

आयकर अपीलीय अधिकरण
मुंबई पीठ "के", मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नबीन कुमार प्रधान, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER
आअसं. 2074/मुं/2017 (नि.व.2012-13)
ITA NO.2074/MUM/2017 (A.Y.2012-13)

M/s.Banc Tec TPS India Pvt. Ltd.
Tribunal-341, Tower 3, 4th Floor,
International Infotech Park,
Vashi Railway Station Complex,
Vashi, Navi Mumbai 400 703
PAN: AAAC8971E

..... अपीलार्थी /Appellant

बनाम Vs.

The Asstt. Commissioner of Income tax,
Circle.15(1)(2)
Mumbai

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri J.D.Mistry Sr. Advocate with
Ms. Urvi Mehta

प्रतिवादी द्वारा/Respondent by : Shri Akhtar H. Ansari

सुनवाई की तिथि/ Date of hearing : 16/03/2020

घोषणा की तिथि/ Date of pronouncement : 12/06/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against assessment order dated 31/01/2017 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') for the assessment year 2012-13.

2. The brief facts of the case as emanating from records are that the assessee company is providing customized business process outsourcing services which include voice based inbound phone support, e-mail support, on line chat and back office processing to Tracmail group of companies (Associated Enterprises). During the period relevant to assessment year under appeal, the assessee entered into following international transactions.

S.No.	Nature of Transaction	Amount (Rs.)	Method
1.	Accounts receivable Management Services	34,98,59,203.00	TNMM
2.	Reimbursement of expenses	2,14,05,189.00	CUP
3.	Issue of equity shares	51,30,00,000.00	CUP
	Total	88,42,64,392.00	

The margin of the assessee in transactions with its Associated Enterprises (AE) is stated to be 2.89% and with non-AEs is 2.99%. To benchmark international transactions with AEs, the assessee furnished list of comparables. The Transfer Pricing Officer (TPO) applied various filters and finally selected following six companies as comparables:-

S.No.	Name of the company	Operating Margin
1.	Accentia Technologies Limited	11.76%
2.	eClerx Services Limited	61.21%
3.	Genesys International Corporation Ltd.	30.19%
4.	Jindal Intellicom Private Limited	6.08%
5.	Infosys BPO Ltd.	33.92%
6.	Excel Infoways Limited (Segmental)	49.38%
	Average	32.09%

The assessee objected to inclusion of Genesys International Corporation Ltd. (in short 'Genesys') and Excel Infoways Limited (Segmental) (in short 'Excel') in the final set of comparables. The objection of the assessee against inclusion of Genesys is that it is not functionally comparable as the company is predominantly engaged in providing advance mapping, survey, geospatial services and offers solutions revolving state of the art remote sensing LIDAR, ariel survey. The assessee further objected to inclusion of Genesys on the ground that there is no segment for ITES and the said company is having high turnover. In respect of Excel the assessee objected that the said company does not maintain separate segment for ITES in the financial year. The company is primarily engaged in providing BPO services. There is considerable change in the business of the assessee and there is extra-ordinary event in the financial year 2011-12 i.e. disinvestment. The company had sold 25,000 shares of Excel Infra N reality Pvt. Ltd. The objections raised by the assessee for excluding above two companies were rejected by the TPO.

3. The Assessing Officer while passing draft assessment order dated 31/03/2016, further disallowed assessee's claim of depreciation on goodwill. Aggrieved against the draft assessment order, the assessee filed objections before the Dispute Resolution Penal (DRP), inter-alia, assailing inclusion of Genesys and Excel in the final set of comparables and disallowance of assessee's claim of depreciation on goodwill, as well as, depreciation on goodwill arising pursuant to merger of Tracmail AR Services Pvt. Ltd. with the assessee company. The DRP rejected the objections of the assessee qua, aforementioned claims. The Assessing Officer consequent to the directions of the DRP passed impugned assessment order making additions in respect:

- | | | |
|---------------------------------|---|-------------------|
| (i) Transfer Pricing adjustment | - | Rs. 7,34,02,419/- |
| (ii) Depreciation on goodwill | - | Rs. 1,69,24,694/- |

Aggrieved against aforesaid additions, the assessee is in appeal before the Tribunal.

4. The assessee has raised 12 grounds in the grounds of appeal and the same are summed up as under:-

- The ground No.1 to 8 of the appeal are in respect of TP adjustment.
- The ground No.9 of the appeal is against disallowance of depreciation on goodwill amounting to Rs.1,69,24,694/-.
- The ground No.10 of the appeal is in respect of non-admission of the claim, qua additional depreciation on goodwill.
- The ground No.11 of the appeal is against non-granting of set off of brought forward losses.
- The ground No.12 of the appeal is against levy of interest under section 234B of the Act.

5. Shri J.D.Mistry, appearing on behalf of the assessee submitted that while selecting comparables the TPO has failed to consider the objections filed by the assessee against inclusion of Genesys and Excel in the final list of comparables. The Id. Counsel for the assessee pointed that Genesys is functionally not comparable. The said company was included in the list of comparable in assessment year 2008-09. The matter travelled to the Tribunal. The Tribunal in appeal filed by the assessee in ITA No.7519/Mum/2012 for assessment year 2008-09 decided on 05/01/2018 held that Genesys is not

functionally comparable with the assessee. The Id. Counsel for the assessee further pointed that in assessment year 2009-10 and 2010-11 there was no disputed with regard to the comparables as the case of the assessee was not referred to the TPO. In assessment year 2011-12, the TPO did not include Genesys in the list of comparables. The Id. Counsel for the assessee submitted that there has been no change either in the nature of business of the assessee or that of Genesys. Since the facts in assessment year 2008-09, 2011-12 and assessment year under appeal i.e. assessment year 2012-13 are same, Genesys should be excluded from the list of comparables on account of functional disparity.

In respect of Excel, the Id. Counsel for the assessee submitted that the company is liable to be excluded from the list of comparables on the ground that the said company is having highly fluctuating margins in the financial year 2011-12 (relevant to assessment year 2012-13). To support his contention, the Id. Counsel for the assessee placed reliance on the following decisions:-

- (i) Emersion Climate Technologies vs. DCIT, ITA No.359/PUN/2016 decided on 25/04/2018.
- (ii) Baxter India Pvt. Ltd vs. ACIT, ITA No.6158/Del/2016 decided on 24/08/2017.

The Id. Counsel for the assessee further pointed that the DRP in proceedings for assessment year 2013-14 had excluded Excel from the final set of comparables. The Id. Counsel for the assessee confined his submissions in respect of Transfer Pricing issues, in assailing inclusion of Genesys and Excel in the list of comparables.

5.1 In respect of ground No.9 and 10, the Id. Counsel for the assessee submitted that the issue of allowability of depreciation on goodwill and additional depreciation on goodwill was considered by the Tribunal in assessee's own case in ITA No.2692/Mum/2016 for assessment year 2011-12 decided on 12/07/2019. The Tribunal held that the assessee is eligible for claiming depreciation on goodwill. As regards additional depreciation on goodwill, the Id. Counsel for the assessee submitted that in assessment year 2011-12 the assessee had not claimed additional depreciation on goodwill in the return of income. The claim was made subsequently during the assessment proceedings. The Assessing Officer rejected assessee's claim, the Tribunal accepted assessee's claim of additional depreciation. However, the same was restored to Assessing Officer for verification.

5.2 In respect of ground No.11 of the appeal, the Id. Counsel for the assessee submitted that the authorities below have erred in not allowing set off of brought forward business losses. The Id. Counsel for the assessee prayed for direction to the Assessing Officer to reconsider the claim of the assessee.

6. Shri Akhtar H. Ansari, representing the Department vehemently defended the impugned assessment order and the directions of DRP. The Id. Departmental Representative submitted that the assessee's objection with regard to exclusion of Genesys and Excel from the list of comparables was duly considered by the DRP. Since there was no merit in the contentions of the assessee, the same were rejected. The Id. Departmental Representative pointed that as regards fluctuating margins of Excel, this plea was never raised

either before the TPO or before the DRP. The assessee has raised a fresh plea for exclusion of Excel from the list of comparables.

In respect of depreciation/additional depreciation on goodwill, the Id. Departmental Representative fairly admitted that the issue was subject matter of appeal before the Tribunal in preceding assessment year i.e. assessment year 2011-12. However, the Id. Departmental Representative pointed that the assessee had never claimed additional depreciation in the return of income. The claim of depreciation on goodwill was raised for first time during the course of assessment proceedings. The Hon'ble Supreme Court of India in the case of Goetze (India) Limited vs. CIT, 284 ITR 323(SC) has held that the Assessing Officer has no power to accept the claim not made in the return of income.

7. We have heard the submissions made by rival sides and have perused the orders of authorities below. The grounds No.1 to 8 of the appeal are in respect of TP adjustment. The Id. Counsel for the assessee while making submissions on these grounds confined his submissions to assailing the final list of comparables. The Id. Counsel for the assessee submitted that the authorities below have erred in including Genesys and Excel in the final list of comparables. The Id. Counsel pointed that if both these companies are excluded from the final list of comparables, the margins of the comparables would be within +/- 5% range of the assessee's margin.

