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

BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 283/DEL/2022 (A.Y 2017-18)

GE India Business Services Pvt. Ltd. Building No. 7A, 4th Floor, DLF Cyber City DLF Phase-III, Sector 25A, Gurgaon, Haryana, 122002 **PAN No. AAAC16748J** **(APPELLANT)**	Vs	DC/ACIT IT & TP 2(1)(1) Delhi **(RESPONDENT)**

Appellant by	**Sh. Ravi Sharma, Adv & Ms. Shubhangi Arora, AR**
Respondent by	**Sh. Surender Pal, CIT (DR)**

Date of Hearing	**12.04.2022**
Date of Pronouncement	**26.05.2022**

ORDER

PER YOGESH KUMAR U.S., JM

This is an appeal filed by the Assessee for the Assessment Year 2017-18 against the final assessment order dated 11/01/2022 passed under Section 143(3) r/w Section 144C of Income tax Act, 1961, by DC/ACIT IT & TP 2(1)(1), Delhi.

2. The assessee company GE India Business Services Pvt. Ltd.('GEIBSPL') is set up as a captive service provider to provide offshore outsourcing services primarily to GE entities/ business worldwide. The primary activity in which Assessee Company specializes is to render IT Enabled Services ("ITES") and financial support services to various overseas GE Group Companies. Assessee company has filed its Return of Income on 30.11.2017, electronically, declaring a total income of Rs. 13,64,66,410/-. The return was processed under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as: the Act).The case was selected under CASS and notice under section 143(2) of the Act was issued on 10.08.2018 and served on the assessee. Further notices under section 142(1) of the Act were issued along with questionnaire electronically.During scrutiny assessment proceedings, various information and details related to the assessee company were called for and verified. After verification of the information as available on record, the information filed by the assessee during the course of assessment proceedings. The order under section *92CA(3)* of the Act was passed on 30.01.2021. An adjustment of Rs 7,16,92,181/- was made on account of international transactions to the income of the assessee. Draft order u/s. 144C of the Act was passed on 31/03/2021. After receiving the draft order u/s. 144C of the Act, the assessee filed objection in Form 35A before Dispute Resolution Panel. Ld. DRP vide order dated 10.11.2021 has called for inclusion / exclusion of *certain*filters after verification and directed the adjustment u/s 92CA on account of international transaction related to software development services was revised to Rs.6,59,84,529/- from Rs.

7,04,93,545/- . The final assessment order came to be passed on 11/01/2022 by making addition of Rs. 6,71,83,164 and assessed the income of the assessee at Rs. 20,36,49,574/- as against the returned income of Rs. 13,64,66,410/-.

3. Aggrieved by the final Assessment order dated 11/01/2022, the assessee has preferred the present Appeal on following grounds:

"1. On the facts and circumstances of the case & in law, the final assessment order passed by National Faceless Assessment Center ('NaFAC') and directions passed by the Learned Dispute Resolution Panel ('Ld. DRP') are erroneous and bad in law.

2. On the facts and circumstances of the case & in law, the Ld. DRP erred in issuing the directions under section 1440(5) of the Income Tax Act, 1961 ('the Act') dated November 10, 2021 without quoting the mandatory DIN in conformity with Para-2 and Para-3 of Circular No. 19/2019 dated August 14, 2019.

3. On the facts and circumstances of the case & in law, the NaFAC and the Learned Transfer Pricing Officer ('Ld. TPO') (following the directions of Ld. DRP) have erred on facts and in law in enhancing the income of the Appellant by INR 6,71,83,164. In this respect,

3.1. *The NaFAC/ Ld. DRP/ Ld. TPO erred on the facts and in the circumstances of the case & in law in framing the order under section 92CA of the Act on findings which are erroneous in law, contrary to the facts and based on mere conjectures and surmises.*

3.2. *The NaFAC/ Ld. DRP/ Ld. TPO failed to appreciate the submissions made/ contentions raised by the Appellant and further erred in making several allegations, observations, assertions and inferences in the order, which were both factually incorrect as well as legally*

untenable.

4. On the facts and circumstances of the case & in law, the NaFAC and the Ld. TPO (while following the directions of the Ld. DRP) erred in enhancing the income of the Appellant by INR 6,59,84,528 holding that the international transactions of the Appellant pertaining to provision of Information Technology Enabled Services ('ITeS') do not satisfy the arm's length principle ('ALP') envisaged under the Act and in doing so, have grossly erred in:

4.1 disregarding the ALP as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');

4.2 rejecting comparability analysis undertaken by the Appellant in the TP documentation and conducting a fresh comparability analysis based on application of additional/ revised filters, and disregarding Appellant's filters in determining the ALP for the international transactions;

4.3 disregarding and ignoring the submissions/ rebuttals against the rejection reasons provided in the show cause notice on the comparables accepted by the Appellant in its TP documentation, based on its surmise and conjecture without adequate supporting or evidence;

4.4. including certain companies in the final set of comparables that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

4.5 considering the entity-wide return on total cost ('ROTC') of R Systems International Limited instead of considering the segment ROTC of the comparable segment i.e. business process outsourcing

('BPO') services segment;

4.6rejecting Sundaram Business Services Ltd from the set of comparable companies on ground of it being a "persistent loss maker" and ignoring that this company had earned profit in the current and last year i.e. year ending March 31, 2017 and March 31, 2016;

4.7including Inductis India Pvt. Ltd. in the final set of comparable companies without appreciating the fact that it does not satisfy Ld. TPO's own filter of rejecting companies having significant related party transactions;

4.8 not excluding Infosys BPM Ltd from the final set of comparable despite the fact that such company was excluded by the Hon'ble ITAT in Appellant's own case for AY 2012-13;

4.9excluding certain companies on arbitrary basis despite being comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

4.10. not considering the correct computation of the ROTC of the Appellant; and

4.11. ignoring the business/ commercial reality that the Appellant undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact.

5. *On the facts and circumstances of the case & in law, the NaFAC and the Ld. TPO (following the directions of Ld. DRP) erred in enhancing the income of the Appellant by INR 11,98,636 by treating the*

receivables outstanding beyond 60 days from associated enterprises ('AEs') as deemed loan and charging notional interest on the basis of 6 month LIBOR plus 400 basis points and in doing so, have grossly erred in:

5.1 not appreciating that continuing debit balances do not constitute an 'international transactions' within provisions of section 92B of the Act;

5.2 not considering that the average collection period of the Appellant works out to 37 days signifying that the Appellant has received the payments within a reasonable time period from the AE;

5.3 imputing interest on outstanding receivables, despite the fact that the Appellant had carried out working capital adjustment and hence, no further adjustment on account of interest on outstanding receivables was warranted;

5.4 disregarding supporting Transfer Pricing principles and recent judicial pronouncements in India in undertaking the said adjustment

The above grounds are without prejudice to each other.

4. The Ld. Counsel for the Assessee submitted that the Assessee's Grounds of Appeal No. 1 to 4.7 and 4.9 to 4.11 will become academic in nature on considering the Assessee's Ground No.4.8. He further contended that if Infosys BPM Ltd. is excluded, the margin would be within 5% and in such event the Assessee's international transaction is at Arm's Length. Therefore, the additions will not sustain.

5. The Ld. Counsel for the assessee submitted that, Ld. TPO and DRP banking on the annual report, came to the conclusion that, Infosys BPM is engaged in IT enabled and BPO Services which are similar to the services

provided by the assessee. Further contended that, the Infosys BPO cannot be considered as comparable to the assessee due to difference in the functional profiles, further the Infosys BPO has created a brand name itself in the market and made significant investment in creating such intangible. The assessee has revenue recognition policy based on total cost plus mark up basis, while Infosys BPO recognizes revenue on time material fixed price fixed time frame and united price basis. The Ld. AR relied on the decision of the Coordinate Bench of the Tribunal in Assessee's own case in G.E. India Services Pvt. Ltd. Vs ACIT in ITA No 5503/Del/2016 Assessment Year 2012-13.

6. Per contra, Ld. DR relied on the orders of the Lower Authorities and submitted that no interference is required by this Tribunal.

7. We have heard the rival submissions on the issue under consideration; we have also gone through the entire materials available on record and gave our thoughtful consideration. We find similar issue has been considered by the Coordinate Bench of this Tribunal in Assessee's own case in ITA No. 5503/Del/2016 for AY 2012-13, wherein M/s. Infosys BPO LTD. (erstwhile Infosys BPO Ltd.) has been excluded from the comparables. The relevant paragraphs are hereunder:-

> *"4. Coming to ground number 2 and 3 which are against the addition/adjustment on account of arm's-length price of the international transaction of information technology enabled and financial support services amounting to ₹ 25,892,279. In essence, the assessee is contesting for exclusion of three comparable companies.*
>
> *(1) TCS E Serve Ltd, (2) Infosys BPO Ltd and (3) E Clrex services Ltd.*

5. Assessee is a company engaged in the business of providing information technology enabled remote processing and financial support services. It is set up as a captive service provider to provide offshore outsourcing services to its GE entities. It renders ITeS and financial support services to those entities. Assessee prepared its transfer pricing documents related to various international transactions. Assesseeentered into an international transaction of

(1) of provision of ITeS services and finance support services amounting to ₹ 343,010,158/-,

(2) payment of services 74,41,458/-,

(3) reimbursement of expenses received of Rs 3,081,754,

(4) contribution Under employees sale purchase plan of ₹ 58,411 and

(5) reversal of invoices raised in earlier years amounting to ₹ 1,828,687/-.

