

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 5503/Del/2016
(Assessment Year: 2012-13)

GE India Business Services Private Limited, 401 & 402, 4 th Floor, Aggarwal Millenium Tower, E-1,2,3, Netaji Subash Place, Wazirpur PAN: AAACI6748J	Vs.	Addl. CIT, Special Range-4, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Sachit Jolly, Adv Shri Aayush Nagpal, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing	07/08/2020
Date of pronouncement	16/09/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by GE India business services private limited, assessee, appellant against the order passed by The Additional Commissioner Of Income Tax, Special Range – 4, New Delhi (The Learned AO) u/s 143 (3) read with Section 144C (5) of The Income Tax Act, 1961 (The Act) dated 23 August 2016 for Assessment Year 2012 – 13 wherein the original return filed by the assessee on 29/11/2012 declaring income at Rs. 130,639,034/- was assessed at Rs 156,603,164/-. The two additions or adjustment to the returned income were proposed. The first addition was addition on account of arm's-length price of an international transaction of ₹ 25,822,279/- and second one was disallowance u/s 14 A of ₹ 71,851/-.
2. The assessee has raised the following grounds of appeal:-
 - “1. That on facts and in law the Assessing Officer [hereinafter referred as the “AO”] / Dispute Resolution Panel [hereinafter referred as the “DRP”] / Transfer Pricing Officer [hereinafter referred as the “TPO”] erred in making/upholding an addition to total income of Rs. 2,59,64,130 (includes Rs. 2,58,92,279 on account of transfer pricing addition) under the Income Tax Act, 1961 [hereinafter referred as “the Act”] in the order of assessment.

2. *The Ld. TPO/AO erred in enhancing the income of the Appellant by Rs. 2,58,92,279 by holding that the international related party transactions pertaining to its information technology enabled (IT) and financial support services do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred in:*
 - 2.1 *not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*
 - 2.2 *disregarding the Arm's Length Price ('ALP') as determined by the Appellant in the Transfer Pricing (TP1) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');*
 - 2.3 *disregarding the approach adopted by the Appellant of using data of latest available year in the TP documentation and holding that current year (i.e. FY 2011-12) data for comparable companies should be used despite the fact that the same may not have been available to the Appellant at the time of preparing its TP documentation;*
 - 2.4 *rejecting the comparability analysis conducted by the Appellant in the TP documentation and undertaking a comparability analysis by rejecting / modifying quantitative filters applied by the Appellant in its TP documentation and applying the following additional/revised filters:*
 - 2.4.1 *rejecting the filter of research and development expenditure/sales applied by the assessee in its TP documentation;*
 - 2.4.2 *exclusion of companies in whose employee cost is less than 25 percent of the total cost*
 - 2.4.3 *exclusion of companies having export sales less than 75% of total income;*
 - 2.4.4 *exclusion of companies having different FY (i.e. not March 31, 2012) or the data of the company does not fall within 12 month period i.e. 1 April 2011 to 31 March 2012;*
 - 2.4.5 *increasing threshold for exclusion of companies having related party transactions from 20% to 25% of sales.*
 - 2.5 *including companies having abnormal/ volatile margins, disregarding judicial pronouncements on the issue and with the intention of making an addition to the returned income of the Appellant;*
 - 2.6 *including certain companies that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*
 - 2.7 *rejecting certain companies and adding certain companies to the final set of comparables for the impugned transaction on an ad-hoc basis. The Ld. TPO has resorted to cherry picking of comparables to determine ALP for the impugned transaction;*
 - 2.8 *rejecting the additional comparables introduced by the assessee giving no cognizance to the fresh comparable companies put forward by the Appellant, in the interest of substantial justice;*