Genesys International Corporation Ltd.

The assessee sought exclusion of Genesys on the ground of functional disparity. It was pointed that in assessment year 2008-09 the said company was excluded from the list of comparables by the Tribunal in assessee's own case for the reason of functional differences. We find that in ITA No.7519/Mum/2019 (supra) the assessee has assailed inclusion of four comparables including Genesys. The Tribunal after examining the facts concluded that all the four comparables are not in the same field and hence, directed to exclude the same from the list of comparables. Further, we observe that in assessment year 2011-12 the TPO while passing order U/s.92CA(3) of the Act dated 28-1-2015, has himself not included Genesys in the final list of comparables. No material has been brought on record before us to show that in the assessment year under appeal, both the entities have similar functions. Thus, in the light of the decision of the Co-ordinate Bench in ITA No.7519/Mum/2019 (supra) and no change in the facts in assessment year under appeal, we direct the TPO/Assessing Officer to exclude Genesys from the final list of comparables.

Excel Infoways Limited (Segmental)

The assessee is seeking exclusion of Excel from the final list of comparables on the ground that the company is having fluctuating margins and hence, is not a good comparable for assessment year 2012-13. We find that Pune Bench of the Tribunal in the case of Emersion Climate Technologies vs. DCIT (supra) directed to exclude Excel from the list of comparables on account of fluctuating margins. The relevant extract of the finding of the Tribunal read as under:-

“16. Coming to the first concern Excel Infoways Ltd., wherein the assessee points out that the said concern was not to be selected as comparable because of its fluctuating margins. The learned Authorized Representative for the assessee has filed tabulated details in this regard, wherein the margins of said concern being drastically dropped from 267.31% in earlier years to 41.48% during the year under consideration. The year-wise margins of said concern are as under:-

Financial Year	OP/TC Margin
2008-09	247.74%
2009-10	267.31%
2010-11	238.71%
2011-12	41.48%

17. Further, the said concern had closed down its ITES and BPO segment in financial year 2011-12 on account of global recession. **We hold that the said concern which is in the process of closing down its ITES segment and also because of the factum of fluctuating margins, could not be selected as functionally comparable to the assessee.** In this regard, we find support from the ratio laid down by the Hon'ble High Court of Gujarat in Pr. CIT Vs. Allscripts India Pvt. Ltd. in Income Tax Appeal No.258 of 2016 and Pune Bench of Tribunal in TIBCO Software India Pvt. Ltd. Vs. DCIT in ITA Nos.276/PUN/2015 & cross appeal in ITA No.334/PUN/2015, relating to assessment year 2010-11, order dated 31.01.2017 and Qlogic India Pvt. Ltd. Vs. DCIT in ITA No.227/PUN/2014, relating to assessment year 2009-10, order dated 21.10.2014.”

[Emphasised by us]

In the case of Baxter India Pvt. Ltd vs. ACIT (supra), the Tribunal directed to exclude Excel from the list of comparables inter-alia on account of, abnormal volatility in revenue and margins. It is settled legal position that a company having super normal profits or highly unstable margins should not be idly considered as good comparable. Thus, in view of the decisions referred above, we find merit in the contentions of the assessee and direct the Assessing Officer to exclude Excel from the list of comparables.

8. In view of our above findings, ground No.1 to 8 of the appeal are partly allowed.

9. In ground No.9 of the appeal, the assessee has assailed disallowance of depreciation of goodwill. We find that the issue of allowability of depreciation on goodwill was considered by the Tribunal in assessment year 2011-12 in ITA No.2692/Mum/2016 (supra). The Tribunal while allowing assessee's claim held as under:-

*"18. We have considered rival submissions and perused the material on record. Insofar as the factual position relating to the aforesaid issue is concerned, there is no dispute. Even the Assessing Officer has stated that the assessee had transferred its business on slump sale basis to Tracmail AR Services Pvt. Ltd. in assessment year 2008-09 which included goodwill of Rs. 11,51,01,122. The aforesaid goodwill was also reflected not only in the respective books of account of the assessee and the transferee company but also appears in the financial statements. It is also a fact that the subsequent amalgamation between the assessee and Tracmail AR Services Pvt. Ltd. was by virtue of a scheme of amalgamation approved by the Hon'ble Jurisdictional High Court. That being the case, it cannot be said that the assessee has entered into a circular transaction or adopted a colourable device for claiming depreciation. Moreover, in the return of income filed for the assessment year 2009-10, the assessee had offered capital gain on the transfer of goodwill of Rs. 11,51,01,122. However, in the course of assessment proceedings for the assessment year 2008-09, the Assessing Officer was of the view that the capital gain on goodwill has to be assessed in assessment year 2008-09. Accordingly, he proceeded to assess the amount of Rs. 11,51,01,122, as short term capital gain in assessment year 2008-09. Thus, when the assessee has paid capital gain tax at the time of transfer of goodwill and the Department has accepted it, it cannot be said that the assessee has adopted a colourable device. Moreover, the scheme of amalgamation between the assessee and Tracmail AR Services Pvt. Ltd., having been approved by the Hon'ble Jurisdictional High Court, no doubt can be raised with regard to the transparency or genuineness of such transaction. Thus, when the assessee by virtue of such amalgamation has received back the goodwill in its book, depreciation has to be allowed on goodwill. As regards the doubt raised by learned DRP that the assessee cannot claim depreciation on the entire amount of goodwill, it must be observed that the assessee has claimed goodwill on the opening WDV only and not on the entire amount. **It is now fairly well settled that goodwill being an intangible asset, depreciation has to be allowed. In view of the aforesaid, we direct the Assessing Officer to allow assessee's claim of depreciation of Rs.2,25,66,258, on goodwill. Grounds are allowed.**"*

The facts in assessment year under appeal are identical. For parity of reasons mentioned above, **the ground No.9 of the appeal is allowed.**

10. The ground No.10 of the appeal is with respect to assessee's claim of additional depreciation on goodwill subsequent to amalgamation. Undisputedly, the assessee had not made the claim of additional depreciation in the return of income. The claim was made for the first time in the assessment proceedings. We find that similar was the position with regard to the claim of additional depreciation in assessment year 2011-12. The Tribunal after considering the facts and various case laws held as under:-

"24. We have considered rival submissions and perused the material on record. We have also taken note of the decisions cited before us. As discussed earlier, aforesaid deduction was claimed by the assessee in course of assessment proceedings through a revised statement of income. While the Assessing Officer has not expressed any view on such claim, learned DRP has rejected it solely on the ground that assessee had not claimed it either in the return of income or by filing a revised return of income. In our view, the aforesaid reasoning of learned DRP is contrary to the settled legal position. In case of Pruthvi Brokers and Shareholders Pvt. Ltd. (supra), the Hon'ble Jurisdictional High Court has held that even if the assessee has failed to claim a deduction either in the return of income or by filing revised return of income, the assessee can make such claim subsequently. Even in case of Goetz India Ltd. (supra), the Hon'ble Supreme Court has held that there is no restriction on the appellate authorities in entertaining a fresh claim of deduction made by the assessee. Therefore, keeping in view the ratio laid down in the aforesaid decisions, the decision of learned DRP in rejecting assessee's claim is unsustainable, hence, deserves to be set aside. However, since the Departmental Authorities have not examined assessee's claim, both factually and legally, we are inclined to restore the issue to the Assessing Officer for examining assessee's claim on its own merit. While doing so, the Assessing Officer is also directed to take note of the fact whether such claim was allowed in any other assessment year. He should also keep in view the decisions to be cited by the assessee on the issue. Needless to mention, before deciding the issue the Assessing Officer must afford reasonable opportunity of being heard to the assessee. This ground is allowed for statistical purposes."

Thus, in the light of decision of the Co-ordinate Bench in assessee's own case on same set of facts, we restore this issue back to the file of Assessing Officer with similar directions. **The ground No.10 of the appeal is allowed for statistical purpose.**

11. In ground No.11 of the appeal the assessee has assailed non-granting of set off of brought forward business losses. The Id. Counsel for the assessee has prayed for restoration of this issue with a direction to Assessing Officer to allow assessee's claim. The issue is restored back to Assessing Officer for reconsideration in accordance with law. Needless to say, the Assessing Officer shall grant reasonable opportunity of hearing to the assessee in accordance with law. **The ground No.11 is allowed for statistical purpose.**

12. In ground No.12, the assessee has assailed levy of interest under section 234B of the Act. The charging of interest under section 234B is mandatory and consequential. We find no merit in this ground of appeal. Accordingly, the same is dismissed.

13. **In the result, appeal of the assessee is partly allowed in the terms aforesaid.**

Order pronounced on Friday the 12th day of June, 2020.

Sd/-

(N.K.PRADHAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 12 /06/2020

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar)
ITAT, Mumbai