6. Assessee benchmarked these international transaction relating to IT enabled services using transactional net margin method (TNMM) as the most appropriate method adopting the profit level indicator of return on total cost (ROTC) . It selected 7 comparable companies and computed the comparable margins at 5.52%. It further computed the margin of the comparable companies after working capital adjustment at 3.42 percentage. It further submitted that return on total cost of the assessee for the year ended on 31st of March 2012 is 11.98% and therefore its international transactions are at arm's-length.

7. The learned transfer pricing officer passed an order u/s 92CA (3) of the act on 20 January 2016 wherein he proposed the upward

adjustment of Rs. 4 67,76,784/- to the international transactions of the assessee. The assessee filed objection before the learned Dispute Resolution Panel which passed a direction to the TPO and based on these directions the learned transfer pricing officer as per order dated 17/8/2016 computed the arm's-length price of the international transaction wherein 9 comparable companies were retained having their profit level indicator of operating profit/operating cost (OP/OC) was determined at 25.65% further their adjusted margin was determined at 21.96%. Thereafter the operating cost incurred by the assessee of ₹ 327,343,333/- was used against the international transactions of ₹ 373,335,650/- and the final adjustment was made of ₹ 25,892,279/-.

8. In the final list of comparables, the learned transfer pricing officer included the E Clrex services Ltd having margin of 49.49%, Infosys BPO Ltd having margin of 34.39% and TCS E serve Ltd having margin of 62.07%.

9. The learned authorized representative, Shri Sachit Jolly advocate, submitted that in assessee's own case for assessment year 2010 - 11 in ITA number 6906/del/2014 dated 27th of April 2018 the coordinate bench has considered the issue of inclusion of TCS E serve Ltd in para number 11 of that order and same was remitted back to the file of the learned transfer pricing officer to decide afresh. For assessment year 2009 - 10 coordinate bench in assessee's own case in ITA number 1423/del/2014 dated 18 May 2018 and in ITA number 6008/del/2012 for assessment year 2008 - 09 dated 25 September 2018 the coordinate benches has decided about the comparability analysis of some of the comparables in the case of the assessee. He therefore submitted that issue with respect to the exclusion of Infosys BPO Ltd and TCS E serve international

Ltd are covered in favour of the assessee. He further submitted that there is no change in the facts of the case as well as the FAR in this year compared to that year. Therefore, these two comparables need to be excluded for this year also from the comparability analysis for determination of the arm's-length price of the international transactions. With respect to E Clerx services private limited he referred to the order of the coordinate bench for assessment year 2009 - 10 in its own case ITA number 1423/del/2014 dated 18th of May 2018 wherein in para number 18 the above comparable company was excluded. He therefore submitted that in assessee's own case all these three comparable companies are excluded in earlier years and therefore they should also be excluded for this year.

10. The learned departmental representative payment please supported the orders of the lower authorities. He referred to page number 28 of the order of the learned transfer pricing officer where E clrex services Ltd was held to be comparable. He submitted that all the objections of the assesseehas been considered by the learned transfer pricing officer. Therefore same cannot be excluded. He further referred to page number 30 of the order of the learned transfer pricing officer where Infosys BPO Ltd is considered and found to be a suitable comparable. He also referred to page number 31 of the order wherein TCS E serve Ltd is also held to be comparable. He therefore submitted that detailed reasoning is have been given by the learned transfer pricing officer which is been upheld by the learned dispute resolution panel with respect to all three comparables.

11. With respect to the various orders of the coordinate benches in assessee's own case submitted by the learned authorized

representative he referred to each of them and submitted that the coordinate bench has directed the learned transfer pricing officer to exclude all these three comparables for all the above years following comparability analysis in some other judicial precedent. He submitted that if in case of company X if comparable Y is excluded, there is no reason to exclude that comparable Y in every other case. He submitted that this is neither the essence of the comparability analysis nor it supports the logic. He submitted that for each of the comparable companies only the functions performed by the company, assets employed by the company and risks assumed by the company are required to be compared. He further submitted that judicial precedents cannot be used in such a blatant manner for exclusion of one comparable if excluded in case of one assessee to be always excluded for all other assesses.

12. The learned authorized representative submitted that the judicial precedent binds the coordinate bench if there rendered in assessee's own case. It is not fair to challenge them in some other proceedings where they need to be followed , unless those orders are challenged before the higher forum and are upset.

13. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the arguments of the learned departmental representative with respect to the comparability analysis and there cannot be any dispute with respect to that for the comparability analysis the functions performed, assets employed and risks assumed of the assessee is required to be compared strictly with each of the comparable companies. Unless they are found to be distinct, they cannot be excluded merely because they have been excluded in some other assessee's case. However in the present

case, the issue is when a particular comparable company is excluded from the comparability analysis in assessee's own case for earlier years, for whatever reasons, even if same was excluded following some judicial precedent of other assesses, judicial discipline requires that we follow the same, unless (1) specifically revenue can bring on record the difference in the functional analysis of the assessee or comparable itself with reference to those years, (2) Or those orders are upset by higher judicial forums.

It is not brought on record that those decisions in case of assessee are challenged before higher forum and are upset. In absence of this they bind us.

14. In view of this, respectfully following the decision of the coordinate benches in assessee zone case for earlier years, we direct the learned transfer pricing officer/assessing officer to exclude (1) E Clrex Services Ltd, (2) Infosys BPO Limited and (3) TCS E Serve Limited and then work out the margins of the comparable. Accordingly, ground number 2 - 3 of the appeal of the assessee is allowed."

8. Respectfully following the decision of the coordinate bench of the Tribunal in assessee's own case, we hold that the Infosys BPM Ltd. is not comparable. Accordingly, **we allow the Assessee's Grounds of appeal No.4.8.**

9. In view of exclusion of the Infosys BPM Ltd, the Counsel for the assessee substantiated the adjustment of arms length price which is as under:

Adjustment of arm's length price after excluding comparable, Infosys BPM Limited

Particulars	Reference	ROTC computed as per Ld. TPO
Operating Cost (OC)	A	1,119,475,020
Mark Up	B	11%
Price Received	C= A+(A x B)	1,245,080,117
+/-5% Benefit	D=C+[1.03 x (C)]	1,282,432,521
Arm's length ROTC after Excluding Infosys	E	14%
Arm's Length Price Received	**F=A x (1+E)**	**1,279,224,105**
No Adjustment	G	Since D>F

Company Name	Margin
Crystal Voxx Ltd.	3.57%
E-Zest Solutions Ltd	7.51%
R systems International Ltd (Seg)	18.11%
Inductis	18.68%
Manipal	23.46%
Infosys Excluded	-
Average ROTC	14.27%

Since the margin would be within plus or Minus 5%, the Assessee's international transaction is at Arm's Length, the said fact has not disputed by the Ld. D.R. Therefore, the addition made in the issue under consideration will not sustain.

10. The Grounds of appeal No. 5 to 5.4 are in respect of working capital adjustment. The Ld. AR submitted that allowing working capital adjustment which has been already allowed by the Hon'ble DRP demonstrates that differential impact of working capital of the assessee vis-à-vis its comparable has already been factored in the price/profitability of assessee which is in line with Arm's Length principle when compared to comparable companies. Therefore, any further adjustment to the income of the assessee on the pretext of outstanding receivables is unwarranted to substantiate the contention. The Ld. AR has relied on the decision of Hon'ble High Court in the case of Kusum Healthcare Pvt. Ltd. in ITA No. 6814/Del/2014 wherein it is held as follows:-

> *"**11..... With the Appellant** having already factored in the impact of the receivables on the working capital **and thereby on its pricing/profitability vis-a-vis that of its comparables,** any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterized the transaction**...(emphasis supplied).***

By respectfully following the above ratio, we also of the view that, once the impact of receivable on working capital is evaluated and the consequent profitability/pricing is compared vis-à-vis the draft comparables, there is no requirement of any further adjustment.

Accordingly, **we allow the grounds of appeal No. 5 to 5.4.**

11. **In the result Appeal filed by the Assessee is allowed.**

Order pronounced in the Open Court on this 26th day of May, 2022

Sd/- Sd/-

(R. K. PANDA) **(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 26/05/2022
*R. Naheed **

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5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI