt Ltd vs The ADIT (International Taxation)-7(2), Mumbai (supra)*
4. *Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (supra))*
5. *Capgemini Business Services (India) Ltd vs ACIT (supra)*
6. *Capital IQ Information Systems (India) Pvt Ltd vs Dy.CIT(Int.Taxation), Hyderabad (supra)*
7. *M/s Avineon India Pvt Ltd vs Dy.CIT,Cir.1(1), Hyderabad (supra)*
8. *Zavata India Private Limited vs The DCIT, Cir.3(3), Hyderabad (supra)*
9. *Cognizant Technology Services Pvt Ltd vs ACIT,Cir.1(2), Hyderabad (supra)*

7.10 Accordingly, we direct the assessing officer to exclude this company from the list of comparables.

Informed Technologies India Ltd

7.11 The assessee has sought removal of this company on the ground of its functional dissimilarity, scale of operation and low employee cost. On a perusal of the annual report of the company for the impugned assessment year, we find that the company is into high-end BPO services which can be termed as KPO services. Basically, this company serves the needs of the financial content sector in the USA. It collects and analyses data on financial fundamentals, corporate governance, structures/executes compensation and capital market. The company caters to the niche market segment of financial content and its targeted clientele include well known and respected American Corporate. Thus, as it appears, the company is functionally dissimilar to the assessee. It is also observed, in case of Stream International Services Pvt Ltd vs The ADIT (supra) and AOL Online India Private Limited vs DCIT (supra), which are for the very same assessment year, the Tribunal has rejected this company as a comparable on the ground of low employee cost, abnormal growth and considerable business promotion expenses. Respectfully following the aforesaid decisions of the co-ordinate bench, we direct the assessing officer to exclude this company from the list of comparables.

Caliber Point Business Solutions Ltd & HCL Comnet Systems Pvt Ltd (Seg)

7.12 Insofar as Caliber Point Business Solutions Ltd and HCL Comnet Systems Pvt Ltd (Seg) are concerned, learned counsel for the assessee has sought removal on the ground that their related party transaction (RPT) is substantially high compared to assessee. On perusal of facts on record, we find the aforesaid submission of learned senior counsel acceptable. In fact, both the companies have been rejected due to substantially high RPT by different benches of the Tribunal in following cases:-

- (1) *Stream International Services Pvt Ltd vs The ADIT (International Taxation)-7(2), Mumbai (supra)*
- (2) *Willis Processing Service India Pvt Ltd (supra)*
- (3) *Avaya India (P) Ltd (supra)*
- (4) *Pole to Win India Pvt Ltd vs Dy.CIT, Cir.11(3), Bangalore (supra)*

7.13 Further, we find, HCL Comnet Systems India Ltd (Seg) has been rejected by different benches of the Tribunal in case of other assesses for the reason of having a different financial year ending, different business model and super normal profit. Thus, keeping in view various decisions of the Tribunal cited before us, we exclude these two companies from the list of comparables.

I Services India Pvt Ltd

7.14 Assessee sought removal of this company due to functional dissimilarity, super normal profit and non availability of contemporaneous data in public domain. On a perusal of facts on record, we find that this company is engaged in providing remote data entry services to its clients in USA. Further, it has reported a profit margin of 50.27% for the year under consideration, which is exceptionally high in terms of industry norms. Due to the super normal profit earned by the company for the year under consideration, the Tribunal excluded it from being considered as a comparable in case of Pentair Water India P Ltd vs Addl CIT (supra), which is for the very same assessment year. Further, in case of Willis Processing Service India Pvt Ltd (supra), which is also for the very same assessment year, this company has been excluded due to non availability of contemporaneous data in public domain. Keeping in view the aforesaid decisions of the Tribunal, we exclude this company from the list of comparables.

8. Learned Senior Counsel for the assessee has submitted before us that with exclusion of these eleven companies, assessee's margin would be within (+)/(-)

5% of the arithmetic mean of the rest of the comparables selected by the TPO. In fact, learned senior counsel has also furnished a chart demonstrating the aforesaid fact. Thus, keeping in view the aforesaid submission of the learned senior counsel for the assessee, we treat the other grounds as not pressed. However, the issues raised therein are kept open for adjudication, if they arise in assessee's case in future.

9. Besides the aforesaid main grounds, the assessee has also raised the following additional ground:-

"11.the appellants submit that the AO be directed to allow deduction on account of Education Cess paid by the appellants for the assessment year 2007-08."

10. At the outset, we are of the view that the issue raised in the additional ground is a purely legal issue which can be decided based on the facts available on record. Therefore, we admit the additional ground for adjudication.

11. Having considered rival submissions, we find that the issue raised in the additional ground stands decided in favour of the assessee by the decision of Hon'ble jurisdictional High Court in case of Sesa Goa Ltd vs ACIT Tax Appeal No.17 of 2013 dated 28-02-2020. Respectfully following the aforesaid decision of the Hon'ble jurisdictional High Court, we direct the assessing officer to verify the facts and allow deduction of education cess paid by the assessee.

ITA 2136/Mum/2012 (Revenue's appeal)

12. Grounds raised by the revenue are as under:-

"1. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the benefit of -5% relief to the assessee, without appreciating the fact that no standard education of 5% to the assessee is envisaged under Section 92C(2) of the Act."

2. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the amended proviso to Section 92(2) is not applicable to the AY 2007-08 as the amendment is made effective from 01-10-2009 even though it is

a clarificatory amendment as evidenced by Memorandum to the Finance Bill (2) of 2009."

13. In view of our decision in grounds 1 to 10 in assessee's appeal, being ITA No.2254/Mum/2012 decided in the earlier part of the order, these grounds have become infructuous.

14. Suffice to say, as per settled legal principle, the benefit of (+)/(-) 5% under section 92C(2) cannot be allowed as standard deduction. With the aforesaid observations, these grounds are dismissed.

15. In the result, assessee's appeal is partly allowed; and revenue's appeal is dismissed.

Order pronounced on 11/08/2021.

Sd/-

sd/-

PRAMOD KUMAR	SAKTIJIT DEY
VICE PRESIDENT	JUDICIAL MEMBER

Mumbai, Dt : 11/08/2021

Pavanan

Copy to :

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2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
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By Order

Asstt. Registrar, ITAT, Mumbai