

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH: 'I' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT  
AND  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.1907/Del/2016  
Assessment Year: 2010-11

Everest Business Advisory India Pvt. Ltd., A-1/B-27, Janak Puri, New Delhi	<b>Vs.</b>	ACIT, Circle-11(1), New Delhi
<b>PAN :AABCE2871R</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Ms. Vandana Bhandari, Advocate
Department by	Sh. Manu Chaurasia, Sr. DR

Date of hearing	01.11.2023
Date of pronouncement	29.11.2023

**ORDER**

This is an appeal by the assessee against order dated 05.11.2015 of learned Commissioner of Income Tax Appeals) -44, New Delhi, pertaining to assessment year 2010-11.

2. Though, the assessee has raised multiple grounds, however, at the time of hearing, learned counsel appearing for the assessee submitted that there are basically two issues arising in the appeal, one relating to selection/rejection of certain comparables and the other is in relation to working capital adjustment.

3. At the outset, we propose to deal with the first issue relating to selection/rejection of certain comparables. However, before we proceed to do that, it is necessary to delineate the relevant facts.

4. Briefly stated, the assessee is a resident corporate entity and is a subsidiary of Everest, USA. As stated by the Transfer Pricing Officer (TPO), the group is established as a management consultancy firm and is into the business of advising clients on strategic outsourcing issues. He has further stated that insofar as the assessee is concerned, the business can be divided into following two segments:

1. Consultancy and advisory support services.
2. Back office research support services.

5. He has also classified the assessee in the category of Information Technology Enables Services (ITES). To further explain the actual activity carried out by the assessee, the parent company develops off the shelf published reports and custom research reports on topics, such as, Human Resource Outsourcing, Procurement Outsourcing, Information Technology Outsourcing and Global Sourcing. The research reports are part of database of Everest, USA and are its intellectual property. So far as the assessee is concerned, Everest, USA provides the

assessee, the theme on which research is to be performed, concept and overall content of the report, primary and secondary sources from which data is to be gathered, examples, models, samples, referrals, studies, data and recommendations for development of content. Everest, USA also monitors the progress of works performed by the assessee through weekly calls, video conferencing, and physical visit. Everest USA is also responsible for content and quality of the report. Thus, in sum and substance, the assessee is a captive service provider. For rendering such services to the Associated Enterprises (AEs), the assessee is remunerated at cost plus 15%.

6. In the year under consideration, the assessee has entered into international transactions with its AE and provided ITES. For providing such services, the assessee earned revenue of Rs.5,66,09,811/-. The assessee benchmarked such transaction by adopting Transaction Net Margin Method (TNMM) as the most appropriate method with Operating Profit (OP)/Operating Cost (OC) as the Profit Level Indicator (PLI). Assessee selected nine comparables stated to be functionally similar for economic analysis. Since the average margin of the selected comparables worked out to 13.52% as against the margin shown by the

assessee at 15%, the transaction with AE was claimed to be at arm's length.

7. After verifying the Transfer Pricing Study Report (TPSR) of the assessee, the Assessing Officer was of the view that certain comparables selected by the assessee are not at all comparables on application of various filters. Thus, out of the nine comparables selected by the assessee, he rejected five and retained four comparables. Having done so, the TPO undertook a search in database to select fresh comparables independently. While doing so, he selected seven more comparables. Thus, in total, the TPO selected ten comparables with average margin of 34.95%. By applying the said ratio to the operating cost, TPO determined Arm's Length Price (ALP) at Rs. 6,64,30,383/- as against the price received of Rs.5,66,09,811/-. The resultant short-fall of Rs.98,20,572/- was proposed as adjustment to be made to the ALP. In terms with the order passed by TPO, the Assessing Officer completed the assessment by adding back the amount of Rs.98,20,572/- to the income of the assessee. Assessee contested the aforesaid addition by filing an appeal before learned first appellate authority. While disposing of the appeal, learned first appellate authority, though, more or less, sustained the

comparables selected by TPO, however, he granted partial relief to the assessee by directing the TPO to consider fee income segment in case of Infinity.com and to consider ITES segment in case of M/s. Acropetal Technology Ltd. Thus, in terms with the directions of learned first appellate authority, the adjustment was partially reduced.