- 2.9 *committing errors in the computation of the operating profit margin of certain companies considered as comparable;*
- 2.10 *failed to make appropriate adjustments to account for varying risk profiles of the Appellant vis-a-vis the comparables and in the process also neglected the Indian transfer pricing regulations, OECD guidelines on transfer pricing and judicial precedence*
3. *Hon'ble DRP erred in concluding the Appellant provides high end services i.e. KPO as against ITeS and financial support service, not appreciating the functional, assets and risk profile of the Appellant.*
4. *That on the facts and circumstances of the case and in law, the AO and DRP has erred in making disallowance of Rs 71,851 under the provisions of section 14A of the Act read with rule 8D of Income tax Rules, 1962 ('rules') wherein the appellant has not earned any exempt income during the subject year.*
5. *That on the facts and circumstances of the case and in law, the AO has erred in levying interest under section 234A of the Act when appellant has filed the return within the statutory time.*
6. *That on the facts and circumstances of the case and in law, the AO has erred in not granting the full credit of TDS claimed by the appellant in its return of income.*
7. *That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under section 271 (1)(c) of the Act."*
3. Ground number 1 of the appeal is general in nature covering the transfer pricing adjustment made of ₹ 25,892,279 which is further elaborated in ground number 2 – 3 of the grounds of appeal. Therefore ground number 1 is general in nature and hence same is dismissed.
4. Coming to ground number 2 and 3 which are against the addition/adjustment on account of arm's-length price of the international transaction of information technology enabled and financial support services amounting to ₹ 25,892,279. In essence, the assessee is contesting for exclusion of three comparable companies.
 - (1) TCS E Serve Ltd,
 - (2) Infosys BPO Ltd and
 - (3) E Clrex services Ltd.
5. Assessee is a company engaged in the business of providing information technology enabled remote processing and financial support services. It is set up as a captive service provider to provide offshore outsourcing services to its GE entities. It renders ITeS and financial support services to those

entities. Assessee prepared its transfer pricing documents related to various international transactions. Assessee entered into an international transaction of

- (1) of provision of ITeS services and finance support services amounting to ₹ 343,010,158/-,
- (2) payment of services 74,41,458/-,
- (3) reimbursement of expenses received of Rs 3,081,754,
- (4) contribution Under employees sale purchase plan of ₹ 58,411 and
- (5) reversal of invoices raised in earlier years amounting to ₹ 1,828,687/-.

- 6. Assessee benchmarked these international transaction relating to IT enabled services using transactional net margin method (TNMM) as the most appropriate method adopting the profit level indicator of return on total cost (ROTC) . It selected 7 comparable companies and computed the comparable margins at 5.52%. It further computed the margin of the comparable companies after working capital adjustment at 3.42 percentage. It further submitted that return on total cost of the assessee for the year ended on 31st of March 2012 is 11.98% and therefore its international transactions are at arm's-length.
- 7. The learned transfer pricing officer passed an order u/s 92CA (3) of the act on 20 January 2016 wherein he proposed the upward adjustment of Rs. 4 67,76,784/- to the international transactions of the assessee. The assessee filed objection before the learned Dispute Resolution Panel which passed a direction to the TPO and based on these directions the learned transfer pricing officer as per order dated 17/8/2016 computed the arm's-length price of the international transaction wherein 9 comparable companies were retained having their profit level indicator of operating profit/operating cost (OP/OC) was determined at 25.65% further their adjusted margin was determined at 21.96%. Thereafter the operating cost incurred by the assessee of ₹ 327,343,333/- was used against the international transactions of ₹ 373,335,650/- and the final adjustment was made of ₹ 25,892,279/-.

8. In the final list of comparables, the learned transfer pricing officer included the E Clrex services Ltd having margin of 49.49%, Infosys BPO Ltd having margin of 34.39% and TCS E serve Ltd having margin of 62.07%.
9. The learned authorised representative, Shri Sachit Jolly advocate, submitted that in assessee's own case for assessment year 2010 – 11 in ITA number 6906/del/2014 dated 27th of April 2018 the coordinate bench has considered the issue of inclusion of TCS E serve Ltd in para number 11 of that order and same was remitted back to the file of the learned transfer pricing officer to decide afresh. For assessment year 2009 – 10 coordinate bench in assessee's own case in ITA number 1423/del/2014 dated 18 May 2018 and in ITA number 6008/del/2012 for assessment year 2008 – 09 dated 25 September 2018 the coordinate benches has decided about the comparability analysis of some of the comparables in the case of the assessee. He therefore submitted that issue with respect to the exclusion of Infosys BPO Ltd and TCS E serve international Ltd are covered in favour of the assessee. He further submitted that there is no change in the facts of the case as well as the FAR in this year compared to that year. Therefore, these two comparables need to be excluded for this year also from the comparability analysis for determination of the arm's-length price of the international transactions. With respect to E Clerx services private limited he referred to the order of the coordinate bench for assessment year 2009 – 10 in its own case ITA number 1423/del/2014 dated 18th of May 2018 wherein in para number 18 the above comparable company was excluded. He therefore submitted that in assessee's own case all these three comparable companies are excluded in earlier years and therefore they should also be excluded for this year.
10. The learned departmental representative payment please supported the orders of the lower authorities. He referred to page number 28 of the order of the learned transfer pricing officer where E clrex services Ltd was held to be comparable. He submitted that all the objections of the assessee has been considered by the learned transfer pricing officer. Therefore same cannot be excluded. He further referred to page number 30 of the order of the learned transfer pricing officer where Infosys BPO Ltd is considered and found to be a suitable comparable. He also referred to page number 31 of

the order wherein TCS E serve Ltd is also held to be comparable. He therefore submitted that detailed reasoning is have been given by the learned transfer pricing officer which is been upheld by the learned dispute resolution panel with respect to all three comparables.

11. With respect to the various orders of the coordinate benches in assessee's own case submitted by the learned authorised representative he referred to each of them and submitted that the coordinate bench has directed the learned transfer pricing officer to exclude all these three comparables for all the above years following comparability analysis in some other judicial precedent. He submitted that if in case of company X if comparable Y is excluded, there is no reason to exclude that comparable Y in every other case. He submitted that this is neither the essence of the comparability analysis nor it supports the logic. He submitted that for each of the comparable companies only the functions performed by the company, assets employed by the company and risks assumed by the company are required to be compared. He further submitted that judicial precedents cannot be used in such a blatant manner for exclusion of one comparable if excluded in case of one assessee to be always excluded for all other assesses.
12. The learned authorised representative submitted that the judicial precedent binds the coordinate bench if there rendered in assessee's own case. It is not fair to challenge them in some other proceedings where they need to be followed , unless those orders are challenged before the higher forum and are upset.
13. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the arguments of the learned departmental representative with respect to the comparability analysis and there cannot be any dispute with respect to that for the comparability analysis the functions performed, assets employed and risks assumed of the assessee is required to be compared strictly with each of the comparable companies. Unless they are found to be distinct, they cannot be excluded merely because they have been excluded in some other assessee's case. However in the present case, the issue is when a particular comparable company is excluded from the comparability analysis in assessee's own case for earlier years, for whatever reasons, even if same

was excluded following some judicial precedent of other assesses, judicial discipline requires that we follow the same, unless

- (1) specifically revenue can bring on record the difference in the functional analysis of the assessee or comparable itself with reference to those years,
- (2) Or those orders are upset by higher judicial forums.

It is not brought on record that those decisions in case of assessee are challenged before higher forum and are upset. In absence of this they bind us.

14. In view of this, respectfully following the decision of the coordinate benches in assessee zone case for earlier years, we direct the learned transfer pricing officer/assessing officer to exclude (1) E Clrex Services Ltd, (2) Infosys BPO Limited and (3) TCS E Serve Limited and then work out the margins of the comparable. Accordingly, ground number 2 – 3 of the appeal of the assessee is allowed.
15. Ground number 4 of the appeal of the assessee is with respect to the disallowance u/s 14 A of the act of ₹ 71,851 made by the learned assessing officer and confirmed by the learned dispute resolution panel. During the course of assessment proceedings, the learned assessing officer asked the assessee to explain the reasons why there should not be any disallowance u/s 14 A of the income tax act. The assessee submitted that it has not incurred any expenditure for earning any exempt income and further it has not earned any dividend income or any other income, which does not form part of the total income from the year. However the learned assessing officer applying the provisions of rule 8D of the income tax rules disallowed a sum of ₹ 71,851/- which has also been confirmed by the learned dispute resolution panel.
16. The learned authorised representative submitted that when the assessee has not earned any exempt income there cannot be any question of disallowance u/s 14 A of the act. The learned departmental representative vehemently supported the orders of the lower authorities.
17. We have carefully considered the rival contention and find that when the assessee has not earned any exempt income during the year, there cannot be any reason to disallow any expenditure during the year. This principle

has been laid down by many judicial authorities. In view of this we direct the learned assessing officer to delete the disallowance of ₹ 71,851/- u/s 14 A of the act as assessee has not earned any exempt income. Thus ground number 4 of the appeal is allowed.

18. Ground number 5 is with respect to the chargeability of interest u/s 234A of the act and ground number 7 is with respect of initiation. The chargeability of interest is consequential in nature and further ground against the initiation of penalty proceedings is premature therefore both these grounds are dismissed.
19. Ground number 6 is with respect to not granting the full credit of tax deduction at source claimed by the appellant in its return of income. The AO is directed to verify the credit claim of the assessee and if found in order may allow the credit claimed by the assessee for tax deduction at source. Accordingly, ground number 6 of the appeal is allowed.
20. In the result appeal of the assessee is partly allowed.
- Order pronounced in the open court on 16 /09/2020

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 16 /09/2020
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	