

आयकरअपीलीयअधिकरण, 'डी'न्यायपीठ,चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI**

श्रीमहावीर सिंह, उपाध्यक्ष एवंश्री मनोज कुमार अग्रवाल, लेखा सदस्यके समक्ष
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A No.:761/CHNY/2017

निर्धारण वर्ष/ Assessment Year 2012 – 2013

M/s. MPS Limited,
RR Tower IV, Super A,
No.16/17, Thiruvika Industrial Estate,
Guindy, Chennai – 600 032.

Vs. The Deputy Commissioner of
Income Tax,
Corporate Circle – 4(1),
Nungambakkam High Road,
Chennai – 600 034.

PAN : AAACM 2423L

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थीकीओरसे/Appellant by : Mr. S.P. Chidambaram, Advocate
प्रत्यर्थीकीओरसे/Respondent by : Shri. M. Murali, CIT

सुनवाई की तारीख/Date of Hearing : 12.07.2022
घोषणा की तारीख/Date of Pronouncement : 20.07.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VP:

This appeal by the Assessee is arising out of the final Assessment Order passed by the Deputy Commissioner of Income Tax, Corporate Circle – 4(1), Chennai u/s.143(3) r.w.s.144C(13) of the Income Tax Act, 1961 (hereinafter "the Act), order dated 31.01.2017 for the Assessment Year 2012-2013 in pursuance to the directions issued by the Dispute Resolution Panel-2, Bengaluru u/s. 144C(5) of the Act vide

directions dated 22.11.2016. The draft assessment order was framed by the Assistant Commissioner of Income Tax, Corporate Circle-4(1), Chennai u/s.144C(1) of the Act vide order dated 30.03.2016 to give effect to the order of the Transfer Pricing Officer-2(2) [TPO], Chennai vide No.F.No.M-502/TPO-2(2)/A.Y.2012-13; order dated 22.01.2016 u/s.92CA(3) of the Act for making an upward transfer pricing adjustment.

2. The first issue raised by the Assessee is as regards to the order of the Assessing Officer / Transfer Pricing Officer in pursuance to the directions issued by the Dispute Resolution Panel resulting in the adjustment to the value of international transaction of the Information Technology Enabled Services (ITeS) provided to its Associated Enterprises (AEs) which is contrary to the facts and circumstances and in law. For this, the Assessee has raised various grounds numbering from 2 to 2.6 where various facets of arguments are narrated which need not be reproduced.

3. The learned Counsel for the Assessee at the start of the hearing had made only one submission that the Bench can hear

in respect of the exclusion of two comparables; i.e., Cosmic Global Limited and Infosys BPO Limited. The learned Counsel for the Assessee took us through the TPO's order and the order of the Dispute Resolution Panel [DRP] and stated the facts in regard to the Cosmic Global Limited and as to how this comparable cannot be compared with the Assessee and that it should be rejected.

3.1 The learned Counsel for the Assessee stated that Cosmic Global Limited is engaged in the business of providing Translation, Transcription and Accounts processing services. He further stated that on perusal of the Annual Report, it could be observed that the income from the Medical Transcription and Consultancy Services aggregate to an amount of Rs.12.64 lakhs; whereas the income from the Translation Services aggregate to an amount of Rs.9.93 crores which is approximately 96% of the total revenue. The learned Counsel for the Assessee further pointed out that the learned TPO had clearly stated that in Note No.29 of the financial statement, it is stated that the company's revenue was mainly from the Translation Services and the revenue from other services are

less than 10% of the total revenue and hence, reporting under AS-17 Segment was not made. It is stated that the company has a portal named as "artlogin.com" which is developed, launched and maintained by the company.

3.2 However, it is contended that while considering Cosmic Global as a comparable company, due consideration is to be given to the fact as the company possesses brand value / IPR's which would tend to influence the pricing policy and thereby directly impacting the margins earned by the company. Further, the learned Counsel pointed out that the order of the TPO stated that the functional profile of the company, which is into translation business is entirely different, as the company is into pre-publishing business and therefore cannot be considered as a comparable. However, he stated that the learned TPO has accepted this company only on the ground that the same was originally included in the list of comparable in the Transfer Pricing Report. However, the learned TPO has highlighted that at the time of preparation of the Transfer Pricing Report, the Assessee did not have access to the financial statements of the company. The learned Counsel for the Assessee further stated

that during the assessment proceedings, the financials of the company was available in the public domain and on perusal of the same, it was noted that the company was mainly into the business of translation services and that the business model is such that it outsourced its translation business which is different from that of the Assessee.