8. Before us, learned counsel for the assessee sought exclusion of following five comparables:

- i. Acropetal Technology Ltd. (Information Technology Segment)
- ii. Infinity.com Financial Securities Ltd.
- iii. Eclerx Services Pvt. Ltd.
- iv. Genesys International Corporation Ltd.
- v. ICRA Techno Analytics Ltd.

9. Further, she sought inclusion of the following comparable:

- i. R. Systems International Ltd. (BPO Segment)

10. Hereinafter, we will deal with the issues relating to each of the comparables as indicated above.

**(I) Acropetal Technology Ltd.**

11. Objecting to selection of this company, learned counsel submitted that as per the annual report of the company, the functional profile shows that it is engaged in engineering design service, information technology service, and healthcare software.

She submitted, from the functional profile of the company it is evident that it is not comparable to the assessee. She submitted, the employee cost is less than 25% of the total cost, meaning thereby, major portion of its work is outsourced. He further submitted, the company is engaged in significant R&D activities and incurring significant advertisement, marketing and promotion expenses as a percentage of sale, which is indicative of the fact that it is engaged in the business of development of software. She submitted, though, learned Commissioner (appeals) has directed to consider Information Technology segment for comparability purpose, however, that segment cannot be a comparable, as, the assessee is rendering low end ITES. In support of such contention, she relied upon the following decisions:

1. *Rampgren Solutions (P) Ltd. Vs. CIT [2015] 279 CTR 441 (Delhi HC)*
2. *Open Solutions Software Services (P.) Ltd. [2020] 116 taxmann.com 708 (Delhi HC)*
3. *NTT Data Global Delivery Services Ltd. Vs. ITO [2020] 117 taxmann.com 92 (Delhi – Trib.)*
4. *MD Everywhere India (P) Ltd. Vs. DCIT [2022] 139 taxmann.com 577 (Delhi – Trib.)*
5. *Jr. CIT Vs. Steria India (P) Ltd. [2021] 123 taxmann.com 264 (Delhi – Trib.)*
6. *SBI Business Process Management Services (P.) Ltd. [2021] 127 taxmann.com 374 (Delhi – Trib.)*

7. *Smart Analyst India Pvt. Ltd. Vs. ACIT [2021] 123 taxmann.com 223 (Delhi – Trib.)*
8. *Transcend MT Services (P.) Ltd. Vs. DCIT [2021] 126 taxmann.com 295 (Delhi – Trib.)*
9. *Timex Group India Ltd. Vs. DCIT [2019] 102 taxmann.com 459 (Delhi – Trib.)*
10. *Flextronics Technologies (India) P. Ltd. [2019] 101 taxmann.com 348 (Bangalore – Trib.)*
11. *Bechtel India (P.) Ltd. Vs. Dy. CIT [2019] 101 taxmann.com 385 (Delhi – Trib.)*

12. She further submitted that this company was never selected as comparable in any other assessment years.

13. The learned Departmental Representative submitted, the ITES segment is comparable to the nature of services provided by the assessee. Therefore, it is a valid comparable.

14. We have considered rival submissions and perused the materials on record. As far as functional profile of the assessee is concerned, there is no dispute that the services rendered by the assessee fall under ITES category. In fact, the TPO has also acknowledged this factual position. In assessee's own case in assessment year 2007-08, the Tribunal in ITA Nos. 41 & 1191/Del/2013, order dated 15.12.2017, having examined the functional profile of the assess, has treated it as a low end Business Process Outsourcing (BPO) service provider. The factual position remains identical in the impugned assessment year

insofar as functional profile of the assessee is concerned. Therefore, the assessee has to be treated as low end BPO service provider.

15. Insofar as Acropetal Technology Ltd. is concerned, it is observed, the TPO has considered the engineering design services segment to be falling under the category of ITES, hence, comparable to the assessee. However, when the issue came up before learned first appellate authority, he has held that the engineering design service segment cannot be treated as comparable to the assessee but Information Technology service segment can be compared to ITES, hence, comparable to the assessee. Accordingly, he has directed the TPO to consider the Information Technology service segment and compute the operating margins.

16. On perusal of the annual report of this comparable, a copy of which is at page 86 of the paper-book, it is observed that as per the information available in the annual report, the foreign exchange earning activity involves export in software services. Further, in the Note to Accounts it is stated that the company is engaged in the development of computer software. The segmental break-up at page 109 of the paper-book, though, mentions three

segments, however, there is no ITES segment. Thus, keeping in view the factual position, as discussed above, we are of the opinion that this company, being functionally different from the assessee, is not comparable. The decisions relied upon by learned counsel for the assessee support our view. Accordingly, we direct the Assessing Officer to exclude this company.

**(II) Infinity.com Financial Securities Ltd.**

17. Objecting to the selection of this company, learned counsel submitted, it is functionally dissimilar to the assessee as it is a stock broking company, which operates in equity, cash and derivative market in National Stock Exchange (NSE) and Bombay Stock Exchange (BSE). She submitted, the company services to institutional and retail clients and provides Research Services, Portfolio Management Services and Trading Services to clients. She submitted, though, the first appellate authority was convinced with the submission of the assessee, however, he has directed the TPO to take Professional Fee segment as comparable to assessee. She submitted, Professional Fee segment, being a high end Knowledge Process Outsourcing (KPO), cannot be compared with the low end BPO services provided by the assessee.

18. Without prejudice, she submitted, sufficient information relating to company is not available in public domain. Therefore, it cannot be treated as comparable. In this context, she drew our attention to Note 5 to Notes to Accounts. She submitted, as per the segment report, the company's operations comprises of broking and investment/trading in equity shares and securities and professional services. Therefore, it cannot be a comparable to the assessee. Proceeding further, she submitted, direct expenses against fee income segment have not been reported. She submitted, the Departmental Authorities have incorrectly applied forex filter of 25%, since assessee's revenue from export sales is 100% in ITES segment. Therefore, in the given circumstances, forex filter of 75% should have been applied. In support of such contention, she relied upon the following decisions:

1. *Open Solutions Software Services (P.) Ltd. [2020] 116 taxmann.com 708 (Delhi –HC)*
2. *Rampgreen Solutions (P.) Ltd. Vs. CIT [2015] 279 CTR 441 (Delhi – HC)*

19. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned first appellate authority.

20. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions relied upon. On perusal of the annual report of the company, placed in the paper-book, it is observed that it has reported income from three segments, income from securities, broking income and fee income. It is a fact that while considering the issue of comparability of this company, learned first appellate authority has directed the TPO to consider the fee income segment as comparable to the assessee.

21. Undisputedly, in the fee income segment, the company has earned revenue from research services in relation to financial markets. Thus, in our view, the company is similar to the assessee, as the assessee is also involved in research services. As regards the other contentions of the assessee that forex filter of 75% should be applied and as far as lack of information regarding nature of foreign exchange earnings is concerned, we do not find merit in them. Accordingly, we uphold the selection of this comparable.

**(III) Eclerx Services Pvt. Ltd.**

22. Objecting to selection of this comparable, learned counsel submitted that it is a leading KPO service provider, which

provides expert strategic consulting, high end analytics and process improvement solutions. She submitted, in capital market division, it provides end to end financial transaction support, such as, trade booking, trade confirmation, asset servicing, cash settlements, client servicing, risk management and reference data integrity across all asset classes, and its services span both “sell-side” (the large banks) and “buy-side” (the funds and asset managers). She submitted, the company provides strategic and process consulting services to help clients devise efficiency and reduce risk. She submitted, in sales and marketing support division, the company supports clients in all elements of product and services marketing and sales-with a focus on online support to include content development and management, search engine management, web operations, pricing and customer analytics, product database manage and catalog audits. Thus, she submitted, such high end services provided by the company cannot be compared to the low end BPO service provided by the assessee. She further submitted that in the year under consideration, the company is involved in merger and acquisitions, as it has acquired a company in Singapore. She submitted, being convinced that the company is not functionally

similar to the assessee, the Tribunal has excluded it in assessee's own case in assessment year 2007-08. She submitted, the learned first appellate authority has excluded it in assessment year 2009-10. Whereas, the TPO himself has excluded it in assessment years 2011-12 and 2012-13. Additionally, she relied upon various other judicial precedents.

23. Learned Departmental Representative relied upon the observations of the TPO and learned Commissioner (Appeals).

24. Having considered rival submission and examined the functional profile of the company under dispute, we are convinced that it is engaged in high end KPO services, hence, under no circumstances, can be comparable to the assessee. Having noticed material difference in the functional profile, the Tribunal in assessee's own case in assessment year 2007-08 in ITA Nos. 41 & 1191/Del/2013, dated 15.12.2017, has held that it cannot be a comparable to the assessee. The same view has been expressed by the first appellate authority in assessment year 2009-10. In fact, the TPO himself has not considered this company as comparable in assessment years 2011-12 and 2012-13. There being no difference in the factual position involved in the current assessment year, we hold that this company cannot be treated as

comparable to the assessee. Accordingly, we direct the Assessing Office to exclude it.

**IV Genesys International Corporation Ltd.**

25. Objecting to the selection of this company, learned counsel submitted that it is functionally different from the assessee as it provides Geospatial Consulting services, Navigational Maps services, Photogrammetry/Remote Sensing services, 3D Mapping services, Surveying, Utility services, Cadastral Mapping, Image Processing, Mobile VAS Development, Business Geographic & Logistics in Telecom and Infrastructure verticals. She submitted, the company offers technical solutions like TeleSCAPE, InfraSCAPE, MARS (Market Analysis and Route Planning System), CitySCAPE, WaterSCAPE, Hilly Terrain Analysis, Hydrologic Applications, Irrigation, Agriculture, Forestry and Ecological Applications, Urban Area plans, Coastal Area Plans, InfraSCaPE etc. She submitted, considering the difference in the functional profile, the Tribunal in assessee's own case in assessment year 2008-09 has excluded it. Whereas, the first appellate authority has excluded it in assessment year 2012-13. Thus, she submitted, the company should be excluded.

26. Learned Departmental Representative relied upon the observations of Assessing Officer and learned Commissioner (Appeals).

27. Having considered rival submissions and perused the materials on record, including annual report of the company, we find that it is functionally different from the assessee as the nature of services provided are distinct and highly specialized. Considering this aspect, the Tribunal in assessee's own case in assessment year 2008-09 passed in ITA No. 2562/Del/2013, dated 13.06.2018, has excluded it as comparable. Learned first appellate authority has also expressed similar view in assessment year 2012-13. Due to parity of facts in the impugned assessment year, we follow the view expressed by the Coordinate Bench in assessment year 2008-09 and exclude this company from the list of comparables.

**V ICRA Techno Analytics Ltd.**

28. Learned counsel submitted that the TPO has considered the service segment of the company as comparable. Drawing our attention to the annual report of the company, she submitted, it renders wide variety of software development, Business Intelligence and Analytics and Computer Aided Engineering

Design Services. She submitted, engineering services include design and drawing in mechanical, civil/structural, electrical and instrumentation space. She submitted, the company also deploys skilled resources to work for large engineering consulting companies in domestic and international market. She submitted, IT services include applications development and maintenance, software testing, manpower sourcing for large projects. Drawing our attention to annual report of the company, she submitted, bifurcation of service segment is not available. Therefore, it cannot be treated as comparable. In support, she relied upon the following decisions:

1. *Open Solutions Software Services (P.) Ltd. [2020] 116 taxmann.com 708 (Delhi HC)*
2. *Rampgreen Solutions (P) Ltd. Vs. CIT [2015] 279 CTR 441 (Delhi HC)*
3. *ACIT Vs. Smart Analyst India Pvt. Ltd., 123 taxmann.com 223 (Delhi – Trib.)*
4. *Evalueserve SEZ (Gurgaon) P. Ltd. Vs. ACIT [2017] 83 taxmann.com 371 (Delhi – Trib.)*
5. *Steria India (P.) Ltd. Vs. JCIT [2021] 123 taxmann.com 264 (Delhi – Trib.)*
6. *MD Everywhere India (P) Ltd. Vs. DCIT [2022] 139 taxmann.com 577 (Delhi – Trib.)*
7. *Timex Group India Ltd. Vs. DCIT [2019] 102 taxmann.com 459 (Delhi – Trib.)*

29. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

30. We have considered rival submissions and perused the materials on record. On going through the annual report of the company placed in the paper-book, we have observed that it provides wide spectrum of services including software development services and engineering design services. However, revenue has been reported without providing any segmental break-up. Thus, in our view, complete information relating to the service segment of the company is not available. That being the factual position on record, the company cannot be treated as a comparable. In this regard, we are supported by the decisions relied upon by learned counsel for the assessee. Accordingly, we direct the Assessing Officer to exclude this company.

31. As discussed earlier, the assessee is also disputing the exclusion of R Systems International Ltd. (BPO Segment) selected by it. It is observed, the TPO rejected this company for two reasons; firstly, sufficient data relating to the company is not available and, secondly, it is a persistent loss making company.

Learned first appellate authority has also agreed with the decision of the TPO.

32. However, before us, learned counsel for the assessee submitted that the annual report of the company is available in the public domain, both in the website of the company as well as in the website of the Ministry of Corporate Affairs. She further submitted that the company is not a persistent loss making company, as it has not reported loss in the current year as well as previous two assessment years. She submitted, the issue may be restored back to the Assessing Officer for re-examination.

33. Learned Departmental Representative agreed for restoration of the issue to the Assessing Officer.

34. Having considered rival submissions, we find, the departmental authorities have rejected this company primarily for the reasons that sufficient data relating to the company is not available in public domain and it is a loss making company. However, before us, the assessee has submitted that the annual report of the company for the assessment year under dispute is available in public domain and it has not incurred loss in the current year and in the previous two assessment years, hence, it cannot be considered to be a persistent loss making company. In

our considered opinion, the aforesaid contention of learned counsel for the assessee requires factual verification. Accordingly, we restore the issue to the Assessing officer for examining assessee's claim and decide it after providing reasonable opportunity of being heard to the assessee.

35. One more issue raised by the assessee relates to non-allowance of working capital adjustment.

36. We have heard the parties and perused the materials on record. Before us, learned counsel for the assessee has submitted that in assessment years 2007-08, 2008-09, 2009-10 and 2012-13, the TPO himself has allowed working capital adjustment. She submitted, since, assessee's business model remains unchanged, there is no justifiable reason, why working capital adjustment should not be allowed in the impugned assessment year.

37. Having considered the submissions of the parties, we direct the Assessing Officer to examine assessee's claim, and in case, it is found that similar adjustment was allowed in assessment years 2007-08, 2008-09, 2009-10 and 2012-13, the same may be allowed to the assessee after examining the relevant facts. Needless to say, the assessee must be provided an opportunity of being heard before deciding the issue.

38. In ground nos. 4 and 5, the assessee has challenged the disallowance of Rs.70,59,836/- under section 40(a)(i) of the Act.

39. Briefly the facts are, in the year under consideration the assessee has paid the aforesaid amount to its AE, M/s. Everest Global Inc. towards management fee. The Assessing Officer was of the view that the payments made, being in the nature of Fees for Technical Services (FTS), the assessee should have withheld tax under section 195 of the Act. Since, the assessee had not done so, the Assessing Officer disallowed the payments by invoking the provisions of section 40(a)(i) of the Act.

40. Learned first appellate authority upheld the disallowance.

41. Before us, it is an agreed position that the issue is squarely covered by the decisions of the Coordinate Bench in assessee's own case in assessment years 2011-12, 2012-13 and 2013-14.

42. Having considered the submissions of the parties, we find, while deciding identical issue in assessee's own case in the aforesaid assessment years, the Tribunal in ITA No. 5965/Del/2016; 6238/Del/2018 and 4438/Del/2018 dated 20.09.2022 has held as under:

*"8. We have considered rival submissions and perused the material on record.*

9. The core issue arising for consideration is, whether assessee was required to deduct tax at source under Section 195 of the Act while paying management fee to its overseas AE i.e. Everest Global Inc. It is observed, for availing certain services from the AE, assessee had entered into a Master Support Services Agreement with the A.E on 08.07.2010. The support services to be availed by assessee along with other group entities are as under:

1. Management Oversight
  - a. Strategic direction
  - b. Contract review
  - c. Financial and legal guidance
  - d. Client relationship management
  - e. Insurance
  - f. Peer review
2. Marketing
  - a. Brand awareness
  - b. Marketplace analysis
  - c. Competitive analysis
  - d. Webinars
  - e. Leadership forums
  - i. Speaking engagements
3. Finance and Accounting
  - a. Payroll
  - b. General ledger
  - c. Employee time and expense
  - d. Revenue and expense accruals
  - e. Payables
  - f. Accounts receivable
  - g. Cash management
  - h. Financial reporting
  - i. Budgeting
  - j. Line of credit access management.
4. Human Resource Management
  - a. Recruiting
  - b. Compensation
  - c. Benefits administration
  - d. Legal
5. Information Technology
  - a. Laptop maintenance
  - b. Help desk support
  - c. Desk side support
  - d. User ID and passwords
  - e. Remote access
  - f. System/antivirus

- g. Intranet*
- h. Inter-site communication links, email, voice mail, etc.*
- i. Standard computer platform*
- j. New Hardware and software*
- k. Training on IT resources*
- l. Licenses and compliance*
- m. Computer and phone networks*

*6. Training*

- a. Global training conference*
- b. Monthly training sessions*
- c. Ad hoc training as required*

*7. Legal*

- a. Contract review*
- b. Litigation management*
- c. Other legal services as required.*

10. *Undisputedly, assessee is availing such services from the AE from assessment year 2010-11 onwards.*

11. *It is the case of the Revenue that the services rendered by the AE to the assessee are in the nature of managerial/technical/consultancy services, hence, will fall within the scope and ambit of FTS/FIS as per the provisions of domestic law as well as under the India-USA DTAA. Notably, while considering the taxability of the corresponding receipts made at the hands of the AE viz. Everest Global Inc. in assessment years 2010-11 to 2012-13, the Tribunal in ITA Nos.2469, 6137 & 2355/Del/2017 dated 30.03.2022 has held that they are not in the nature of FTS/FIS under Article 12(4) of the India-USA DTAA. As could be culled out from the observations of the Co-ordinate Bench in the aforesaid decision, the services received by the assesseees are general managerial services, hence, do not qualify the test of technical/consultancy services to satisfy the definition of FIS under Article 12(4) of the Tax Treaty. Thus, considering the fact that while considering the nature and taxability of corresponding receipts at the hands of the payee, the Tribunal has held that the amount is not taxable in India, in our considered opinion, there is no legal obligation on the assessee to withhold tax at source under Section 195 of the Act while remitting the management fee to the AE. This is so, because, section 195 itself is quite explicit in its language while providing withholding of tax in respect of any payment, which is chargeable to tax in India. Since, the management fee paid by assessee is not chargeable to tax in India in terms with Article 12(4) of India-USA DTAA, as held by the Co-ordinate Bench in case of the payee, the assessee was not required to deduct tax at source while making such payment. Therefore, we hold that the disallowance made under Section 40(a)(i) of the Act in the assessment*

*years under dispute are unsustainable, hence, deleted. Grounds are allowed.”*

43. Facts being identical in the impugned assessment year, respectfully following the decision of the Tribunal, as discussed above, we delete the disallowance. Grounds raised are allowed.

44. Ground nos. 6 & 7, being premature and consequential in nature, are dismissed.

45. In the result, the appeal is partly allowed.

***Order pronounced in the open court on 29<sup>th</sup> November, 2023***

***Sd/-***  
**(PRADIP KUMAR KEDIA)**  
**ACCOUNTANT MEMBER**

***Sd/-***  
**(SAKTIJIT DEY)**  
**VICE-PRESIDENT**

Dated: 29<sup>th</sup> November, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi