

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai “H” Bench, Mumbai.
Before Shri Vikas Awasthy, Judicial Member &
Shri Amarjit Singh, Accountant Member

I.T.A. No. 521/Mum/2015 (A.Y. 2010-11)
C.O. No. 54/Mum/2015
[in I.T.A. No. 1126/Mum/2015 (A.Y. 2010-11)]

Tech Mahindra Business Services Ltd. (formerly known as Hutchison Global Services Ltd.) Spectrum Towers MindSPACE, Chincholi Bunder link Road Malad West Mumbai-400064. PAN: AABCH8136L	Vs.	ACIT, Circle-13(3)(2) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

I.T.A. No. 1126/Mum/2015 (A.Y. 2010-11)

DCIT, Circle-13(3)(2) Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	Tech Mahindra Business Services Ltd. (formerly known as Hutchison Global Services Ltd.) Spectrum Towers MindSPACE, Chincholi Bunder link Road Malad West Mumbai-400 064.
(Appellant)		(Respondent)

Assessee by	Shri J.D. Mistry Sr. Advocate with S/Sh. Harsh Kapadia and Pranay Gandhi
Department by	Sh. Gaurav Batham, CIT-DR & Ms. Dhivya Ruth J., Sr. DR
Date of Hearing	22.03.2024
Date of Pronouncement	14.05.2024

O R D E R**Per Vikas Awasthy (JM):**

These cross appeals by the assessee and the Department are directed against the assessment order dated 30.12.2014 passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (herein after referred to 'the Act'), for the Assessment Year 2010-11.

2. Shri J.D. Mistry Sr. Advocate for the assessee, submitted at the outset that he is not pressing application dated 23/6/2023 for admission of additional legal ground challenging validity of the assessment order based on the decision rendered by the Hon'ble Madras High Court in the case of CIT. v. Roca Bathroom Products P. Ltd. Writ Appeal Nos. 1517 & 1519 of 2021.

3. The learned counsel submits that in ground No. 2 to 11 of appeal, the assessee has assailed Transfer Pricing adjustment. By way of aforesaid grounds the assessee is primarily seeking removal of some comparable companies selected by the Transfer Pricing Officer (TPO) in proceedings u/s 92CA(3) of the Act. Narrating the facts of case, he submitted that the assessee is engaged in providing I.T enabled services (ITES) to its group concerns. The assessee is a captive call centre. Earlier the call centre business was carried out by the Vodafone India Services Pvt. Limited. Vodafone India Services Pvt. Ltd. in pursuance to slump sale business agreement with the assessee transferred the entire business as going concern to the assessee from December, 2007. The nature of business carried out by the assessee is identical in every respect to the business earlier carried out by Vodafone India Services Pvt. Limited.

4. The learned Counsel submitted that in the instant appeal, the assessee is seeking exclusion of following comparables from the list of comparables finally selected by the TPO:

- i) Eclerx Services Ltd.
- ii) Genesys International Corporation Ltd.
- iii) Infosys BPO Ltd.
- iv) Wipro Ltd.
- v) Informed Technologies India Ltd.

He submitted that the assessee to benchmark Arms's Length Price (ALP) of international transactions adopted Transactional Net Margin Method (TNNM) as the most appropriate method. The assessee identified five companies as comparables. The assessee's OP/OC is 9.70%. The arithmetic mean of comparables selected by the assessee is (-)0.96%. The TPO accepted TNNM as the most appropriate method but did not agree with the list of comparable companies selected by the assessee. The TPO selected fresh comparables and excluded some of the comparables selected by the assessee. The final set of comparables considered by the TPO are as under :-

Sr.No.	Name of Company	OP/OC
1	Sparsh BPO	7.2
2	Accentia Technologies Ltd	43.61
3	Acropetal Technologies Ltd (Seg)	27.82
4	Cosmic Global Ltd	14.97
5	e4e Healthcare Solutions Ltd	21.01
6	Eclerx Services Ltd	42.17
7	Genesys International Corporation Ltd	111.53
8	Informed Technologies India Limited	24.2
9	Infosys BPO Ltd.	31.23
10	Wipro Ltd (Segment)	28.56
	Average	35.23

The average mean of final set of comparable selected by the TPO is 35.23% as against the assessee's margin of 9.70%. Thus, the TPO made adjustment in ALP with respect to the Provision of IT Services at Rs. 130.51 crores.

5. The learned Counsel for the assessee submitted that in A.Y. 2008-09, 2009-10 & 2011-12, the Tribunal in assessee's own case excluded Eclerx Services Ltd. and Genesys International Corporation Ltd. from the list of comparables on account of functional disparity. There is no change in the functions and nature of services rendered by the said companies in the impugned assessment year. As regards Infosys BPO Ltd., he fairly submitted that the company were included in the list of comparables by the TPO in the proceeding assessment year. Inclusion of the aforesaid company was upheld by the Tribunal. However, in the period relevant to assessment year under appeal, Infosys BPO Ltd. and Wipro Ltd. are liable to be excluded from the list of comparables on account of extra ordinary event. Infosys BPO Ltd. acquired McCamish Systems LLC, USA to provide end to end solutions. This extra ordinary event has impact on the financial results of the comparable. He further asserted that the said company is not good comparable due to substantial difference in turnover. The turnover of the assessee is Rs.560 crores as against the turnover of Infosys BPO Ltd. at Rs.1126 crores for the Financial Year 2009-10. Hence, Infosys BPO Ltd. should be excluded from the final set of comparables. In support of his submissions, he placed reliance on the decision in the case of Travelex India Private Limited Vs. ACIT in ITA No. 1214/Mum/2015 decided on 7.11.2022.

He further cited substantial Brand value and high-risk profile of Infosys BPO Ltd. as reasons for excluding the said company from the list of comparables.

5.1. In respect of Wipro Ltd., learned counsel pointed that in Financial Year 2009-10 there was amalgamation of Wipro Networks Pte Ltd. Singapore and WMNETSERV Ltd., Cyprus into the assessee and the same was approved by

Hon'ble Karnataka High Court. This extra ordinary event of amalgamation had impacted financial results of Wipro Limited. He further pointed that the company is primarily into IT Service segment with high turnover of Rs.20246 crores. The revenue from BPO services is minuscule part of total turnover and constitutes only 11% of total turnover. Hence, the said company should be excluded from the list of comparables.

5.2. With regard to exclusion of Informed Technologies India Limited, the learned counsel submits that the said company is functionally different from that of the assessee. The said company is a KPO/high end BPO. It collects and analyses data on financial fundamentals, corporate governance, director/ executive compensation and capital markets. The assessee is a low-end voice based captive call center. The assessee has high employee cost of 70% to sales, whereas employee cost to sales ratio of the said company is 30%(approx.) In support of his submissions that the assessee and Informed Technologies India Ltd. are functionally different, he placed reliance on the following decisions:

- Travelex India Pvt. Ltd. (supra);
- Aptara Technology (P) Ltd., (2019) 410 ITR 100 (Bom);
- DCIT Vs. DBOI Global Services (P) Ltd., 130 taxman.com 488 (Mum);
- Dialogic Networks (India) P. Ltd. Vs. DCIT, 78 taxman.com 349 (Mum);
- Stream International Services Pvt. Ltd. Vs. ACIT, 152 ITD 664 (Mum).

He further submitted that that risk profile of the two companies is also different. Informed Technologies India Ltd. is high risk company, whereas, the assessee is 100% captive call center bearing minimum risk or no risk.

6. Per contra, Sh. Gaurav Batham representing the department vehemently supported the order of TPO and the assessment order. He submitted that Infosys BPO Ltd. was accepted as comparable in the past in assessee's own case. Therefore, a consistent view should be taken in

accepting the company as comparable. As regards extra ordinary event of acquisition, he asserted that this fact was never brought to the notice of TPO or DRP. In any case, the assessee had not furnished any documentary evidence to show that such an acquisition has any impact on the financials of the company. The learned DR further submitted that the assessee is seeking exclusion of Infosys BPO Ltd. on the grounds of difference in turnover. Turnover filter was never applied either by TPO or the assessee. Hence, now argument that there is a substantial difference in turnover should not be accepted. On exclusion of Informed Technologies India Ltd., learned DR placed heavy reliance on the findings of DRP.

Decision:

7. We have heard the submissions made by rival sides and have examined the orders of the authorities below. We have also considered the decisions on which reliance has been placed in support of respective submissions. In so far as the nature of activities/functions carried out by the assessee, they are not in dispute. The primary grievance of the assessee qua Transfer Pricing adjustment is inclusion of following companies in the list of comparables by the TPO and upheld by the Dispute Resolution Panel (DRP):

- i) Eclerx Services Ltd.
- ii) Genesys International Corporation Ltd.
- iii) Infosys BPO Ltd.
- iv) Wipro Ltd.
- v) Informed Technologies India Ltd.

The assessee is seeking exclusion of aforesaid companies from the final list of comparable companies.

Eclerx Services Ltd.:

8. We find that in the assessment year 2008-09, 2009-10 & A.Y. 2011-12, the Tribunal in appeal by the assessee i.e. ITA No. 7520/Mum/2012 decided

on 23.9.2019, ITA No. 1326/Mum/2014 decided on 15.9.2021 and ITA No. 766/Mum/2016 dated 30.6.2021 has held that Eclerex Services Ltd. to be functionally different, hence the same was excluded from the list of comparables. No material is placed on record before the Bench to distinguish the facts in the impugned assessment year. Thus, for parity of reasons we direct the Assessing Officer to exclude Eclerx Services Ltd. from the list of comparable in the impugned assessment year, as well.

Genesys International Corporation Ltd. (in short 'Genesys'):

9. We find that in assessee's own case for assessment year 2008-09, the Co-ordinate Bench directed to exclude Genesys from the list of comparables on account of functional disparity. Similar view was taken by the Tribunal in assessee's appeal for assessment year 2009-10 for excluding Genesys from the list of comparable. No material to controvert the findings of co-ordinate Bench in the preceding assessment years is brought on record by the Revenue. Thus, in light of undisputed facts of the case and the decisions of the Coordinate Benches, we direct the Assessing Officer to exclude Genesys from the list of comparables in the impugned assessment year.

Infosys BPO Ltd. (in short 'Infosys') :-

10. The assessee is seeking exclusion of Infosys from the list of comparables primarily on three counts:

- (i) The said company has sizable brand which has an enormous impact on its profitability;
- (ii) Substantial difference in turnover. The turnover of Infosys in Financial Year 2009-10 is Rs.1126 crores (approximately) as against turnover of the assessee for the same period Rs.560 crores.
- (iii) Extra ordinary event in Financial Year 2009-10.

The learned counsel for the assessee had pointed that in A.Y. 2007-08, the business of providing captive call center was carried by Vodafone India Services Pvt. Limited (in short 'Vodafone'). The TPO had included Infosys in the list of comparables. The issue travelled to the Tribunal. The Tribunal in

the case of Vodafone India Services (P) Ltd. Vs. DCIT, 36 taxmann.com 127 rejected assessee's submissions to exclude Infosys BPO Ltd. We find that the Co-ordinate Bench in assessment year 2007-08 held Infosys BPO Ltd. as good comparable for the following reasons:

"24.3.2 We have carefully considered the various aspects of the issue and the rival arguments advanced by both the parties. We have already held that high end services in ITES sector could not be the basis for exclusion of comparables. Similarly, we have also not found the arguments based on high margin convincing for the reason given earlier. The argument of the learned AR based on brand value and high marketing /selling expenses had been examined in detail by the Tribunal in case of Actis Advisors (P) Ltd. (Supra). The Tribunal noted that high marketing expenses did create marketing intangibles such as brand. But it was not necessary that it always resulted into high margin. The Tribunal in that case noted the finding of TPO that 95% of the revenue of Infosys came from repeat business which showed that marketing intangibles did not help Infosys to get any better business. The Tribunal also accepted the finding of TPO that marketing intangibles may be helpful in getting better business but the same may not be applicable in the case of service industries like ITES. The department in that case had placed on record some instances in which companies with much lower marketing expenses had shown much higher margin. The Tribunal therefore, concluded that marketing intangibles such as brand could not be considered as a factor for raising the margin in a particular case. Brand is an asset which can bring in more business and can give more turnover but there is no evidence to show that it results in higher margin. Brand is no doubt an asset which is a relevant factor for deciding comparability but in the absence of any concrete material to show that it raises the margin, the argument based on branding cannot be accepted. We therefore, follow the decision of Tribunal (Supra) and reject the arguments advanced based on high marketing expenses and branding.

24.3.3. The argument based on turnover has also been examined in detail by the Tribunal in case of Willis Processing Services India (P) Ltd. (Supra) and in case of Capgemini India (P) Ltd. (Supra) and not found acceptable. In that case material in the form of graph and chart had been placed by the department before the Tribunal to point out that there was no linear relationship between turnover and margin and it was pointed out that in many cases with rise in turnover the margin came down. The Tribunal in both the cases referred to above also noted the argument based on concept of economy scale and held that it was relevant to manufacturing concerns and not applicable to service companies. The Tribunal in case of Capgemini India (P) Ltd. (Supra) noted that employees in service companies were not doubt, valuable assets which have to be considered as a factor for comparability. The Tribunal observed that the assets employed had two dimensions i.e. quantity and quality, more employees would mean more turnover but there was linear relationship between margin and turnover. As regard the quality of employees, the Tribunal noted that this would depend

upon the nature of projects and employee cost being more in case of more skilled manpower, it will not result into higher margins. Therefore following the decisions of Tribunal (Supra), we reject the argument advanced for exclusion of Infosys BPO Ltd. and accordingly hold that this has to be accepted as a good comparable.”

[Emphasised by us]

Thus, we find that the Co-ordinate Bench while examining inclusion/exclusion of Infosys had also considered submission of the assessee with regard to brand value and difference in turnover and held the same as no impediment for selecting the company as comparable.

11. To substantiate the argument of extra ordinary event, the assessee placed on record Annual Report of Infosys for Financial Year 2009-10. A perusal of same reveals that Infosys has acquired McCamish Systems LLC, USA for a total consideration of Rs. 173 crores and further contingent consideration of Rs.67 crores. Thus, from the above it is evident that there was financial impact on the funds of the company in Financial Year 2009-10 on account of acquisition of another entity. The Hon'ble Bombay High Court in the case of PCIT vs. JP Morgan India (P) Ltd. 261 Taxman 404 has held that events like merger, amalgamation etc., in life span of a company is not a normal event, hence, such company cannot be considered as comparable. Thus, on account of extra-ordinary event of amalgamation during the relevant year, Infosys BPO Ltd. is directed to be excluded from the list of comparables.

Wipro Ltd.:

12. We find that the TPO has selected Wipro Ltd. as comparable on the basis of segmental data. The assessee is seeking exclusion of Wipro Ltd. from the list of comparables on account of difference in functionality, difference in turnover, brand size and extra ordinary event of amalgamation of Wipro Networks Pte. Ltd. Singapore and WMNETSERV Limited. The assessee has pointed that only 11% of Wipro's revenue is attributable to BPO segment. The assessee has placed on record a Annual Report of Wipro

Ltd. for Financial Year 2009-10. A perusal of the same reveals that during financial year 2009-10 relevant to assessment year 2010-11 there is an extraordinary event, wherein Wipro had acquired two companies viz. Lornamead FZE and Lornamead Personal Care Pvt. Ltd. In addition to the above Wipro had paid Rs. 2385 million relating to previous acquisition. Further, from perusal of annual report it emerges that Hon'ble Karnata High Court had approved amalgamation of Wipro Networks Pte. Ltd. Singapore and WMNETSERV Limited, Cyprus with Wipro w.e.f. 1.4.2009. Thus, there were extraordinary event of amalgamation and merger during the relevant period. As held earlier, wherever there are such extraordinary event in the life cycle of a company in particular/relevant financial year, the said company cannot be considered as good comparable. Thus, in the aforesaid reasons, we hold that Wipro is not a good comparable in the impugned assessment year.

