

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
DR. B. R. R. KUMAR, ACCOUNTANT MEMBER**

**ITA No. 5530/DEL/2016 (A.Y 2012-13)
(THROUGH VIDEO CONFERENCING)**

Future First Info Services Pvt. Ltd. 303, Mansarover Building 90, Nehru Place, New Delhi AAACF8545J (APPELLANT)	Vs	ACIT Circle-9(2) New Delhi (RESPONDENT)
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Appellant by	Sh. Rahul Yadav & Suyansh Sinha, Advs
Respondent by	Sh. Surendar Pal, CIT DR

Date of Hearing	18.08.2021
Date of Pronouncement	16.11.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeals is filed by the assessee against the order dated 31/08/2016 order passed by 144C(1)(3) read with Section 143 (3) of the Income Tax Act, 1961 for Assessment Year 2012-13.

2. The grounds of appeal are as under:-

Appeal under section 253(1) of the Income-tax Act, 1961 ("the Act") against the order dated August 31, 2016 (received on September 1, 2016) passed under section 143(3) of the Act read with 144C of the-Act by the Assistant Commissioner of Income Tax, Circle 9 (2), Delhi ("AO") for the assessment year 2012-13, pursuant to the directions of Dispute Resolution Panel ("DRP") under section 144C(5) of the Act

GROUNDS OF APPEAL

1. *That on the facts and circumstances of the case and in law, the assessment order dated August 31, 2016 under section 143(3) of the Act, pursuant to the directions of the DRP, assessing the total income of the Appellant at Rs. 34,84,50,690, as against returned income of Rs. 23,32,06,570, is bad in law.*
2. *That on the facts and circumstances of the case and in law, the AO/ Transfer Pricing Officer (“TPO”)/ DRP erred in making an upward transfer pricing adjustment of Rs 11,52,44,123 in respect of the international transaction pertaining to provision of Information Technology enabled Support Services (“ITeS”), alleging the same to be not at arm’s length in terms of the provisions of Sections 92C(1) and 92C(2) of the Act read with Rule 10D of the Income-tax Rules, 1962 (“the Rules”).*
3. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in arbitrarily modifying/rejecting the economic analysis and quantitative/qualitative search filters, which has resulted in selection of final comparables, which are not comparable with the Appellant, having regard to its functional, asset and risk profile, for the purpose of benchmarking its international transaction of provision of ITeS.*
4. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in arbitrarily characterizing the Appellant as a High - end Knowledge Process Outsourcing (“KPO”) entity, relying on the Safe Harbour Rules which were not applicable for the year under consideration.*
5. *That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in arbitrarily selecting comparable companies based on incorrect appreciation of functional, asset and risk profile of the Appellant. In doing so, the AO/DRP/TPO have also erred in rejecting the claim of the Appellant that the companies with high turnover and/or abnormal high margins ought not be selected as comparable for the purpose of benchmarking the international transaction of provisions of ITeS.*

6. That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in arbitrarily rejecting certain functionally comparable companies selected by the Appellant.

7. That on the facts and circumstances of the case and in law, the AO/DRP/TPO have erred in incorrectly computing the operating margins of the Appellant as well of the comparable companies, by excluding the forex fluctuation gains/loss from the operating revenue/expenditure, following the Safe Harbour Rules, which were not applicable for year under consideration.

8. That on facts and circumstances of the case and in law, the AO/DRP/TPO have erred in ignoring the provisions of Rule 10B(4) of the Rules and judicial pronouncement which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.

9. That on the facts and circumstances of the case and in law, the AO has erred in charging interest under section 234B of the Act.

3. The assessee company is subsidiary of GHF Holdings Limited, Mauritius. It is engaged in IT Enabled support services functions with relation to primary activity of its Associated Enterprises ("AEs") which is trading in derivatives in Europe and US exchanges. The support functions are provided as per specified guidelines, training and rules laid down by the AEs. Summary of International Transaction and benchmarking approach adopted by the assessee is as follows:

Sr. No.	Nature of Transaction	AE	Amount (INR)	Method
1	Provision of IT enabled Services	Indus Derivatives Ltd Mauritius	142,84,37,885/-	TNMM

The assessee company filed its return of income on 10.09.2012 declaring total income at Rs. 23,32,06,570/-. During the year under consideration, the assessee company has made the international transaction with the associated

enterprises and a reference in this regard was made to the Transfer Pricing Officer vide letter dated 12.01.2015 u/s 92CA(3) of the Income Tax Act, 1961 in respect of international transaction entered into by the assessee during A.Y. 2012-13. The TPO passed order dated 29.01.2016 thereby determining arm's length price of the international transaction adjustment at Rs.152,29,92,122/-. Accordingly draft assessment order was passed on 29.02.2016. Being aggrieved by the draft assessment order, the assessee filed objections before the DRP and the DRP vide directions/order dated 30.06.2016 directed the TPO to recompute the Arm's Length Price adjustment. The Assessing Officer passed the assessment order dated 31.08.2016, thereby making addition of Rs. 11,52,44,123/- and assessed the income at Rs. 34,84,50,690/-.

4. Being aggrieved by the assessment order, the assessee filed present appeal before us.

5. The Ld. AR submitted that Ground No. 1 to 3 are general in nature. As regards Ground No. 4, relating to erroneous classification of the assessee as a KPO by applying safe harbor Rules, the Ld. AR submitted that the functional profile of the assessee has been accepted by the TPO and no case was ever made out by the TPO that the assessee is a KPO. This is evident from Para 4 of TPO's order (page 2) where the TPO has recorded "*...The main international transactions of the assessee is the provisions of IT Enables services. The TP report has described the functions of the assessee as submitted in the TP report are found to be in order.*" The functional profile of the assessee was accepted by the TPO in similar terms in A.Y. 2010-11, which was noted by the Tribunal in assessee's own case. The functions performed by the assessee reveal that it is engaged in providing IT enabled support functions. The Ld. AR further submitted that the Hon'ble Delhi High Court in case of Rampgreen Solutions Pvt. Ltd. vs. CIT (ITA No. 102/2015) held that KPO services require high level of skills and knowledge and domain expertise. The Ld. AR submitted that in contrast, the assessee

company provides back office support services to AEs with the help of tools, infrastructure and training provided by the AEs. The assessee hires young graduates with no or minimal work experience, trains them with basic computer skills with the help of AEs so that its employees can follow the parameters, guidelines and criteria determined by AEs to input buy-sell figures to support AE. Therefore, the Ld. AR submitted that the findings of the DRP to categorize the assessee as a high-end KPO are misplaced. The Ld. AR further submitted that Rule 10B(2) categorically provides that comparability shall be judged, *inter alia*, with reference to specific characteristics of the services provided. Therefore, where the services provided by the assessee and that of comparables, are materially different, the comparable has to be ignored. The Ld. AR further submitted that the reliance on Safe Harbour rules by the DRP/TPO is misplaced. In fact, the DRP has itself admitted that Safe Harbour Rules are not applicable for the subject assessment year, yet reliance has been placed to justify assessee's classification as KPO. The Ld. AR relied upon the decision of Delval Flow Controls Private Limited v DCIT in ITA 640/PUN/2017, order dated 20.01.2021 and Dana India Private Limited v. DCIT in ITA No. 473/PUN/2018.

6. The Ld. DR relied upon the Assessment Order, order of the TPO and the directions of the DRP.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that the Revenue at no point of time disputed the functions of the assessee company. The assessee company provides back office support services to AEs with the help of tools, infrastructure and training provided by the AEs which is different than the functions of the KPO. Besides this, the DRP has admitted that the Safe Harbour Rule will not be applicable in assessee company's case. Thus, classification of the assessee as a KPO by applying safe harbor Rules is totally out of context and does not get any support from the evidences before us. Therefore, the directions of the DRP as

well as the observations made by the TPO and thereafter comparing the assessee company with that of high end KPO for benchmarking ALP determination of the comparables is not correct. Hence, Ground No. 4 is allowed.

8. As regards Ground No. 5, relating to incorrect inclusion of comparables by the TPO/DRP, the Ld. AR submitted that the inclusion of following comparables by the TPO/DRP is being challenged by the assessee in the instant appeal.

8.1. E-Clerx Services Ltd.: The Ld. AR submitted that in assessee's own case for Assessment Year 2009-10, the Tribunal has excluded E-Clerx Services Ltd. as a comparable in ITA NO. 3476/Del/2017 concluding that it is not comparable with the assessee, on the following grounds:-

- (a) It is a high end KPO and carries out data analytics based services not comparable with the assessee;
- (b) It carries out substantial business on outsourcing model which is absent in case of the assessee;
- (c) It carries out a wide array of activities but no segmental data is available.

The functions performed by E-Clerx Services Ltd. takes the nature of high end analytical and research services which require manpower of specific qualifications, skill sets and domain knowledge in contrast to the Assessee rendering back office support services. The Ld. AR further submitted that E-Clerx Services Ltd. works on outsourcing model and outsources substantial amount of work. In the subject year, 22.07% of the total cost of the company that has been paid to the outside vendors for availing of IT enabled services. As such it cannot be compared to the Assessee which provides in-house back office services to AEs. On this factor alone, the Tribunal in AY 2009-10 in assessee's own case rejected E- Clerx Services Ltd. as a comparable. The Ld. AR submitted that the comparable company has valuable intangible assets

which comprise of 11.26% of the total assets, viz. the Assessee which has intangible assets of value at 1.81% of total assets. The Ld. AR further submitted that the comparable company is engaged in rendering wide variety of services including KPO, sales and marketing functions but no segmental data is available. As per annual report of the company, the company operates under a single segment viz. "Data Analytics and Process Outsourcing Services". The Ld. AR relied upon the following decisions:

- Rampgreen Solutions Pvt. Ltd v. CIT (ITA 102/2015 (Delhi High Court)
- Agilent Technologies (International) Pvt. Ltd. v. ITO (ITA No. 1620/Del/2015, 477 & 6420/DEL/2016)
- PCIT v. B.C. Management Services Pvt. Ltd., (ITA No. 1064 & 1083/2017 (Delhi High Court)
- BC Management Services Pvt. Ltd. vs. DCIT ITA 6134/Del/2015, 5829/Del/2015 & ITA No. 6572/Del/2016)
- Copal Research India Pvt. Ltd. v. ITO (ITA No. 1713/Del/2014)
- PCIT v. Actis Global Services Pvt. Ltd. (ITA 417/2016 (Delhi High Court))
- Actis Global Services Pvt. Ltd. v. ITO (ITA No. 30/Del/2015)
- DCIT v. DBOI Global Services Pvt. Ltd. (ITA No. 2136/Mum/2012)

8.2 The Ld. DR relied upon the order of the TPO.

8.3 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the functions of the comparable company E-Clerx Services Ltd. is totally different than that of assessee company. In fact, the functions performed by E-Clerx Services Ltd. takes the nature of high end analytical and research services which require manpower of specific qualifications, skill sets and domain knowledge in contrast to the Assessee rendering back office support services. E-Clerx Services Ltd. works on outsourcing model and outsources substantial amount of work. In the subject year, 22.07% of the total cost of the company that has been paid to the outside vendors for availing of IT enabled services. As such it cannot be compared to the Assessee which provides in-house back office services to AEs. The Tribunal in AY 2009-10 in assessee's own case rejected E-

Clerx Services Ltd. as a comparable and the functions of this comparable has not changed in the present assessment year as well. Therefore, we direct the TPO/AO to exclude this comparable from the list of comparables.

8.4 Infosys BPO Ltd.: The Ld. AR submitted that this comparable company is a giant engaged in providing high-end integrated services by assisting its clients in improving their competitive positioning by managing their business processes in addition to providing increased value, whereas the Assessee engaged in providing IT Enabled services. Infosys BPO has high value of goodwill. Infosys BPO owns significant intangibles and hence enjoys premium pricing, as such, it cannot be compared with the assessee. In assessee's own case for AY 2009-10 and AY 2010-11, the Tribunal has excluded Infosys BPO as the said company is Giant company (among Top 10 BPO companies) having high turnover and assets and huge number of employees. It has presence of significant goodwill/ intangibles. This comparable company fails filter applied by TPO to reject companies having peculiar/ extraordinary economic circumstances such as mergers and amalgamations etc. Infosys BPO acquired Portland Group Pty. Limited during the FY 2011-12. The acquisition has enhanced the presence of Infosys BPO in high end sourcing and procurement space in Asia Pacific Region. The TPO rejected ICRA on the grounds of amalgamation being carried out in the current year. As such, on this ground alone Infosys BPO deserves to be excluded in the final set of comparables. The Ld. AR relied upon the following decisions:

- * Actis Global Services Pvt. Ltd. v. ITO (ITA No. 30/Del/2015)
- * DCIT v. DBOI Global Sendees Pvt. Ltd. (ITA No. 2136/Mum/2012)
- * PCIT v. Sanvith Info Group Pvt. Ltd. (ITA 420/2019 (Delhi High Court))
- * Agilent Technologies (International) Pvt. Ltd. vs. ITO (ITA No. 1620/Del/2015, 477 & 6420/DEL/2016)
- * Smart Analyst India Private Limited Vs ACIT (ITA No.3779 & 3989 Del 2017)

8.5 The Ld. DR relied upon the assessment order and the order of the TPO.

8.6 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this comparable company is a giant engaged in providing high-end integrated services by assisting its clients in improving their competitive positioning by managing their business processes in addition to providing increased value, whereas the Assessee engaged in providing IT Enabled services. Infosys BPO has high value of goodwill. Infosys BPO owns significant intangibles. Infosys BPO acquired Portland Group Pty. Limited during the FY 2011-12. The acquisition has enhanced the presence of Infosys BPO in high end sourcing and procurement space in Asia Pacific Region. Thus, this comparable company has to be excluded from the set of final comparables. We direct the TPO/AO accordingly.

9. As regards Ground No. 6 relating to incorrect exclusion to certain comparables by the TPO/DRP, the Ld. AR submitted that the exclusion of following comparables by TPO/DRP is being challenged by the assessee in the present appeal.

9.1 Caliber Point Business Solutions Ltd.: The Ld. AR submitted that this comparable company cannot be rejected only on the ground of different financial year ending. Company is functionally comparable, this fact has not been disputed by the TPO or DRP. Caliber Point Business Solutions Ltd. is a provider of IT solutions and Business Process Outsourcing (BPO) services. This comparable company meets all quantitative filters applied by the TPO. It is settled law that a comparable, otherwise functionally comparable, cannot be rejected merely because it follows a difference financial year, provided that reliable data for comparability can be extrapolated from the available information. The Ld. AR submitted that the assessee has provided the relevant data compiled for April 1, 2011 to March 31, 2012 and the same was filed

before the DRP. Caliber Point Business Solutions Ltd. was held comparable to the assessee and included in the final set of comparables by the Tribunal in assessee's own case in AY 2010-11. The Ld. AR relied upon the following decisions:

- * CIT vs. Mckinsey Knowledge Centre India Pvt. Ltd. (ITA No.217/2014 (Delhi High Court)
- * Mercer Consulting (India) Pvt. Ltd. v. DCIT (ITA No.966/Del/2014)
- * Exchanging Technology Services India Private Limited vs. DCIT (ITA No. 1222/Del/2015)
- * Smart Analyst India Vs. ACIT (ITA Nos. 3779, 3989/Del/2017 & 2745/Del/2018)

9.2 The Ld. DR relied upon the assessment order and the order of the TPO.

9.3 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this comparable company cannot be rejected only on the ground of different financial year ending. Company is functionally comparable, this fact has not been disputed by the TPO or the DRP. Caliber Point Business Solutions Ltd. was held comparable to the assessee and included in the final set of comparables by the Tribunal in assessee's own case in AY 2010-11. No distinguishing facts were pointed out by the Ld. DR related to functions for this year to that of A.Y. 2010-11. Hence, we direct the TPO/AO to include this comparable company in final set of comparable.

9.4 Jindal Intellicom Ltd.: The Ld. AR submitted that the assessee is not a high-end KPO, as alleged by the DRP. Jindal Intellicom Ltd. passes all the filters applied by the TPO and is functionally comparable to the assessee. It was selected by the TPO/DRP in the preceding year as well i.e. F.Y 2011-12. Given there has been no change in functional profile of Jindal Intellicom or the assessee, following the principle of consistency, this comparable ought to have

been retained. Detailed submissions were filed by the assessee before lower authorities. The Ld. AR relied upon the following decisions:

- * Radhasoami Saisang vs. CIT (1992) 193 1TR 321 (SC)
- * CIT vs. Excel Industries Ltd. (2013) 358 ITR 295 (SC)

9.5 The Ld. DR relied upon the assessment order and the order of the CIT(A).

9.6 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that as we have observed hereinabove in respect of Ground No. 4, the assessee is not a high-end KPO. Jindal Intellicom Ltd. passes all the filters applied by the TPO and it is functionally comparable to the assessee. In fact, in preceding year 2011-12, the said comparable company was accepted by the TPO/DRP and the functions remain same. No distinguishing facts were brought on record by the Ld. DR. Hence, we direct the TPO/AO to include this comparable company in final set of comparable.

10. Thus, Ground No. 6 is allowed.

11. As related to Ground No.7 relating to erroneous treatment of foreign exchange gain/loss as non-operating by applying Safe Harbour Rules, the Ld. AR submitted that foreign exchange fluctuation is inextricably linked with the assessee's business operation. The foreign exchange gain was on account of the following reason:

- (a) Difference in the exchange rate prevailing at the time of invoicing & payment for the inter-company billing;
- (b) Difference in exchange rates prevailing at the time of transaction and as on 31.3.2012 for the amount outstanding at the end of the year.

The Ld. AR relied upon the following decisions:

- * PCIT v. B. C. Management Services Pvt. Ltd. ITA 1064 & 1083/2017 (Delhi High Court)

- * BC Management Services Pvt. Ltd. v. DCIT (ITA 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016)
- * Smart Analyst India Private Limited vs. ACIT (ITA No.3779 & 3989 /Del/2017)
- * Techbooks international Pvt. v. ACIT (ITA No. 722/Del/2014)

The Ld. AR submitted that the Safe Harbour Rules are not applicable to the assessee and reiterated the submissions made in respect of Ground 4 hereinabove.

12. The Ld. DR relied upon the assessment order and the order of the TPO.

13. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that foreign exchange fluctuation is inextricably linked with the assessee's business operation. The foreign exchange gain was on account of difference in the exchange rate prevailing at the time of invoicing & payment for the inter-company billing as well as Difference in exchange rates prevailing at the time of transaction and as on 31.3.2012 for the amount outstanding at the end of the year. In fact, the DRP has admitted that the Safe Harbour Rules do not apply in assessee's case. Thus, Ground No. 7 is allowed.

14. As regards Ground No. 8, the same is general in nature and Ground No. 9 is consequential in nature, hence not adjudicated upon at this juncture.

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

Order pronounced in the Open Court in presence of both the parties on this 16th Day of November, 2021

sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER
Dated: 16 /11/2021
R. Naheed

sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI