

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. BRR KUMAR, ACCOUNTANT MEMBER**

**ITA No. 7882/Del/2018
Assessment Year: 2013-14**

Addl. CIT, Special Range-1,
New Delhi.

Versus Avaya India Pvt. Ltd.,
210, Platina, 3rd Floor, Plot No.
C-59, G-Block, Bandra Kurla
Complex, Bandra(E), Mumbai.
PAN: AAECA3592N
(Respondent)

(Appellant)

Assessee by : Sh. Nishank Vashistha, Adv.
Revenue by : Sh. Rajesh Kumar, CIT-DR

Date of hearing : 14.09.2023
Date of pronouncement: 20.09.2023

ORDER

Captioned appeal by the Revenue arises out of order dated 28.09.2018 of learned Commissioner of Income-tax (Appeals)-44, New Delhi for the assessment year 2013-14.

2. Grounds raised by the Revenue are as under :

- "1. Whether the Ld. CIT(A) was justified in laying down stringent standards of comparability and attempting to identify exact replica of the taxpayer for comparability analysis, whereas the India law and the international jurisprudence recognize the reality that there cannot be an exact comparable in a

given situation without any differences without appreciating that such stringency will defeat the purpose of flexibility provided in comparability analysis for determination of ALP

2. Whether in the facts and circumstances of the case the Ld. CIT(A) was correct in law to rely upon another case without examining the fact of the case and subsequently directing to exclude comparables on the basis of parity.
3. Whether in the facts and circumstances of the case the Ld. CIT(A) was correct in law to rejecting **Infosys Ltd., Thirdware Ltd., Larsen & Tubro Infotech Ltd., Harton Communication (seg.), Tech Mahindra Ltd., Aplico Ltd., and just Dial** as a comparable by ignoring the fact that these are functionally similar and qualifies all the filters applied by the TPO.
4. Whether the functional profile of the comparables must be same while making transfer pricing adjustments for the calculations of ALP under TNMM method.
5. Whether the Ld. CIT(A) was justified in law to treat foreign exchange gain/loss as operating without considering the TPO's finding to consider foreign exchange gain/loss as non-operating."

3. As could be seen from the grounds raised, the core issue is with regard to rejection of certain comparables as stated in ground No. 3. However, at the time of hearing, learned counsel appearing for the assessee submitted that out of the comparables disputed by the Revenue, if only one comparable, i.e., Infosys Ltd. is rejected even with inclusion of other comparables disputed by the Revenue, assessee's margin would be within the tolerance range of the other comparables. Thus, he submitted, except Infosys Ltd., the issue

relating to taxability of other comparables disputed by the Revenue would be of academic nature.

4. Learned Departmental Representative fairly agreed with the aforesaid submission of the assessee.

5. Keeping in view the aforesaid submissions of the parties, at the outset, we proceed to deal with comparability of Infosys Ltd. with the assessee.

6. Briefly, the facts for deciding this particular issue are, the assessee is a resident corporate entity stated to be engaged in the business of primarily as a software programming and application developer, providing support services to other group entities. In other words, the assessee provides software development support, programming and applications support for switching integration and PBX system and specifically deals with IVR, call centre, AIC and CMS technologies. Thus, basically, the assessee provides software development services and information technology enabled services (ITES). However, presently we are concerned with software development service segment.

7. In the year under consideration, the assessee entered into various international transactions with its overseas associate and enterprise and earned revenue. The assessee benchmarked the transactions by following transactional net margin method (TNMM). Since, the average margin of the comparables selected was found to be within the tolerance range, the price charged for the transactions with AE was claimed to be at arm's length. However, the TPO did not accept the benchmarking of the assessee and proceeded to conduct his own analysis. In this process, he rejected some of the comparables selected by the assessee by introducing fresh comparables, one of them being Infosys Ltd. In accordance with the order of the Transfer Pricing Officer (TPO), the Assessing Officer passed an assessment order adding back the transfer pricing adjustment suggested by the TPO. The assessee contested the addition before the first appellate authority. After considering the submissions of the assessee in the context of facts and materials on record, learned first appellate authority called upon the Assessing Officer to examine assessee's submissions and furnish a report. Having considered all the facts and materials available on record, learned Commissioner (Appeals) finally held that Infosys Ltd. cannot

be treated as a comparable, as in assessee's own case in assessment year 2007-08, the Tribunal has excluded the company from the list of comparables. Being aggrieved with the aforesaid decision of the first appellate authority, the Revenue is before us.

8. We have considered rival submissions and perused materials on record. It is observed, the assessee has sought exclusion of Infosys Ltd. as a comparable on account of high turnover, having business segments of software development and sale of products, diversified business operations, substantial intangible assets, brand value, intangible and R & D expenses etc. It is observed, considering the aforesaid aspects, the coordinate Bench in assessee's own case in assessment year 2007-08 has excluded Infosys Ltd. as a comparable while deciding assessee's appeal in ITA No. 5528/Del/2011 dated 18.09.2015. Identical view was expressed by the coordinate Bench while deciding assessee's appeal in assessment year 2008-09 in ITA No. 146/Del/2013 dated 17.06.2016. Learned counsel appearing for the assessee has made a statement at bar that in assessment year 2014-15, the Dispute Resolution Panel(DRP) has excluded Infosys Ltd. as a comparable. Whereas, in

assessment year 2015-16 and 2016-17, the TPO himself did not consider Infosys Ltd. as a comparable. Thus, keeping in view the decision taken by the coordinate Benches in assessee's own cases in assessment years 2007-08 and 2008-09 and the further fact that the departmental authorities themselves have excluded Infosys Ltd. as a comparable in assessment year 2014-15, 2015-16 and 2016-17 in assessee's own case, we decline to interfere with the decision of the first appellate authority on the comparability of Infosys Ltd.

9. As regards the other comparables disputed by the Revenue, since, the issue has become academic, we leave the issue relating to comparability of other comparables open for consideration, in case, the dispute relating to their comparability arises in future in respect of any other assessment year.

10. In the result, appeal is dismissed as indicated above.

Order pronounced in the open court on 20/09/2023.

Sd/-

(DR. BRR KUMAR)
ACCOUNTANT MEMBER

Sd/-

(SAKTIJIT DEY)
VICE-PRESIDENT

Dated:20.09.2023

*aks/-