Informed Technologies India Ltd. (in short 'Informed Tech.'):

13. The assessee is seeking exclusion of Informed Tech. on account of functional disparity, low employees cost to sales ratio, etc. The assessee has placed reliance on the decision of DBOI Global Services (P.) Ltd. (supra) for exclusion of said company. The Co-ordinate Bench in the said case directed the Assessing Officer to exclude Informed Tech. for the following reasons:

"7.11 The assessee has sought removal of this company on the ground of its functional dissimilarity, scale of operation and low employee cost. On a perusal of the annual report of the company for the impugned assessment year, we find that the company is into high-end BPO services which can be termed as KPO services. Basically, this company serves the needs of the financial content sector in the USA. It collects and analyses data on financial fundamentals, corporate governance, structures/executes compensation and capital market. The company caters to the niche market segment of financial content and its targeted clientele include well known and respected American Corporate. Thus, as it appears, the company is functionally dissimilar to the assessee. It is also observed, in case of Stream International Services Pvt Ltd vs The ADIT (supra) and AOL Online India Private Limited vs DCIT (supra), which are for the very same assessment year, the Tribunal has rejected this company as a comparable on the ground of low employee cost, abnormal growth and considerable business promotion expenses. Respectfully following the aforesaid decisions of the co-

ordinate bench, we direct the assessing officer to exclude this company from the list of comparables”.

14. We find that the activities carried by DBOI Global Services (P) Ltd. are in the nature of providing data process and back office support services to its AEs. Thus the said company is also captive service provider. In the light of similar facts, we follow the decision of the Coordinate bench and direct the Assessing Officer to exclude Informed Technologies India Ltd. from the list of comparables.

15. Thus, in the light of our above findings ground No. 5, 6 & 7 of appeal are allowed.

16. The learned counsel for the assessee stated at Bar that he is not pressing ground of appeal No. 8 to 10. In view of the statement made by the Counsel for the assessee, ground of appeal No. 8 to 10 are dismissed as not pressed.

17. Ground No. 1 of appeal is general in nature, hence requires no separate adjudication.

18. In respect of No. 2 to 4 and Ground No. 11, no arguments were advanced by the learned counsel for the assessee, hence, the same are dismissed.

19. In ground No. 12 of the appeal the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, hence ground No. 12 of appeal is dismissed as such.

20. In ground No. 13 & 14 of appeal, the assessee has assailed charging of interest under section 234B & 234C of the Act. Charging of interest under

aforesaid sections is mandatory and consequential, hence, ground No. 13 & 14 are devoid of any merit and are dismissed.

21. The assessee vide application dated 4.2.2021 has raised an additional ground of appeal claiming deduction of 'education cess'. In light of the decision of Hon'ble Apex Court in the case of JCIT vs. Sesa Goa Ltd., 295 Taxman 236, 'education cess' is not an allowable deduction. Hence, aforesaid additional ground raised by the assessee is dismissed.

22. **In the result, appeal of the assessee is partly allowed.**

ITA No. 1126/Mum/2015: (Department Appeal)

23. In Ground No. 1 of appeal, the Revenue is seeking inclusion of Accentia Technologies Ltd. and Acropetal Technologies. The TPO had included both the above companies in the final list of comparables. The DRP vide directions under section 144C(5) of the Act dated 14.11.2014 excluded above two companies on account of non-availability of segmental data and functional disparity respectively. The Id. Counsel pointed that the Tribunal in assessee's own case in AY 2008-09 and 2009-10 had excluded the said companies being functionally different.

We find that the Co-ordinate Bench in assessment year 2008-09 in ITA No. 7520/Mum/2012(supra) excluded Accentia Technologies Ltd. and Acropetal Technologies. For similar reasons Accentia Technologies Ltd. and Acropetal Technologies were excluded by the Coordinate Bench in appeal of the assessee for A.Y. 2009-10 & 2011-12. Thus, we find no infirmity in the direction of DRP to exclude aforesaid two companies from the list of comparables. Consequently, Ground No. 1 of appeal is dismissed.

24. In Ground No. 2 of appeal, the Revenue is against the direction of DRP to reduce service tax refund from operating expenses. The assessee has placed reliance on the decisions of Tribunal in the case of AMD India P. Ltd

vs. ITO, 114 taxmann.com 703 (Bang.) and Capstone Securities Analysis P. Ltd. vs. DCIT 105 taxmann.com 62 (Pune) to contend that service tax refund is operating revenue. The assessee has also furnished a table indicating that even if service tax refund is ignored the variation between the ALP and value of international transaction is less than 5%, hence, the international transaction would be within tolerance limit.

We find that the Tribunal in the cases afore-mentioned has held service tax refund/service tax written back as operating revenue while computing profit level indicator. Considering above decisions of the Tribunal, we see no merit in ground no.2 of appeal, hence dismissed.

25. In ground No. 3 of the appeal, the Revenue has assailed the direction of DRP in allowing benefit of deduction under section 10A in respect of interest earned on various fixed deposits. We find that this issue is recurring. In assessment year 2009-10 & 2011-12, the assessee had claimed deduction under section 10A on interest income. The Assessing Officer disallowed the same. The matter travelled to the Tribunal. The co-ordinate bench allowed benefit of deduction under section 10A of the Act in respect of interest income. The facts being identical in the impugned assessment year, we uphold the direction of DRP in treating interest income of Rs. 149,87,918/- as income from business eligible for deduction under section 10A of the Act. Ergo, ground No. 3 of appeal is dismissed being devoid of any merit.

26. In Ground No. 4 of appeal, the Department has assailed the directions of DRP in allowing deduction under section 10A in respect of foreign exchange gain of Rs.26,95,886/- on EEFC account.

We find that this issue has been considered by the Co-ordinate Bench in assessee's own case in A.Y. 2009-10 & 2011-12. The Coordinate Bench in assessee's appeal in ITA No. 766/Mum/2016 (supra) allowed the benefit of deduction under section 10A on foreign exchange gain by holding as under :-

“17. As regards deduction claimed in respect of foreign exchange gain, it is noticed that both the assessing officer and learned DRP have disallowed assessee's claim relying upon the decision of the Hon'ble jurisdictional High Court 11 ITA 766/Mum/2019 in the case of CIT vs Shah Originals (supra). However, on a careful reading of the said judgement, it is noticed that the decision of the Hon'ble jurisdictional High Court was rendered in the context of deduction claimed under section 80HHC of the Act. Whereas, in the present case, assessee has claimed deduction under section 10A of the Act. On going through the relevant statutory provisions, we find a marked difference in the language used in both the provisions. While, as per section 80HHC(1), the deduction is available on profits derived by the assessee from the export of goods or merchandise, in case of section 10A the deduction is available on profits and gains derived by an undertaking from the export of articles, things, etc. Taking note of the difference in the language used in both the provisions, the Hon'ble Karnataka High Court in CIT vs Motorola India Electronics (P) Ltd (supra) has held that unlike section 80HHC of the Act, which expressly excluded certain types of income such as foreign exchange gain in EEFC account, etc; however, no such express provision is there in sections 10A / 10B of the Act. The Hon'ble Court has held, what is exempted is not merely the profits and gains of the export of articles, but also the income from the business of the undertaking. Proceeding further, the Hon'ble Court has observed that since the export proceeds kept in the EEFC account are the income of the business undertaking; hence, the claim of deduction would be allowable. In our considered opinion, the aforesaid decision of the Hon'ble Karnataka High Court clinches the issue in favour of the assessee. Hence, we direct the assessing officer to allow assessee's claim of deduction on the foreign exchange gain. Ground no.12 is allowed.”

No material to controvert the decision of Co-ordinate Bench has been furnished by the Revenue, therefore, we find no merit in Ground No. 4 of appeal. Hence, dismissed.

27. In the result, appeal of the Revenue is dismissed.

C.O. No. 54/Mum/2015:

28. The assessee has filed cross objections in appeal filed by the Department. The assessee in cross objection has supported the findings of DRP on the issues in which the Revenue is in appeal. Since, we have dismissed appeal of the Revenue in toto, the cross objections filed by the assessee have become infructuous, hence, the same are dismissed.

29. To sum up, appeal of the assessee is partly allowed, appeal of the Revenue and cross objections of the assessee are dismissed.

Order pronounced in the open court on Tuesday the 14th Day of May, 2024.

Sd/-

(Amarjit Singh)
Accountant Member

Sd/-

(Vikas Awasthy)
Judicial Member

Mumbai; Dated : 14/05/2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS