

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

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.3713/Del./2018
(ASSESSMENT YEAR : 2012-13)**

DCIT, Circle 12 (2), vs. M/s. IQOR India Services Pvt. Ltd.,
New Delhi. P-24, Green Park Extension,
New Delhi – 110 016.

(PAN : AABCI2835F)

**CO No.143/Del/2018
(in ITA No.3713/Del./2018)
(ASSESSMENT YEAR : 2012-13)**

M/s. IQOR India Services Pvt. Ltd., vs. DCIT, Circle 12 (2),
P-24, Green Park Extension, New Delhi.
New Delhi – 110 016.

(PAN : AABCI2835F)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Rishabh Malhotra, AR
REVENUE BY : Shri Mrinal Kumar Das, Sr. DR

Date of Hearing : 31.05.2022
Date of Order : 14.07.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

The appeal by the Revenue and cross objection filed by the assessee are directed against the order of the Id. CIT (Appeals)-44, New Delhi dated 09.04.2018 for the assessment year 2012-13.

2. The grounds of appeal raised in the Revenue's appeal read as under:-

“1. Whether the Ld. CIT (A) was correct in treatment of forex gain/loss as operating by applying the decisions in the cases of Pro CIT Vs Cashedge India Pvt. Ltd., Ameriprise India Pvt. Ltd. and Fiserv India Pvt. Ltd. without noting that those decisions were based on the applicability of the Safe Harbor Rules from a later date and without discussing the merits of the matter?

2. Whether the Ld. CIT(A) erred in not appreciating the fact that the TPO followed the provision of Rule 10B(3) by Similarly treating foreign exchange fluctuation as non-operating cost/ revenue of the tested party as well as of the comparable to eliminate the difference, thereby leading to consistent and reliable basis for comparison ?

3. Whether the order of Ld. CIT(A) is perverse in rejecting the comparable M/s Infosys BPO Ltd. ignoring the fact that the company is a suitable comparable and engaged in the business of BPG service as that of the taxpayer'?

4. Whether the order of Ld. CIT (A) is perverse in rejecting the comparable M/s e4e Healthcare Services ignoring the fact that under TNMM exact comparable company is not required and broadly similar comparable is accepted for calculating the margin computation?

5. Whether the order of Ld. CIT (A) is perverse in rejecting the comparable M/s TCS E-Serve ignoring the fact that under TNMM exact comparable company is not required and broadly similar comparable is accepted for calculating the margin computation?"

3. The assessee has taken the following grounds in the cross objection:-

“1. On the facts and in the circumstances of the case and in law, the Learned ("Ld.") Commissioner of Income Tax

(Appeals) ["CIT(A)"]J, while disposing off the appeal u/s 250 of the Act, erred by remanding back the issue of computation of operating margin of Acropetal Technologies Limited to the file of Ld. Assessing Officer/ Ld. Transfer Pricing Officer and not adjudicating on the same; and

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A), while disposing off the appeal u/s 250 of the Act, erred in not granting economic adjustments (risk adjustment, etc.) on account of differences in the functional and risk profile of the Respondent vis-a-vis the comparable companies. All the above grounds are without prejudice to each other.”

4. Brief facts of the case are that iQor US Inc. is based in New York city and is a business process outsourcing company that provides call center services including customer care, customer retention, first-party receivables management, third-party collections and revenue recovery services to large and mid-sized companies. iQor India Services Private Limited, the assessee was incorporated in September 2004 to provide customer management solutions specializing in collections, accounts receivable management and customer retention services. The assessee is 100% export oriented unit. It is registered with Software Technology Parks of India. As per Form 3CEB for the Ay 2012-13, the assessee has entered into international transaction with iQor Inc USA, its Associated Enterprises (AE) by provision of IT Enabled Services (ITES) amounting to Rs.51,77,39,312/-. The Arm’s Length Price (ALP) of international transaction representing ITES provided to AE during the year was

determined by applying Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). The Operating Profit to Operating Cost (OP/OC) was Profit Level Indicator (PLI) in the TNMM analysis. The assessee was taken up as tested party. The tested party PLI was arrived at 16.85% on cost. For the benchmarking of this transaction, assessee has conducted a search on public database and arrived at a set of 7 comparables. The average PLI of the comparables were arrived at 12.94% worked out after adopting weighted averages for the current year and the immediately preceding two years. The computation was as under:-

Income	
Export of Services	517,739,312
Foreign Exchange Gain	32,965,323
Total Operating Income (A)	550,704,635
Expenditure	
Personal Expenses	337,109,983
Admin and other expenses	133,778,613
Less : Bank charges	(295923)
Depreciation	687,088
Total Operating Expenditure (B)	471,279,761
Operating Profit C=A-B	79,424,874
Op. Profit/Op.Cost (%)	16.85%

5. TPO upon enquiry and in his own analysis computed the final set of comparables as under :-

S.No.	Name of Company	OP/OC
1	Accentia Technologies Ltd.	11.95%
2	Eclerx Services Ltd.	58.4%

3	Informed Technologies India Ltd.	7.62%
4	Infosys B P O Ltd.	36.75%
5	Jindal Intellicom Ltd.	-0.05%
6	T C S E-Serve Ltd.	63.69%
7	e4e Healthcare Services Pvt Limited	19.85%
8	Acropetal Technologies Ltd. (Segment)	18.32%
	Average	27.06%

6. Apart from the above, AO in his computation has also removed foreign exchange gain from the operating income.

7. The TPO vide his order dated 29.01.2016 has enhanced the income by making adjustment of Rs.8,10,68,752/- being the ALP international transactions relating to services provided by the assessee company to its AEs.

8. First issue raised in Revenue's appeal is with regard to the treatment of foreign exchange fluctuation gain as operating income.

9. The TPO while rejecting the foreign exchange gain from operating income has relied upon the Safe Harbour Rules. The assessee's contention was that the Safe Harbour Rule was introduced in 2013 and was enforceable from the date of 18.09.2013. That, therefore, the said Rule is not applicable to the assessment year under consideration. For which proposition, decision from the Hon'ble jurisdictional High Court and the Tribunal were also quoted.

10. Ld. CIT (A) found the issue to be covered in favour of the assessee and accordingly, he held as under :-

“5.8 The contention of the appellant is supported by the judgments of the Hon'ble Delhi high court in the cases of Ameriprise India Pvt Ltd (ITA 206/2016); Cashedge India Pvt Ltd (ITA 279/2016) and Fiserv India Pvt Ltd (ITA 17/20\6). In accordance with the principle of consistency and respectfully following the order of the jurisdictional High court stated above, the AO/TPO is directed to include foreign exchange gain/Loss as non-operating while calculating the operating profit margin of both the appellant & comparable companies. The ground of appeal is decided in favour of the appellant.”

11. Against this order, Revenue is in appeal before us. We have heard both the parties and perused the record.

12. We find that the issue is covered in favour of the assessee by the decision of Hon'ble Delhi High Court cited above. Hon'ble Delhi High Court in the case of PCIT vs. BC Management Services Pvt. Ltd. in ITA 1064/2017 has expounded as under :-

“6. This Court notes that so far as the second and third questions i.e. foreign exchange and notional interest are concerned, they are no longer res integra in terms of the order made by the DB of this Court in Principal Commissioner of Income Tax Vs. Cashedge India Pvt. Ltd., ITA 279/2016 decided on 04.05.2016.

7. In Principal Commissioner of Income Tax Vs. Ameriprise India Private Limited (ITA 206/2016) decided on 23.03.2016, this Court had held that foreign exchange gains earned by the assessee which is in relation to trading items and emanating from international transactions, direct value derived from it cannot be treated as Non- Operating losses and gains.

8. This Court notices that Revenue seeks to rely on the Safe Harbour Rules which were notified by the Revenue authority and came into force in 2013. In these circumstances, given that the present assessment period covers AY 2011-12, the treatment cannot be in accordance with those rules as held in

'Principal Commissioner of Income Tax Vs. M/s Cashedge India Pvt. Ltd., ITA 27912016', decided on 04.05.2016. Consequently, no question of law arises.”

13. Thus, from the above, it is apparent that the issue is covered in favour of the assessee and the Safe Harbour Rule referred by the TPO are not applicable in the current assessment year. Hence we uphold the order of ld. CIT (A).

14. The next issue raised is that ld. CIT (A) has erred in rejecting the comparable, Infosys BPO Ltd.. The selection of Infosys BPO Ltd. was objected by the assessee before the ld. CIT (A) on the ground that the company is functionally different as it provides high end integrated services; that it has substantially high turnover; that it is an established player and market leader; that its revenue is 24 times that of the assessee; that it commanded premium prices by virtue of its brand; and submitted hence it is not comparable. For this proposition, ITAT, Delhi Bench decision in the case of Exevo India Pvt. Ltd. in ITA No.20/Del/2017 dated 30.11.2017 for AY 2012-13 was referred as under :-

“Infosys BPO Ltd.

6.6 The TPO included this company despite assessee's objections. Assessee had objected for inclusion of this company as it provides high-end integrated services in the nature of business platforms, customer service outsourcing, finance and accounting etc. it has been submitted by Ld. Counsel that this company has been excluded by this Tribunal in Exevo India (P.) Ltd. v. ITO [2016172 taxmann.com 339 {Delhi-Trib2 in assessee's own case, for assessment year 2011-12. It has been

submitted by Ld. Counsel that there has been no change in the functions of this company as well as that of assessee vis-a-vis assessment year 2011-12.

6.7 Ld. DR, however, referred to the extracts made by the Id.TPO in the order to submit that Infosys BPO Ltd. is a comparable company with that of assessee. He placed reliance upon the manner in which this company derives its revenue which has been detailed at page 494 of the financial statement placed in the paper book volume 2. Ld. DR placed reliance on the observations recorded by the DRP and TPO.

6.8 After considering the rival submissions and pursuing the relevant material on record, we find that for the year under consideration, this company is primarily into providing business process management services to organisations that outsource their business processes. It is further observed that this company has acquired hundred percent voting interest in Portland group Pty., on 04/01/12 which is a strategic sourcing and category management service provider based in Sydney, Australia. We have also perused the decision of this Tribunal in assessee's own case for previous assessment year wherein this comparable has been excluded from the list. This Tribunal has dealt with it as under:'

'6.6. After considering the rival submissions and perused in the relevant material on record, we find that for the year under consideration this company has had extraordinary financial events. It is noted that the company is providing high end integrated service by assisting its clients in improving their competitive positioning by managing their business process in addition to providing increased value. On the other hand, assessee is engaged in providing routine support services in the nature of data collection and analysis which is low end in nature bearing minimal risks.

6.6. Ld. A.R. has rightly placed his reliance upon the decision of Agnity India Technologies Pvt. Ltd. passed by Hon'ble Delhi High Court in I.TA.No. 3856/2010 wherein, it has been held that this comparable must be rejected on account of difference in risk levels assumed, huge revenues derived and

the fact that they are market leaders. Hon'ble court held as under:

"it is argued that the case of assessee is not comparable with Infosys Technologies Ltd., the reason being that the latter is giants in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited currency risk. Having considered these points, we are of the view that the case of aforesaid Infosys and the assessee are not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in this order. Therefore, we are of the view that this case is required to be excluded. "

6.7. Since there is no similarity in the functional profile of this company and assessee respectfully following the ratio laid down in Agnity India Technologies (supra), we direct the Ld. TPO/AO to remove this company from the list of comparables.

6.9 Ld. DR has not been able to bring out any distinguishing feature in the functions of this company vis-a-vis previous year. Respectfully following the same we do not find any reason to differ from the above. Accordingly we direct Ld. TPO to exclude this company from the list of comparables."

(c) In accordance with the principle of consistency and respectfully following the order of the Hon'ble ITAT in the case of Exevo India Pvt Ltd. (supra) the AOITPO is directed to exclude Infosys BPO from the final set of comparables. The issue is decided in favour of the appellant."

15. Against this order, Revenue has filed appeal. We have heard both the parties and perused the records.

16. Ld. counsel of the assessee reiterated the submissions as above. He further submitted Infosys BPO Ltd. on similar grounds has been excluded in other decisions as under :-

- (i) BT e-Serv (India) (P.) Ltd. vs. ITO (2019) 101 taxmann.com 275 (Delhi-Trib);
- (ii) Baxter India (P.) Ltd. vs. ACIT (2017) 85 taxmann.com 285 (Delhi-Trib).

17. Upon hearing both the parties and perused the record, we find that in view of the aforesaid decision of the ITAT, the issue stands covered in favour of the assessee. No contrary decision has been cited before us. Accordingly, we uphold the order of Id. CIT (A).

18. The next issue raised in Revenue's appeal is that Id. CIT (A) has erred in excluding the comparable, e4e Healthcare Services.

19. The AO has included this comparable. Before the Id. CIT (A), assessee stated that this company is functionally different as it is engaged in healthcare services as evident from the annual return kept in the paper book. For this proposition, ITAT, Delhi Bench decision in the case of Bechtel India in ITA No.1478/Del/2015 dated 21.12.2015 for AY 2010-11 was cited. Id. CIT (A) referred to the aforesaid decision of the ITAT as under:-

"(3) E4e Healthcare Business Services Private Limited

This company has been included by the Id. TPO as a comparable. Functionally the company is into health care outsourcing services and in addition it also renders software development services. It is also observed that segmental information in respect of this company is not available. The company is also a 100% EOU, under STPI guidelines. We are therefore inclined to accept the contention of the assessee that

this company should be excluded as a comparable. Hence we direct the Assessing Officer to do so.”

20. Finding the facts of the case similar to this case, ld. CIT (A) decided the issue in favour of the assessee.

21. Against this order, Revenue has filed appeal. We have heard both the parties and perused the records.

22. Ld. counsel of the assessee reiterated the submissions before the ld. CIT (A). No contrary decision has been cited before us. Hence, respectfully following the precedent as above, we uphold the order of ld. CIT (A).

23. The last issue in Revenue’s appeal is that ld. CIT (A) has erred in excluding the TCS E-Serve.

24. The TPO has rejected this comparable. Before the ld. CIT (A), assessee submitted that this company is functionally different as it is engaged in providing high end ITES; that its operating revenue is 29 times that of the assessee; that it makes payment for the brand ‘TATA’; that it owns intangibles in the form of software licenses; that its margins at 63.69% are abnormally high. For this proposition, the decision of ITAT in the case of Exevo India Pvt. Ltd. vs. DCIT in ITA No.20/del/2017 dated 30.11.2017 for AY 2012-13 was cited as under :-

“6.10 The ld. TPO had included this company as a comparable, despite objections by the assessee. The assessee objected the

inclusion of this company, as it provided financial information processing and customer contact services with high-level of foreign expenditure and abnormal profits. Further Ld. Counsel submitted that this company has been excluded by this Tribunal in ITA No. 9071del12016 vide order dated 25/07116 in assessee's own case for assessment year 2011-12.

6.11 Ld. DR, referred to observations by the Id. TPO in the order to submit that TCS E Serve Ltd., is a comparable company with that of assessee. He submitted that the functions of this company has changed which is evident from page 177 of the paper book volume wherein the principal activity of this company has been characterized as under:

"TCS E-serve Ltd (the company) along with its subsidiary TCS E serve international Ltd (TEIL) and TCS e-Serve America Inc., (TEAI) is primarily engaged in the business of providing business process service (BPO) its customers in banking, financial services and insurance domain. "

6.12 After considering the rival submissions and perusing the relevant material on record, we find that the financial results of this company shows that this company is into financial services to help its customers achieve their business objectives by providing innovative best in class services. The Ld. AR submitted that the DRP had excluded this company in the immediately preceding previous year. It is observed at page 159 of paper book volume 2 that this company's operation include delivering core business processing services, analytics and insights (KPO) and support services for both data and voice process. It has also been categorized as an integral part of the Tata Consultancy Services (TCS) strategy to build on its full- service offerings that offer global customers and integrated portfolio of services ranging from IT services to BPO services. It provides its services from various processing facilities, backed by a robust and scalable infrastructure network tailored to meet clients' needs.

6.13 The above function performed by this company differentiates it with the functions performed by assessee before us for the year under consideration. Hence following the rule of consistency, we are of the opinion that this company cannot be considered as comparable for the year under consideration. We therefore direct to exclude this comparable."

25. Following the above, Id. CIT (A) decided the issue in favour of the assessee. Against this order, Revenue has filed appeal. We have heard both the parties and perused the record.

26. Ld. counsel of the assessee reiterated the submissions made before the Id. CIT (A) and submitted that the above finding of Id. CIT (A) is consistent with the annual report of the comparable, which is at page 140 of ARC, under the head “Company Overview” that the company’s operations include delivering core business processing services, analytics & insights (KPO) and support services for both data and voice processes. He further submitted that on similar reasoning, TCS E-Serve has not been found to be valid comparable in similar decisions by following decisions of ITAT :-

- (i) BT e-Serv (India) (P.) Ltd. vs. ITO (2019) 101 taxmann.com 275 (Delhi-Trib.);
- (ii) Baxter India (P.) Ltd. vs. ACIT (2017) 85 taxmann.com 285 (Delhi-Trib.).

27. No contrary decision has been cited on behalf of the Revenue.

28. In view of the decision of the coordinate Bench of the ITAT, we uphold the order of Id. CIT (A) excluding the above comparable from the valid comparables.

29. In the result, the appeal of the Revenue stands dismissed.

30. Since the issues raised in the Revenue's appeal have been rejected, the issue raised in the cross objections by the assessee is only academic interest and we are not going into the same. Moreover in this written submissions, assessee has not submitted any further in this regard. Hence, the cross objections filed by the assessee is dismissed as infructuous.

Order pronounced in the open court on this 14th day of July, 2022.

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 14th day of July, 2022
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-44, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
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