4. Further, the learned Counsel for the Assessee took us through the DRP's order and read out paragraph no.3.2 wherein adjudication is done by the Dispute Resolution Panel [DRP] which reads as under:

"3.2 The Panel has already held that the functions of the Assessee are fairly complex and diverse. Making MIS, a complex presentation, etc., for the AE is fairly complex in nature. These are jobs requiring highest levels of skills. Accordingly, the Panel holds that the functions of the Assessee are complex and need very high degree of skill sets. The Assessee has not given any correlation between the outsourcing and the operating margin. Translation charges do not mean that work is being outsourced which is not indicated otherwise in the report. It is also seen that under TNMM only broad functional comparability to be considered and not precise matching. In addition to this it was Assessee's own comparable. The panel holds the Cosmic Global Limited is a valid comparable and the objections are rejected."

5. In view of the above, the learned Counsel for the Assessee stated that the comparable included by the Revenue on Cosmic Global Limited is to be rejected.

6. On the other hand, the learned CIT-DR, Mr. M. Murali relied on the order of the Transfer Pricing Officer and that of the Dispute Resolution Panel for inclusion of this comparable.

7. We have heard the rival contentions on this issue and had gone through the facts and circumstances of this case. We noted that the majority of the revenue of Cosmic Global Limited is from translation services which is apparently outsourced. The Assessee before us had filed the Profit and Loss [P&L] Statement which includes at Page No.76 of the Assessee's paper-book where the cost of material consumed is reflected at Rs.4.19 cores and corresponding Schedule No.15 "Cost of Services Availed" at Page No.80 shows the same as Translation charges paid vis-à-vis the total expenses in the P&L Account at Rs.7.49 crores. According to the Assessee, the translation charges paid constitutes almost 56% of the Assessee's work which is out-sourced. The learned Counsel for the Assessee stated that this issue has been accepted by the Revenue in the Assessment Year 2010-2011; wherein the Tribunal has set aside the matter in its order vide I.T.A. No.963/Chny/2015; dated

03.04.2018 and subsequently also the Tribunal in I.T.A. No.1386/Chny/2014 for the Assessment Year 2009-2010 vide order dated 31.01.2022 remitted the matter back to the TPO/AO by following the future year's Tribunal's order of 2010-2011. We noted that the Tribunal in I.T.A. No.963/Chny/2015 for the Assessment Year 2010-2011 vide order dated 03.04.2018 has remitted the matter back to the file of the Assessing Officer. We noted that the Tribunal vide Page No.6 remitted the issue of Cosmic Global Limited which is discussed in paragraph no.3 and finally remitted the matter back vide paragraph no.6, as under:

"6. We heard the rival submissions. Since, the Assessee has furnished the required particulars and relying on the decisions of the Tribunal / High Court, we remit the issues in connection with the above comparables to the TPO / AO for a fresh examination. In respect of the comparables, Caliber Point Business Solutions Limited & R Systems International Limited, the Assessee shall furnish comparables data for the verification of the TPO. The TPO shall decide as to whether the above comparables are to be included or to be excluded, as the case may be, in accordance with law, after affording adequate opportunity to the Assessee. The Assessee's corresponding grounds are treated as allowed for statistical purposes."

8. The learned Counsel for the Assessee then took us through the TPO's order giving appeal effect to the Tribunal's order for the Assessment Year 2010 – 2011 vide order No.

ITBA/TPO/F/92CA3/2019-20/1019437506(1); dated 25.10.19;
wherein the Assessing Officer has excluded M/s. Cosmic Global Limited from the comparables vide paragraph no.3, as under:

“3. The Hon’ble Tribunal, in its order ITA No.973/Chny/2015; dated 03.04.2018 has remitted the matter to the file of the TPO for the verification of the following comparable companies:

- a. M/s. Cosmic Global Limited
- b. M/s. Fortune Infotech Limited
- c. M/s. Jeevan Scientific Technology Limited
- d. M/s. Caliber Point Business Solutions Limited &
- e. R Systems International Limited

The contention of the Assessee to exclude M/s. Cosmic Global Limited and M/s. Fortune Infotech Limited from the list of comparable company is accepted.”

We noted that this year there is no difference on facts as is observed from the TPO’s order as well as the DRPs order and the facts being exactly identical, we direct the Assessing Officer to exclude this comparable while benchmarking the transaction.

9. The next comparable argued by the learned Counsel for the Assessee is as regards to the exclusion of Infosys BPO Limited. The learned Counsel for the Assessee stated the facts that Infosys BPO was incorporated in April 2002 as “Progeon Limited” as the business process outsourcing subsidiary of Infosys Limited (“Infosys”). Infosys BPO is backed by the

parent Infosys Technologies Limited to offer an integrated IT-BPO deliver model designed for 'one stop shop' solution model which helps managing the entire outsourcing operational chain of IT and process management services. Infosys BPO provides services to horizontal and vertical focus areas which comprises mainly of Sourcing and Procurement, Customer Service, Finance and Accounting, Knowledge Services, Human Resources, Banking and Capital Markets, Communication Media and Entertainment Manufacturing, Emerging Market Solutions, Insurance and Healthcare, Retail, Energy, Utilities and Resources, Automotive and Aerospace, Transportation and Services.

9.1 The learned Counsel for the Assessee also stated that according to the NASSCOM ranking, Infosys BPO is ranked as the Top-10 third party BPO companies in India as their main focus is on end-to-end outsourcing and is amongst the most profitable BPO companies in India. He also stated that Infosys BPO provides BPO solutions to their clients and their services are spread across multiple industry segments. The learned Counsel for the Assessee reiterated that Infosys BPO is

predominantly into the areas like Insurance, Banking, Financial Services, Manufacturing and Telecom which are the niche areas.

9.2 The learned Counsel for the Assessee then took us through the findings of the Dispute Resolution Panel [DRP] for inclusion of this comparable, i.e., Infosys BPO Limited which is noted at paragraph no.4.7.2, as under:

“4.7.2 In view of the above and in absence of any evidence that the high or low turnover has influenced operating margin and also in absence of any direct relation between the turnover and the margin, the objections raised by the Assessee regarding the turnover and size and the consequent request for application of the turnover filter are non-acceptable and are hereby rejected.”

Hence, the Infosys BPO Limited was included as comparable.

10. The learned Counsel for the Assessee stated that functionally Infosys BPO Limited is incomparable to the Assessee, since it is a big / giant company. According to him, this company operates in various areas like Insurance, Banking, Financial Services, Manufacturing and Telecom, whereas the Assessee is rendering only routine and simple Information Technology Enabled Services (ITeS). According to the learned

Counsel for the Assessee, the Infosys BPO Limited possesses high brand value which will have significant influence in its business operation and pricing policy; whereas the Assessee is a very unknown company. He also stated that the Infosys BPO Limited had incurred huge expenditures for selling and marketing, i.e., Assessee transacts with its Associated Enterprise and does not incur such expenses. The turnover filter also fails as upper turnover more than eight times.

11. On the other hand, the learned CIT-DR heavily relied on the order of the Transfer Pricing Officer [TPO] as well as the Dispute Resolution Panel [DRP].

12. We have heard the rival contentions and had gone through the facts and circumstances of the case. We noted that this issue is squarely covered by the decision of the Bangalore Bench of the Tribunal in the case of VWR Lab Products (P.) Limited Vs. Assistant Commissioner of Income Tax, Circle - 7(1)(2) reported in I.T.(TP)A. No.779 (Bang.) of 2017 / [2020] 116 Taxmann.com 244 (Bangalore - Trib.); wherein the Tribunal has considered exclusion of Infosys BPO Limited and by following the decision of the Delhi Tribunal in the case of Baxter

India Private Limited Vs. Assistant Commissioner of Income Tax in I.T.A. No.6158/Del/2016 for the Assessment Year 2012-2013 directed the Assessing Officer / TPO that this company is functionally not comparable and for this the Tribunal had recorded the findings in paragraph no.8, as under:

"8. (b) Infosys BPO Ltd.

Assessee objected for inclusion of this comparable primarily on the basis of functional incompatibility presence of intangibles. It has been submitted that this company owns huge brand and not a fit compara for company like assessee, who provide captive service to its AE's.

Ld. CIT DR opposed the exclusion and placed reliance upon. orders passed by authorities below.

We have perused submissions advanced by both sides in the light of the records placed before us. Assessee placed reliance upon decision of this Tribunal in case of Zyme Solutions (P.) Ltd. v. Asstt. CIT [2019] taxmann.com 495 (Bang.-Trib.), wherein this comparable has been excluded by observing as under:

'5. We have heard the rival submissions on the comparability of Infosys BPO as a comparable company. Delhi ITAT in the case of Baxter India Pvt. Ltd. v. ACIT ITA No.61 Del/2016 for AY 2012-13 in the case of a company rendering ITES such as the Assessee. Vide order dated 24.8.2017 Paragraph-23 held that Infosys BPO is not comparable with a company rendering ITES for the following reasons:

"23. In so far as exclusion Infosys BPO Ltd. is concerned, we find from the submissions made by assessee before the Assessing Officer/TPO/DRP is that Infosys BPO Ltd. is predominantly into areas Insurance, Banking, Financial Services, Manufacturing and Telecom which are in the niche areas, un

the assessee. Further it was also submitted that the Infosys BPQ Ltd. comprises brand value which tend to influence its business operation and the pricing policy thereby directly impacting the margins earned by the Infosys BPO Ltd.. We find the submissions of the Id. counsel for the assessee before the TPO/DRP that in order to maintain the brand image of Infosys BPQ Ltd. in the market, the comp incurs substantial selling and marketing expenditure whereas the assessee being a contract service provider does not incur such expenses to maintain its brand has not been controverted by them. Further, Infosys BPO Ltd. being a subsidiary of Infosys has an element of brand value associated with it. This be further confirmed by the presence of brand related expenses incurred by Infosys BPO Ltd. Further, Infosys BPO Ltd. has acquired Australian based company M/s Portland Group Pty Ltd. during financial year 2011-12. They provide sourcing and category management services in Sydney, Australia. Therefore, this company also failed the TPO's own filter of rejecting companies with peculiar circumstances. view of the above i.e. functionally not comparable, presence of brand and extraordinary event that taken place during the year on account of acquisition of Australian based company, we are of considered opinion that Infosys BPO Ltd. should not be included in the list of comparables. accordingly direct the Assessing Officer/TPO to exclude Infosys BPO Ltd. from the list of comparables for the purpose of computing the average margin."

2. It was also brought to our notice that the Hon'ble Delhi High Court in ITA No.260/2018 in the appeal filed by the Revenue against the aforesaid order dismissed the appeal at the admission stage observing that rationale given by the ITAT for exclusion was correct. In view of the aforesaid decision, we direct the exclusion of Infosys BPO from the list of comparable companies chosen by the TPO.

From the above, it is clear that this company is functionally not comparable with captive service provider.

Respectfully, following the same, we direct that this company to be excluded from the list of comparables."

12.1 As the issue is fully covered in favour of the Assessee, respectfully following the decision of the Co-ordinate Bench of the Tribunal, we direct the Assessing Officer / TPO to exclude this comparable while benchmarking the transaction. Since, these two comparables will bring the Transfer Pricing adjustment within the range, the learned Counsel for the Assessee has not argued any other exclusion or inclusion.

13. The next issue in this appeal of the Assessee is as regards to the disallowance of marked to market loss under normal provisions as well as the Minimum Alternative Tax [MAT] provisions, i.e. Section 115 JB of its book-profit. For this, the Assessee has raised various grounds from Ground Nos.3 to 3.6 and 4 to 4.5 which need not be reproduced.

14. The brief facts are that the Assessee has claimed marked to market loss in the Profit and Loss [P&L] Account of Rs.338.70 lakhs. The Assessing Officer simply relying on the CBDT

Instruction No.3/2010 disallowed the marked to market loss as not allowable expenditure. The Assessing Officer noted that in view of the CBDT Instructions, the above loss is not an allowable expenditure even while computing the profit under regular assessment as well as while computing the book profit u/s.115 JB of the Act. The Dispute Resolution Panel [DRP] directed the Assessing Officer to verify the existence or absence of forward contract and further directed to allow the loss only on the basis of actual realization as termination of the contracts before the end of the financial year. The DRP's direction to the Assessing Officer recorded at paragraph no.9.1 of its order is as under:

"9.1 Panel: The Assessing Officer is hereby directed to verify the existence or absence of forward contract. In case of forward contract being present, the Assessing Officer is hereby directed to allow the loss only on the basis of actual realization as termination of the contracts before the end of the financial year.

In this aspect, the Department's stand on this issue is very clear that exchange losses are to be recognized only in the year of actual payment / termination. The claim of 'Marked to Market Losses' be it for hedging for speculation, is notional and disallowable as per CBDT Instruction No.03 of 2010 dated 23.03.2010.

As seen from the CBDT Instruction No.03 of 2010, 'Marked to Market losses' are 'notional' and 'contingent' despite the claim of 'Marked to Market' statement being a transparent accounting practice. In terms of this Instruction even actual losses i.e. hedge loss are allowable as non-speculative only if

the transaction quality under Clause (d) of the proviso to Section 43(5). "Marked to Market" losses claimed as notional losses prior to settlement has to be treated as speculative loss in terms of Section 43(5). The action of Assessing Officer is as per law and objections under normal provisions of the Act as well as under 115JB are rejected."

Aggrieved, the Assessee is in appeal before the Tribunal.

15. We have heard the rival contentions and had gone through the facts and circumstances of the case. The learned Counsel for the Assessee stated the facts that during the subject Assessment Year 2012-2013, the Assessee had entered into a forward contracts with Banks based on its past performance to mitigate its exposure to loss on foreign exchange fluctuation on account of the unrealized export sales. At the end of the financial year, it is stated that the value of the unrealized export sales, i.e. debtors was revalued as on the reporting date, i.e. last day of the financial year and the loss or gain was accounted for in the books. The learned Counsel for the Assessee stated that the Assessee has to mandatorily follow the Accounting Standards (AS) issued by the Institute of Chartered Accountants of India (ICAI) and by virtue of the provisions of the Companies Act, it was obliged to make a

market valuation of the forward contract covers as on the reporting date and account for the same in the books to comply with the accounting standards. Accordingly, the Assessee had recognized and accounted for the MTM loss of Rs.3,38,70,000/- in the books of accounts for the year ending 31.03.2012.

15.1 The learned Counsel for the Assessee relied on the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Woodward Governor India Private Limited reported in [2009] 312 ITR 254 (SC). The learned Counsel for the Assessee stated that the Assessee has been consistently following this approach and in fact, the very same amount is reversed and offered to tax in the Assessment Year 2013-2014. The Assessee enclosed the Cash-Flow Statement from the Annual Report, wherein it is apparently evident that the same amount is shown as negative figure as on 31.03.2013 and as a positive figure as on 31.03.2012.

16. On the other hand, the learned CIT-DR, Shri. M. Murali relied on the order of the TPO and that of the DRP.

17. We have heard the rival contentions and had gone through the facts and circumstances of the case. It is clear that the Assessee has reversed the loss claimed in the next year and offered to tax. On this very count, the addition cannot be made. Secondly, this issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Woodward Governor India Private Limited (supra); wherein it is held as under:

"For valuing the closing stock at the end of a particular year, the value prevailing on the last date is relevant. This is because profit/losses embedded in the closing stock. While anticipated loss is taken into account, anticipated profit in the shape of appreciated value of the closing stock is not brought into account, as no prudent trader would care to show increase in profits before actual realization. This is the theory underlying the rule that closing stock is to be valued at cost or market price whichever is lower."

As the Assessee is consistently adopting the policy as and when losses arise, the same is disclosed as loss earned and is a claimed deduction. Hence, we allow the claim of the Assessee. Since we have allowed the claim of the Assessee on merits on regular assessment, similar to the decision on computing the book-profit u/s.115JB of the Act, the appeal of the Assessee is partly allowed.

18. In the result, the appeal of the Assessee in I.T.A No.:761/CHNY/2017 is partly allowed.

Order pronounced in the court on 20th July, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 20th July, 2022

IA, Sr. PS

आदेशकीप्रतिलिपिअग्रेषित/**Copy to:** 1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF