

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

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1491/MUM/2022
(Assessment Year: 2012-13)

DCIT-1(2)(1), Mumbai,
Room No. 535, Aayakar Bhavan,
New Marine Lines, Mumbai - 400020 Appellant

M/s Cactus Communication Pvt. Ltd., Vs
510, Shalimar Morya Park Off Link Road,
Andheri (West), Mumbai - 400053 Respondent
[PAN: AACCC1194L]

CO No. 134/MUM/2022
(IN ITA No. 1491/Mum/2022)
(Assessment Year: 2012-13)

M/s Cactus Communication Pvt. Ltd.,
510, Shalimar Morya Park Off Link Road,
Andheri (West), Mumbai - 400053 Appellant
[PAN: AACCC1194L]

..... Vs

DCIT-1(2)(1), Mumbai
Room No. 535, Aayakar Bhavan,
New Marine Lines, Mumbai - 400020 Respondent

Appearances

For the Appellant/Department : Ms. Samruddhi Dhananjay Hande

For the Respondent/Assessee : Shri Dhanesh Bafna, Pratik Shah,
Amol Mahajan, Yogesh Malpani

Date of conclusion of hearing : 16.11.2022
Date of pronouncement of order : 30.11.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal filed by the Revenue and Cross-Objection filed by the Assessee arise from the order of Commissioner of

Income Tax (Appeals)-55, Mumbai [hereinafter referred to as 'the CIT(A)'], passed on 09.03.2022 for the Assessment Year 2012-13, which in turn arose from the Assessment Order, dated 11.04.2016, passed under Section 143(3) read with Section 144(C) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'].

2. The Revenue has raised the following grounds of appeal:

1. *"Whether on law and in the facts on the instant case, was the Ld. CIT (A) right in allowing the appeal of the assessee and excluding Excel Infoways Ltd from the comparable list without appreciating the fact that the comparable company is engaged in the business of providing BPO/IT enabled services only and is broadly functionally comparable to assessee ?"*
2. *"Whether on law and in the facts on the instant case, was the Ld. CIT(A) right in allowing the appeal of the assessee overlooking FAR analysis of Excel Infoways Ltd and assessee company ?"*
3. *"Whether on law and in the facts on the instant case, was the Ld. CIT(A) right in allowing the appeal of the assessee stating that the comparable Excel Infoways Limited is functionally not same to assessee relying on the decision of Hon'ble bench in the case M Modal Global Services P Ltd v/s. ACIT & BT e-services (India) (P) Ltd Vs ITO overlooking the fact of annual report of the company through which it is found that the company is engaged in business of BPO/ Information Technology Enabled & broadly functionally comparable with the assessee company."*
4. *"Whether or not on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the comparable company M/s. Excel Infoways Ltd., by holding that the company has earned super normal profits during the year without appreciating the fact that the company satisfies the comparability criterion and do not involve any abnormal business conditions hence cannot be rejected on the grounds of high profits/ losses reliance is placed upon Capgemini India (P) Ltd. Vs. ACIT in ITA No. 786/Mum/2011 (AY. 2007-08)"*
5. *"Whether or not on the facts and circumstance of the case and in law, the Ld. CIT(A) erred in rejecting the comparable company M/s. Excel Infoways Ltd., by holding that the*

company has diminishing revenue and abnormal profits without appreciating that not a singular factor but a broad level functional comparability needs to be seen under TNMM. M/s. Excel Infoways Ltd qualifies as a comparable in FAR analysis, The Ld CIT(A) erred in overlooking that some parameters on higher end of spectrum get nullified by those at the lower end. The special bench judgement in the Maersk Global Centres (India) P Ltd. Vs ACIT, Wherein it was held that Indian TP regulations deviate from OECD guidelines by adopting arithmetic mean instead of quartile range as suggested by OECD, which excludes outliers, is pertinent in this case, which was overlooked by the Ld. CIT(A)."

6. *"Whether on facts of the case and in view of amendment to Section 14A by Finance Act, 2022, Ld. CIT(A) is correct to delete the disallowance made by the AO."*

3. The Appellant has raised the following grounds of Cross Objections:

" 1. On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) / Ld. AO/Ld. TPO erred in:

a. Disregarding the functional profile and characterisation of the Cross-objector and its Associated Enterprises (AES), as conducted by the Cross-objector and adopted in the transfer pricing documentation;

b. Rejecting the economic analysis undertaken by the Cross-objector,

c. Not accepting the overseas AEs as tested party, being the least complex of the transacting entities, thus violating the basic principles of transfer pricing; and

d. Erroneously considering the Cross-objector as the tested party and determining arm's length price using companies engaged in Information Technology enabled Services (ITeS) industry.

2. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A)/Ld. AO/Ld. TPO has erred in

a computing incorrect margin of comparable companies selected by Ld. TPO; and

b. not granting working capital adjustment with respect to such comparable companies.

It is therefore prayed that the above grounds of Cross-objector be accepted and consequently the transfer pricing adjustment made be deleted."

ITA No. 1491/Mum/2022

4. Ground No. 1 to 5 raised by the Revenue are directed against the exclusion of Excel Infoways Ltd. from the list of comparables by the CIT(A), whereas Ground No. 6 pertains to deletion of addition/disallowance made by the Assessing Officer under Section 14A of the Act.
5. The relevant facts in brief, are that the Appellant filed return of income for the Assessment Year 2012-13 on 08.09.2012 declaring total income of INR 9,02,290/- and offering minimum alternative tax under Section 115JB of the Act on the Book Profits of INR 4,52,91,309/-.
- 5.1. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions.
- 5.2. The TPO noticed that Appellant is a company engaged in the business of providing editing, educational transaction, and training services to individual and institutional clients worldwide. The Appellant has, selected its AE as a tested party for benchmarking the international transactions using Transaction Net Margin Method (TNMM). The TPO rejected the foreign AE as tested party and taking the Appellant as a tested

party proceeded to determine Arm's Length Price using TNMM. The TPO arrived at final set of comparables consisting of three companies, namely, Excel Infoways Ltd., Jindal Intellicom Ltd. and e4e Healthcare Business Services Pvt. Ltd. Taking Operating Profit (OP)/ Operating Cost (OC) as the Profit Level Indicator (PLI), the TPO proposed transfer pricing adjustment of INR 3,17,46,205/- vide order dated 29.01.2016 passed under Section 92CA(3) of the Act. Assessment Order was passed under Section 143(3) read with Section 144C(3) of the Act on 11.04.2016 making transfer pricing addition of INR.3,17,46,205/-. Further, addition/disallowance of INR.7,58,155/- was also made under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules').

6. Being aggrieved, the Assessee filed appeal before CIT(A) against the Assessment Order. The CIT(A) rejected the challenged mounted by the Appellant against the selection of Appellant by TPO as tested party in place of the foreign AE of the Appellant. However, the CIT(A) granted relief to the Appellant by excluding Excel Infoways Ltd. from the list of comparables. The CIT(A) also deleted the addition/disallowance under Section 14A of the Act, inter alia, for the reasons that the Appellant did not earn any exempt income during the relevant previous year.
7. Being aggrieved by the above relief granted by the CIT(A), the Revenue has preferred the present appeal, whereas the Appellant has filed Cross-Objections against the rejection of its foreign AE as a tested party.

Ground No. 1 to 5

8. In relation to Ground No. 1 to 5, the Ld. Departmental Representative submitted that Excel Infoways Ltd (EIL) submitted that while selecting comparables under TNMM broad functional comparability needs to be established. As per the annual report of EIL, it was engaged in the business of providing Business Process Outsourcing (BPO)/Information Technology Enabled Services (ITeS) during the relevant previous year. The Assessee was engaged in the business of providing ITeS services pertaining to academic editing, writing, transcribing and reaching services. Thus, the Appellant and EIL shared broad functional comparability sufficient for selection as a comparable for determining ALP as per TNMM. Thus, the CIT(A) erred in excluding EIL by overlooking the Function Asset & Risk (FAR) Analysis. EIL was not facing any abnormal business conditions. Looking at a singular factor, i.e., diminishing profits, EIL was excluded by the CIT(A) without appreciating that broad level functional comparability needs to be examined for the purpose of TNMM. She further submitted that Indian TP regulations deviate from OECD guidelines by adopting arithmetic mean instead of quartile range as suggested by OECD, which excludes outliers. Reliance was placed upon the decision of the Tribunal in the case of Capgemini India (P) Ltd. Vs. ACIT in ITA No. 786/Mum/2011 (AY. 2007-08), and the special bench decision of the Tribunal in the case of Maersk Global Centres (India) P Ltd. Vs ACIT 15(20(2), Mumbai [2018] 94 taxmann.com 418 (Mumbai).
9. In response, the Ld. Authorised Representative supported the order of CIT(A) and submitted that for selecting the

comparables the TPO had specifically selected the filter according to which “companies who have diminishing revenues/persistent losses for the period under consideration were excluded”. Since EIL was earning diminishing revenues it should have been excluded. The contentions advanced by the Ld. Departmental Representative to this extent were contrary to the approach adopted by the TPO. The Learned Authorised Representative for Appellant submitted that the Appellant had also opposed inclusion of EIL as a comparables on account of discontinued its BPO business and vast difference in the employee cost of the Appellant and EIL. As regards functional dissimilarity the Ld. Authorised Representative for the Assessee submitted that the Assessee had objected to selection of EIL (IT/BPO Segment) as a comparable as EIL operated in a field different from the Assessee. EIL was engaged in Voice BPO activities whereas the Assessee was engaged in educational transcription and teaching services. According to the Ld. Authorised Representative for the Assessee the CIT(A) was correct in excluding EIL. In order to support this contentions the Learned Authorised Representative for Assessee relied upon the decision of the Hon’ble Delhi High Court in the case of PCIT Vs. Convergys India Services Pvt. Ltd: 142 Taxmann.com 276 (Delhi), of Ocwen financial Solutions Pvt. Ltd. vs. ACIT Circle 5(1)(2), Bengaluru [ITA No. 153/Bang/2017, Assessment Year 2012-13].

10. We have considered the rival contention and perused the material on record including the judicial precedents cited at bar during the course of hearing. On perusal of search criteria adopted by the TPO (at page 3 of 10 of the order passed by TPO) it is clear that TPO had selected following filters

- Companies who have diminishing revenue/persistent for the period under consideration were excluded.

11. We note that CIT(A) has excluded EIL as a comparable by relying upon the decision of the Tribunal in the case of M Modal Global Services (P.) Ltd. v. Assistant Commission of Income Tax, Circle-15(2)(2), Mumbai [(2019) 112 taxmann.com 67] due to diminishing revenue over the years and abnormal profits. The relevant extract of the order passed by CIT(A) read as under:

"In the submission, the appellant has disputed rejection of its selection of AE as tested party, but has also filed without prejudice submission on TPO's methodology, margin calculations and selection of comparable. It has filed detailed submission on Excel Infoways Ltd. summary of which is included in para 7 above. Exclusion of the comparable is sought on the basis of functional dissimilarity, discontinuation of BPO business and vast difference between the employee cost of appellant and Excel Infoways Ltd.

The appellant has sought to distinguish the said comparable company on functional differences. It is stated that it is engaged in VOICE BPO activities as against appellant's activities of providing editing, educational transcription services and training services to individual and institutional clients worldwide. It is thus claimed that the company is functionally different. The main contention of the appellant is functional differences between comparable company and the appellant company. According to appellant, Excel Infoways Ltd is totally in different line of business service activity than that of the appellant. agree with this argument.

The Hon'ble Mumbai ITAT in the case of M Modal Global Services (P.) Ltd. v. Assistant Commission of Income Tax, Circle-15(2)(2), Mumbai (2019) 112 taxmann.com 67 has considered suitability of Excel Infoways Ltd as a comparable. Due to diminishing revenue over the years and abnormal profits, the company has not been found as a comparable, to M Modal Global which was essentially engaged in ITES activity. Also the decision pertained to Ay 2012-13. The Hon'ble bench relied on the decision of Delhi Tribunal in BT e-Services (India) (P) Ltd. v. ITO [2019] 101 taxmann.com 275 (Delhi - Trib). Following the decision and after considering the other arguments of the appellant, it is held that Excel Infoways Ltd is not a valid comparable.

With the rejection of Excel Infoways Ltd, as a valid comparable, the arithmetic mean of margin of 2 remaining comparables namely Jindal Intellicom Ltd & e4e Healthcare Business Services Pvt Ltd comes to 9.925% which is less than the margin of the tested party that is the appellant. Adjustment of Rs 3,17,46,205/- is therefore held to be not sustainable. Ground no 1 is allowed.” (Emphasis Supplied)

12. In the case of M Global Services (P) Ltd. (supra) the Tribunal had relied upon the decision of Delhi Bench of the Tribunal in the case of Baxter India Private Limited Vs ACIT: 85 Taxmann.com 285 (Delhi-Trib) [Assessment Year 2012-13] wherein it has been held as under:

"24. So far as exclusion of Excel Infoways Ltd. is concerned, we also find merit in the submissions of the Id. Counsel for the assessee that the above company should be excluded from the list of comparables. This company fails TPO's own filter of diminishing revenue and abnormal volatility in revenue and margins. We find from the order of the TPO at para 7.5 (page 24 - 25 of the TPO order) where the TPO has observed that the department has applied consistent diminishing revenue/loss making filter wherein the companies with losses/diminishing revenue for the last three years upto and including the financial year 2010-11 were rejected as comparables. The department has excluded such companies with consistent losses/diminishing revenue in an environment where Indian economy is growing at consistent rate. Having held so, the Assessing Officer included Excel Infoways Ltd. as a comparable without considering the fact that the said company does not pass the diminishing revenue filter. From the submissions of the assessee before the TPO (at page 232 of Volume - 1 of the Paper Book) we find the details of the operating margin of the company from financial years 2009-10 to 201(4)-15 are as under :—

25. From the above, it is clear that above company does not pass the diminishing revenue filter as adopted by the TPO himself since its revenue has decreased consistently from financial years 2009-10 to 2011-12 i.e. including the year under consideration. Further, the above company has super normal

profits. We further find the submissions of the assessee that Excel Infoways Ltd. has super normal profits during the current year has not been controverted by the Revenue. We find the Mumbai Bench of the Tribunal the case of Willis Processing Services (India) Pvt. Ltd. (supra) has upheld the order of the DRP rejecting Excel Infoways Ltd. as comparable company on the ground that the company has a super normal profit of 203.80% and low employee cost 10.02%. We, therefore, find merit in the submissions of the Id. counsel for the assessee that Excel Infoways Ltd. should be excluded from the list of comparable on account of super normal profit of the said company in the preceding year." (Emphasis Supplied)

13. The above decision of the Tribunal was relied upon by the Delhi Bench of the Tribunal in the case of Convergys India Services Private Limited Vs. DCIT: ITA No. 1934/Del/2018 (Delhi-Trib) wherein it was held as under:

"18. In Baxter India Pvt. Ltd. (supra), coordinate Bench of the Tribunal excluded Excel as a comparable vis-a-vis ITES provider on ground of failing diminishing revenue filter adopted by the Id. TPO himself from FY 2009-10 to 2011-12. So, in view of the matter, we order to exclude Excel from the final set of comparables form benchmarking the international transactions qua ITES"

14. In the above decisions of the Tribunal wherein EIL has been excluded from the list of comparables for benchmarking international transactions qua ITES has been confirmed by the Hon'ble Delhi High Court on this issue. [PCIT Vs Convergys India Services Pvt. Ltd.: 142 Taxmann.com 276 (Delhi).
15. In view of the above decisions, we do not find any infirmity in the order passed by the CIT(A). The CIT(A) has followed the decision of the Tribunal and has excluded EIL as a comparable taking in view the facts and circumstances of the present case. Thus, we decline to interfere in the order passed by the CIT(A)

on this issue. Ground No. 1 to 5 raised by the Revenue are dismissed.

Ground No. 6

16. Ground No. 6 raised by the Revenue pertains to disallowance under Section 14A of the Act read with Rule 8D of the Rules. The Revenue is aggrieved by the order of CIT(A) deleting the addition of INR 7,58,,155/- made by the Assessing Officer under Section 14A of the Act for the reason that the Assessee did not earn any exempt income.
17. The Learned Departmental Representative submitted that in view of the amendments introduced by the Finance Act 2022, the law stands amended retrospectively. While putting emphasis on the expression “shall be deemed to have always applied” used in the Explanation to Section 14A of the Act inserted by the Finance Act 2022, the Learned Departmental Representative submitted that use of the aforesaid expression clearly brings out the intention of the legislature to give retrospective effect to the amendment. She submitted that the provisions contained in Section 14A of the Act are now to be interpreted taking into account the Explanation inserted by the Finance Act 2022.
18. In response the Learned Authorised Representative for Appellant relied upon the decision of the Hon’ble Delhi High Court and submitted that in the case of Principal Commissioner of Income-Tax (Central) -2 Vs. M/s Era Infrastructure India Ltd: [ITA No. 204 of 2022, decided on 20.07.2022] the contention of the Revenue that amendments to Section 14A of the Act introduced by the Finance Act, 2022 shall have retrospective

effect has been rejected. He also relied upon the decision of the Chennai Bench of the Tribunal in the case of M/s Maxivision Eye Hospital Pvt. Ltd. vs. DCIT: ITA No. 139/CHNY/2020 to support the order of CIT(A) deleting addition under Section 14A in absence of any exempt income for the relevant assessment year.

19. We have considered the rival submissions and in view of the judgment of the Hon'ble Delhi High Court in the case of Era Infrastructure India Ltd (supra) we are not inclined to accept the contention raised by the Revenue. We note that the Mumbai Bench of the Tribunal has, in the case of Assistant Commissioner of Income Tax- Circle 3(1)(1) Vs Bajaj Capital Ventures (P.) Ltd.: [2022] 140 taxmann.com 1 (Mumbai - Trib.) [29-06-2022] held that the amendments to Section 14A introduced by the Finance Act 2022 shall apply from Assessment Year 2022-23. Thus, there is no change in law with respect to assessment years prior to 2022-2023.
20. We note that the CIT(A) has deleted the addition/disallowance under Section 14A since the Appellant had not earned any exempt income during the relevant previous year. The Ld. Authorised Representative for the Appellant had relied upon the decision of the Chennai Bench of the Tribunal in the case of M/s Maxivision Eye Hospital Pvt. Ltd. vs. DCIT (supra). In that case, rejecting the identical contentions raised by the Revenue, it was held by the Tribunal as under:

"7. After hearing the rival contentions and going through the decision of the Hon'ble Delhi High Court in the case of Era Infrastructure (India) Ltd. supra, we are of the view that the explanation inserted in the provisions of Section 14A of the Act by the Finance Act, 2022 is prospective and not retrospective.

Accordidngly, since the assessee has not earned any exempt income, no disallowance cab be resorted by invoking the provisions of Section 14A of the Act read with Rule 8D (2) of the Rules. The appeal of the Assessee is allowed.”

21. In view of the above, the order passed by the CIT(A) on this issue is upheld and Ground No. 6 raised by the Revenue is dismissed.

CO No. 134/Mum/2022

22. In view of our findings in paragraph 15 above whereby Ground No. 1 to 5 raised by the Revenue have been dismissed, the Cross Objection filed by the Appellant is disposed off as not pressed in view of the statement made by the Learned Authorised Representative for Assessee during the course of hearing.
23. In result, the present appeal by the Revenue is dismissed and Cross Objection is disposed off as being infructuous

Order pronounced on 30.11.2022.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.11.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
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6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai