

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

IT(TP)A No.392/Bang/2021
Assessment Year : 2004-05

M/s. Dell International Services India Pvt. Ltd., <i>(Formerly known as Dell Computer India Pvt. Ltd.,)</i> 12/1A, 12/2A, 13/1A, Diyashree Greens, Challaghatta Village, Varthur Hobli, Bengaluru-560 071. PAN : AAACH 1925 Q	Vs.	The Deputy Commissioner of Income Tax, Circle – 2(1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Tanmayee Rajkumar, Advocate
Revenue by	:	Shri. Sumer Singh Meena, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	26.09.2022
Date of Pronouncement	:	28.09.2022

ORDER

Per N. V. Vasudevan, Vice President:

This is an appeal by the assessee against the Final Order of Assessment dated 26.04.2021, passed by the DCIT, Circle – 2(1)(1), Bengaluru, under section 143(3) r.w.s. 144C r.w.s. 254 of the Income Tax Act, 1961 (hereinafter called the ‘Act’) in relation to Assessment Year 2004-05.

2. The assessee is the subsidiary of Dell International USA and is engaged in the provision of call centre support services, back-office support services and offshore development support services [Software Development (“SWD”)] to its associated enterprises (“AEs”). The assessee provided the aforesaid services to

its Associated Enterprise (AE's) and therefore income from providing "Call Support Services", "Back-office Support Services" and "Offshore Development Support Services", had to be determined having regard to Arm's Length Price (ALP) as laid down in Sec.92 of the Act.

3. During the Assessment Year 2004-05, the Transfer Pricing Officer (TPO) vide order dated 15.12.2006 passed u/s.92CA of the Act, determined ALP of the aforesaid 3 international transactions and consequently additions were made to the total income by way of transfer pricing adjustment towards the call centre support services, back-office support services segments and SWD segments. Thereafter, an Assessment Order dated 27.12.2006 came to be passed incorporating the aforesaid TP adjustment. Aggrieved by the aforesaid assessment order, the assessee preferred an appeal before the CIT(A), who vide order dated 26.03.2009 upheld the TP adjustment. Aggrieved, the assessee preferred an appeal before the Tribunal. Upon hearing the parties, the Tribunal vide order dated 21.04.2017 in IT(TP)A No.699/Bang/2009 granted partial relief. However, the Tribunal remanded the matter to the file of the TPO for fresh de novo consideration with respect to determination of arm's length price for "back-office support services" segment.

4. On remand, the TPO determined the call centre support services to be at arm's length while made an adjustment towards the back-office support services and SWD services.

5. Consequently, a draft assessment order dated 17.02.2020 came to be passed in which the aforesaid TP adjustment was incorporated. Aggrieved, the Appellant filed its objections before the Dispute Resolution Panel ("DRP"),

which vide order dated 18.03.2021 granted partial relief to the Appellant in terms of which the SWD segment was held to be at arm's length. However, the DRP upheld the adjustment made towards the back-office support services segment.

6. Thereafter, the AO passed the final assessment order dated 26.04.2021 in line with the DRP's directions. Aggrieved by the final assessment order, the Appellant has preferred the present appeal before this Tribunal.

7. Therefore, in this appeal, we are required to consider the determination of ALP of the back-office support services rendered by the assessee for which the assessee received payments from its AE. In so far as the international transactions of rendering back-office support services is concerned, the assessee as well as the TPO chose Transaction Net Margin Method (TNMM) as the most appropriate method for determining the ALP. The Profit Level Indicator (PLI) chosen for the purpose of comparison of the assessee's margin with that of the comparable companies was operative profit / operating cost (OP/OC). The assessee chose 5 comparable companies in its TP study and the TPO chose 7 comparable companies. The comparable companies chosen by the assessee were rejected by the TPO and the TPO selected 5 comparable companies and computed the ALP of the international transaction as follows:

Comparables selected by TPO and their arithmetic mean:

Sl. No.	Name of the Company	OP/OC (WC-unadj) (in %)
1	ABB Global Inds. & Services Private Ltd.	10.75
2	Concentrix Daksh Services India Private Ltd.	26.77

3	Convergys India Services Private Ltd.	12.34
4	Sitel India Private Ltd.	2.56
5	Tricom India Ltd.	46.20
Average PLI		19.72

Computation of arm's length price by the TPO and the adjustment made:

Average PLI	19.72%
Less: Working Capital Adjustment	2%
Adjusted average of the comparables	17.72%
Operating Cost	Rs.25,98,63,000/-
Arm's Length Revenue – 117.72% of Operating Cost	Rs.30,59,10,723/-
Revenue Received	Rs.27,12,46,000/-
Shortfall being adjustment u/s. 92CA	Rs. 3,46,64,723/-

8. The addition of Rs.3,46,64,723/- consequent to determination of ALP by the TPO was incorporated by the AO in the draft order of assessment. The assessee filed objections before the DRP against the said draft order of assessment but the DRP rejected the contentions of the assessee and upheld the order passed by the TPO. Pursuant to the directions of the DRP, the AO passed the final assessment order wherein, the TP adjustment was sustained. Against the final order of assessment passed by the AO, the assessee has preferred the present appeal before the Tribunal.

9. At the time of hearing of this appeal, the learned counsel for the assessee submitted that the grounds of appeal which are being pressed for adjudication/consideration are the grounds with regard to including **Concentrix Daksh Services India Private Ltd.** and **Tricom India Ltd.** (Ground No. 2.2.1.4).

10. In so far as exclusion of the comparable company, **Concentrix Daksh Services India Private Ltd. (“Concentrix”)**, is concerned, the learned counsel for the assessee submitted that this company is engaged in wide range of services including BPOs, KPOs, ITeS and transcription, which is functionally dissimilar to the Assessee. It was submitted that Concentrix undertakes research and development activities which resulted in a substantial increase in its profit margin. It was submitted that Concentrix own significant intangibles amounting to around 2.08% of total assets, which is 8.01% of total sales. Further, during the year under consideration, the company entered into a share purchase agreement with the IBM group, which is an extraordinary activity having a significant impact on its financial performance. It is also submitted that the company recorded an abnormal growth of 93.91% of its revenue between financials years 2002-03 and 2003-04 which translated into an abnormal growth of 75.48% in profits before taxes. Further, it was submitted that the TPO has himself agreed that Concentrix is engaged in BPO, KPO, ITEs and transcription services and therefore, in principle accepting that the company is not functionally comparable to the Appellant. Submissions in this regard are placed at pages 118 -120 and 287-290 of the appeal set. Annual report of the company is available at pages 162-215 of the Paper Book. In view of the above, it is submitted that Concentrix ought to be excluded from the final list of comparables.

11. We have carefully considered the submissions. In so far as the plea of the assessee for rejection of Concentrix Daksh Services India Pvt. Ltd., is concerned, it is seen that the nature of the back-office share services performed by the assessee as contained in the assessee’s TP study which was undisputed by the AO and the same is as follows:

Back Office (Shared) Services

- (a) Order Processing

- (b) Rebate/Credit Processing (Post Sales Activity)
- (c) Cash application
- (d) Collection Follow up

The TPO proposed Concentrix as comparable company and the assessee objected to the said company being chosen as a comparable company by pointing out that this company was functionally dissimilar and was engaged in R & D activities besides owning intangibles. This plea was however rejected by the TPO with the following remarks:

“The company engaged in BPOs, KPOs, ITES and Transcription etc. The assessee has not demonstrated that how the engagement in R & D has impacted the profit margin percentage. Also the assessee has not come up with reliable data which proves that the year in which no involvement was made in R&D, the assessee earned less percentage of profit margin and the year in which assessee made involvement in R&D then was substantial increase in the profit margin percentage of the assessee. It is a fact that an ITES company uses software as a platform to deliver services. Such software could either tip indigenously developed or purchased. Therefore, the presence of software is an essential requirement to function and not an unusual asset.”

12. In the submissions made before the DRP, the assessee, apart from reiterating stand taken before the TPO also pointed out that certain extraordinary events took place during the previous year in as much as there was a takeover of Concentrix by the IBM. The contention of the assessee before the DRP and the remand report of the AO was considered by the DRP and the DRP upheld the inclusion of Concentrix. The AO in the remand report before the DRP submitted that the assessee has not demonstrated that how the engagement in R&D has impacted/identified as to how the engagement in R & D has impacted the profit margin percentage. Also, the assessee has not come up reliable data in which involvement was made in R&D results in substantial increase in the profit margin percentage. It is a fact that an ITES company uses software as a platform to deliver services. Such software could be indigenously developed or purchased. Therefore, the presence of software is an essential

requirement to function and not an unusual asset. As regards the presence of extra ordinary event, the TPO has pointed out that from the notes to the accounts in the Annual Report. schedule 19 point no 10 it is noticed as under:

"Subsequent to the year-end the company and its shareholders have entered into a share purchase agreement with IBM World trade corporation (IBM). Under the agreement, IBM would acquire all the shares of the company from its existing shareholders. This share purchase is subject to closures on happening of certain events and acquiring all requisite approvals".

The AO has opined that the so called extra ordinary event took place after the relevant previous year and has no impact on profit margin percentage

13. In its reply to the remand report, the assessee pointed out that in principle the TPO/AO has accepted that Concentrix is engaged in BPO, KPO, ITeS, transcription, etc. Thereby, in principle agreeing that it is not functionally comparable to the assessee which is into low end BPO services. It was also highlighted that functionally dissimilarity in the sense that Concentrix was engaged in diversified activities and owned intangibles and the fact that concentrix undertook specific areas undertakes R&D and owned intangibles of INR 55,416,257/, was also highlighted It was reiterated that Extra-ordinary activity viz., Agreement for sale of shares of Concentrix to IBM had impact on revenue and profits of concentrix abnormally increased by 93.91% and 75.48% respectively, in FY 2003-04 vis-a-vis FY 2002-03.

14. The DRP however upheld the inclusion of Concentrix by the TPO on the ground that it was functionally similar as the assessee was also engaged in BPO, KPO. ITeS, transcription. etc. The DRP also held that the assessee has not demonstrated how R&D activities have influenced the profit margin. In addition, the extraordinary event pointed out by the assessee, has not shown any

impact on the profit margin. Hence, the DRP rejected the objection of the assessee.

15. Much Emphasis was made on the fact that the services rendered by Concentrix was in the nature of high-end services and in this regard our attention was drawn to the annual report of Concentrix wherein the annual report makes a reference to the following aspects:

“.....During the year under review, your Company has made an entry into two new verticals. Insurance and Technical Support. Your company has now five business units focusing on key verticals with marquee customers in each of the verticals. In terms of customer wins, your Company has won 5 new customers during the year. One of these is being transitioned. Further, the Company is in advanced stages of discussions with various Fortune 500 and other companies for business outsourcing.

Your Company is in the fourth year of operations and witnessed an overall growth in all its business segments with a focus on entire spectrum of eCRM services.

During the year, Company launched new services like collections, telemarketing, technical support thereby broadening the CRM services portfolios. The company also made a successful foray in back office by building insurance claims processing capabilities.

During the year under review, your company has also set up its service delivery center in Philippines

In summary, new vertical markets, new lines of business and new geographies were developed successfully.”

.....

Your company is embarking on new initiatives like "digitization" to create a strong foundation and investing in building business leadership in US and Europe to accelerate customer acquisition.”

Research & Development (R&D)

In today's world, technologies are changing very rapidly and hence it is very important to invest in research and development. R & D is also very critical in ensuring the success of Company's product strategy. During the

period under review, your Company has analyzed and identified the areas so as to undertake the specific R & D activities for the overall benefits of the Company”

16. The learned DR has however pointed out that the facts as brought out in the submissions of the learned Counsel for the assessee are not reflected in the ultimate final results of the assessee. It was submitted that unless the assessee is able to compute and bring on record material to show as to how the features pointed out by the learned Counsel for the assessee really had an impact on the functional profile of Concentrix not being in the nature of rendering back-office support services as has not been demonstrated. It was therefore submitted by him that the contentions cannot be the basis to hold that Concentrix is not a comparable.

17. After careful consideration of the entire material, we find that the main contention of the learned Counsel for the assessee appears to be that Concentrix is engaged in BPO, KPO such as the assessee. Though in support of this contention, reference was made to the annual report but reference to annual report about the nature of activities performed by Concentrix cannot be the basis to conclude that Concentrix is not engaged in the profession of back-office support services. As rightly contended by the learned DR, the financial impact of the features pointed out by the learned Counsel for the assessee do not reflect in the ultimate financial results. Admittedly, Concentrix figure in the search matrix of BPO back-office services and therefore is no evidence brought on record to show that the predominant activity of the assessee is not that of back-office support services. In this regard, we also notice that in the search matrix / filter applied by the assessee, the assessee itself has adopted a filter of choosing companies with income from a major line of activities $\geq 50\%$ of the total revenue selected for performing similar functions such as the assessee. It has

also applied a filter of comparing companies performing broadly comparable companies of rendering services with similar cost structure. The TPO on his part has also adopted a filter whereby he has chosen companies having service income of 75% or more in each of the segments. We also notice that it has not been demonstrated as to how owning intangibles will render this company out of the ambit of comparability. In the given circumstances of the case, we are of the view that Concentrix was rightly included as a comparable company by the TPO.

18. In so far as the plea of the assessee for exclusion of **Tricom India Ltd.** (“**Tricom**”), is concerned, it was submitted that this company is functionally dissimilar to the assessee and ought to be excluded from the list of comparables. Unlike the assessee, Tricom is significantly engaged in research and development activity with a dedicated team for software research and development. Accordingly, the company develops unique software in house and renders specialized services, which gives it a competitive edge in the market. Further, the company suffers from peculiar economic circumstances as during the financial year 2003-04, the company hived off its finance and investment division into a separate company, which has resulted in an abnormal growth in its revenue by 63.80% between financials years 2002-03 and 2003-04 which translated into an abnormal growth of 33.06% in profits before taxes. The company also acquired Tricom Document Management Inc. USA for expansion of its business in the overseas market, thereby indicating a significant change in the business model and economic performance of the company. Further, the company has substantial related party transaction of 58.03% for the year under consideration. Submissions in this regard are placed at 120 to 122 and 292-294 of the appeal set. Annual report of the company is available at pages 198-242 of the Paper Book. Reliance was placed on the decision of this Tribunal dated in

the case of *24/7 Customer.com (P.) Ltd. v. DCIT* (reported in [2012] 28 taxmann.com 258 (Bangalore). Further reliance was placed on the decision of the Mumbai Bench of the Tribunal in the case of *Exxon Mobile Company India Pvt. Ltd.* (order dated 27.10.2017 passed in ITA No. 8798/Mum/2011) and the decision of this Tribunal in the case of *Transworld ICT Solutions Pvt. Ltd. v. DCIT* (order dated 11.03.2022 passed in IT(TP)A Nos. 1305 to 1308/Bang/2010). In both the aforesaid decision rendered in the case of an assessee rendering BPO services such as the assessee in this appeal, the Tribunal excluded Tricom from the list of comparable companies. The learned DR placed reliance on the order of the DRP.

19. We have carefully considered the rival submissions. In the case of *24/7 Customer.com (P) Ltd.(supra)*, for AY 2004-05, the assessee was engaged in back-office support BPO services and Tricom was chosen as a comparable company by the TPO. The Tribunal held in paragraph 15.3.3 of its order that Tricom had a unique software developed in house which renders specialized services in it' area of specialization given the company a competitive edge. Since this company had unique intangible, it was regarded as not comparable with a normal back-office service provider. Following the view taken in the aforesaid decision by a co-ordinate Bench, we are of the view that Tricom ought to be excluded from the final list of comparables. We hold and direct accordingly.

20. No other grounds were pressed for adjudication. The TPO is directed to compute ALP of the international transaction as per the directions contained in this order after affording the assessee opportunity of being heard.

21. In the result, appeal of the assessee is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(N. V. VASUDEVAN)
Vice President

Bangalore.

Dated: 28.09.2022.

/NS/*

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.