

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 355/DEL/2016
[Assessment Year: 2011-12]**

American Express (I) P. Ltd.,
Metropolitan Saket, 7th floor,
Office Block, District Centre,
New Delhi.

vs

The Dy. C.I.T
Circle-2(2)
New Delhi.

PAN AAACA8163F

[Appellant]

[Respondent]

Date of Hearing : 10.08.2020

Date of Pronouncement : 13.08.2020

Assessee by : Shri Nageshwar Rao, Adv
Shri S. Chakrabarty, Adv

Revenue by : Shri Anupam Kant Garg, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 29.12.2015 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The substantive grievance of the assessee relates to the transfer pricing adjustment, denial of deduction u/s 10A of the Act, disallowance of relocation expenses u/s 40(a)(i) of the Act and non granting of tax deducted at source.

3. Representative of both the sides were heard. Case records carefully perused.

4. Briefly stated, the facts of the case are that the appellant-company is a wholly owned subsidiary of American Express International Inc. USA and is engaged in data management, information analysis and control activities for export to various American Express Affiliates worldwide. During the year under consideration, the gross turnover of the assessee was Rs. 794.70 crores with Net Profit of Rs. 150.71 crores.

6. In accordance with the provisions of Section 92CA of the Act, the international transactions entered into by the assessee with the Associate Enterprises was referred to the TPO for determination of arm's length price. The assessee chose 11 comparable companies to

demonstrate that its international transactions relating to the provisions of IT enables services was at arm's length.

7. However, the TPO chose only 3 comparables out of 11 chosen by the assessee and added five more comparables and finally came to the selection of 8 comparable companies as under:

1. ICRA Techno Analytics Ltd
2. Acropetal Tech Ltd
3. E4e Healthcare Business Services Pvt Ltd
4. Acentia Technologies Ltd
5. Jindal Intellicon Ltd
6. E-clers Services Ltd
7. TCS E Serve Ltd
8. Infosys BPO Ltd

and finally computed ALP by making an upward adjustment of Rs. 1,03,08,58,566/-.

8. The assessee raised objections before the DRP but the objections were of no avail.

9. The assessment order was framed pursuant to the order of the DRP.

10. Before us, the ld. counsel for the assessee, at the very outset, prayed for exclusion of Infosys BPO and TCS E Serve Ltd claiming that the same were excluded by the Tribunal in assessee's own case for Assessment Year 2010-11. The ld. counsel for the assessee further prayed for inclusion of

1. R. Systems International Ltd. (Segmental);
2. CG Vak Software Exports Ltd.;
3. Informed Technologies Ltd.;
4. Infosys Ltd.

on the ground that the same were included by the Tribunal in Assessment Year 2010-11.

11. The ld. counsel for the assessee further stated that the TP adjustments have subsumed the interest on receivables as working capital and, therefore, no further adjustment is required.

12. Per contra, the ld. DR strongly supported the orders of the authorities below.

13. We have carefully perused the orders of the authorities below and the decision of the Tribunal in assessee's own case for Assessment Year 2010-11. We find force in the contention of the ld. counsel for the assessee. The co-ordinate bench in assessee's own case in ITA No. 1426/DEL/2015 order dated 17.07.2019 has considered the exclusion of Infosys BPO and TCS E serve Ltd. The relevant findings of the co-ordinate bench read as under:

"For the reasons discussed in the preceding paragraphs, we are of the considered opinion that because of the extraordinary events that took place in the period under consideration, Infosys BPO limited, Accentia technologies limited, TCS E-Serve limited and TCS EServe international Ltd are not good comparables and are liable to be excluded from the list of comparables to benchmark the international transaction."

14. On finding parity in the facts with the year under consideration, we direct the Assessing Officer/TPO for exclusion of Infosys BPO and TCS E serve Ltd from the finalist of comparables.

15. Now coming to the issue relating to the inclusion of R. Systems International Ltd; CG Vak Software Exports Ltd.; Informed Technologies Ltd. and Caliber Point, the Tribunal in Assessment Year 2010-11 had considered the inclusion of other comparables. The relevant findings of the co-ordinate bench read as under:

"31. We have gone through the order and also the facts involved in this matter. The rejection of this comparable is not on the ground of functional dissimilarity, but only because of a different accounting period. Facts being similar, we are of the considered opinion that it is a fit case to direct the Id. AO to consider the quarterly results and work out the proportionate profit margin for this purpose, we remand the matter to the file of the Id. TPO/AO for compliance of our direction. 32. In respect of CG Vak Software, observations of the Id. TPO for rejecting this company is that under ITeS segment, sale was only just Rs.82.78 lakhs and on that ground this company was rejected.

32. Assessee contended that inappropriateness of the turnover filter has not been considered by the Id. TPO. Id. DRP on a perusal of the financials found that CG Vak Software is mainly involved into software development and earns major portion of its revenue from the same and the

revenue from ITeS/BPO is only 15% i.e. Rs.83 lakhs and, therefore, it fails the turnover filter.

33. Assessee assails the application of turnover filter so long as functional dissimilarity is not attributable to this company and submitted that a similar contention of the revenue was considered by the Tribunal in assessee's own case for the AY 2009-10 wherein the Tribunal by placing reliance on *Chrys Capital Investment Advisors (I) P. Ltd. vs ACIT*, ITA No.6504/Del/2013 reached a conclusion that if the company is functionally comparable, the same cannot be rejected on the basis of turnover and therefore, directed Id. TPO to include *CG Vak Software* as a comparable company.

34. We have gone through the financials of this *CG Vak Software*. At page No.21 of the Annual report of this company, the income from software development product and services is separately mentioned and was also at page 26, the segment revenue and segment results are also provided. In these circumstances, we are of the considered opinion that in the absence of any finding that this company is functionally dissimilar, Id. TPO should have considered these figures to identify whether *CG Vak Software* is a suitable comparable with the assessee. We, therefore, direct Id. TPO to consider this entity for benchmarking the international transaction.

35. The other two companies are M/s Informed Technologies Ltd. and M/s Micro genetics Systems Ltd. TPO rejected the same on the ground that both the Companies sales are below Rs. 5 Crores. In tune with our findings in respect of M/s CG Vak Software, while placing reliance on the decision of the jurisdictional High Court in the case of Chris Capital (supra), we hold that so long as a company is functionally similar to the assessee merely because it does not match with the turnover, it cannot be rejected. We, therefore, direct Id. TPO to include Informed Technologies Ltd. in the list of comparables. Further, we consider the fact that in assessee's own case for the Assessment Years 2004-05, 2005-06 and 2006-07, the Tribunal considered this aspect and rejected the turnover filter.

36. We, therefore, in the light of a view taken by the Tribunal in assessee's own case for AYs 2004-05 to 2006-07 and also in the light of the decision of the Hon'ble jurisdictional High Court in the case Chris Capital (supra) accept the contention of the assessee and direct Id. TPO to consider these two companies as good comparables with the assessee to benchmark the international transactions.

16. In so far as the inclusion of Caliber Point is concerned, we direct the Assessing Officer /TPO to consider the same in light of findings given in the case of other comparables.

17. The next grievance relates to adjustment in respect of interest on receivables.

18. We find that this issue has also been decided by the Tribunal in Assessment Year 2010-11 [supra]. Relevant findings read as under:

"37. Now coming to Ground No.14, this is to the effect that the interest of credit period granted by the company under normal trade practices was unjustly charged, having heard both the counsel, we are of the considered opinion that if working capital adjustment is granted, then no separate adjustment or interest receivables is required. We are fortified in our decision by the decision of the Hon'ble Delhi High Court in ITA No.765/2016 in the case of Kusum Healthcare P. Ltd."

19. The next grievance relates to claim of deduction u/s 10A of the Act.

20. Similar issue was considered by the Tribunal in Assessment Year 2010-11 in assessee's own case [supra]. The relevant findings read as under:

"39. Ground No. 20 is in respect of the claim for deduction under 10A of the Act in respect of AEGSC(STP) Unit set up by the assessee during the financial year 2002-03 on the ground that the STP unit was set up after splitting up its existing business of FCE(EOU) Unit. On this aspect, it is submitted that in respect of Asstt. Year 2009-10, the Tribunal considered this aspect at length and directed the AO to allow deduction u/s 10A of the Act.

40. Paragraph Nos. 33 & 34 of the order dated 3.8.2018 in ITA No.1973/Del/2014 for Asstt. Year 2009-10 are to the effect that,-

"33. The next issue raised by the assessee relates to claim of deduction u/s 10A amounting to Rs.58,93,05,999/- in respect of AEGSC (STP) Unit. Before us Id. Counsel submitted that this issue has been decided in favour of the assessee in assessee's own case by the Tribunal in the earlier years. On the other hand, Id. DR strongly relied upon the order of the AO.

34. From the perusal of the impugned order as well as the earlier order of the Tribunal, we find that in AY 2003-04, the Tribunal has upheld the order of Id. CIT(A) allowing the deduction u/s 10A. In AY 2008-09, again in revenue's appeal this Tribunal following the earlier decision of the Tribunal held that assessee was entitled for deduction u/s 10A on the ground that it has established a new unit. Once already deduction u/s 10A on the same unit has been allowed in the earlier years by the Tribunal, therefore, no different view can be taken for the same unit on similar set of facts for denying the deduction in Assessment Year 2009-10. Accordingly, we direct the AO to allow deduction u/s 10A in respect of the said unit."

41. In view of the above, while respectfully following the same, we direct the learned AO to allow the deduction u/s 10A of the Act for the Asstt. Year 2010-11 to the tune of Rs.49,93,98,378/- in respect of AEGSC(STP) Unit set up by the assessee during the Financial Year 2002-03."

21. The next issue relates to disallowance made u/s 40(a)(i) of the Act.

22. Facts on record show that the Assessing Officer and DRP observed that the assessee had made payments in respect of certain amounts, such as, technology service, fee charge out, receipt of services, professional charges and relocation expenses. The Assessing Officer/DRP were of the view that such payments required TDS in terms of section 195 of the Act. Details of such payments relate to relocation charges of Rs. 1,86,68,714/- which were treated as FTS/royalty as per the India USA DTAA. The Assessing Officer/DRP were of the strong belief that reimbursement of relocation expenses for seconded employees is a part and parcel of same secondment agreement and terms and salary and service agreements are in the nature of FTS and are charged to tax, both u/s 9(1)(vii) and under Article 12(4) of India USA DTAA, thus liable to TDS which has not been done by the assessee. Accordingly, addition of Rs. 1,86,68,714/- was made.

23. Before us, the ld. counsel for the assessee vehemently stated that reliance on the decision in the case of Centrica India Offshore Pvt Ltd 364 ITR 336 is not applicable on the facts of the case. It is the say of the ld. counsel for the assessee that substantial portion of this remuneration is towards expenses incurred by the employees travelling

abroad to which principles in the case Centrica do not apply. The ld. counsel for the assessee further pointed out that on identical set of facts, the first appellate authority in Assessment Year 2012-13 has allowed the appeal of the assessee.

24. We have given thoughtful consideration to the orders of the authorities below. It is true that most of the relocation expenses are in respect of salary paid to employees of the assessee who travelled abroad for business of the appellant. However, in our considered opinion, these details need verification. We, accordingly, restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to verify details and examine whether the payments have been made by the assessee to its own employees who travelled abroad and decide the issue afresh after giving reasonable opportunity of being heard to the assessee.

25. In so far as the issue relating to grant of TDS is concerned, we direct the Assessing Officer to give credit of TDS as per provisions of law.

26. Levy of interest is consequential. The Assessing Officer is directed to charge the same as per provisions of law.

27. In the result, the appeal of the assessee in ITA No. 355/DEL/2016 is allowed in part for statistical purposes.

The order is pronounced in the open court on 13.08.2020.

Sd/-

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 13th August, 2020.

VL/

Copy forwarded to:

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

Asst. 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	