

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES, "B" BENCH : BANGALORE**

Before Shri Chandra Poojari, AM & Smt. Beena Pillai, JM

IT(TP)A No. 361/Bang/2016
(Assessment Year: 2011-12)

M/s. Conduent Business Services India LLP <i>(Formerly known as Xerox Business Services India Private Limited),</i> Unit A, 5th Floor, Aviator Bldg. Whitefield Road, Ascendas ITPB SEZ International Tech Park Bengaluru 560066	Vs.	Assistant Commissioner of Income Tax, Circle -7(1)(2), Bengaluru (Now Assistant Commissioner of Income-tax Circle-4(2)(1), Bengaluru)
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PAN – AAAFX2366G (Erstwhile AADCA8386M)

Appellant

Respondent

IT(TP)A No. 202/Bang/2016
(Assessment Year: 2011-12)

DCIT, Circle -4(1)(1) Bengaluru	Vs.	M/s. Conduent Business Services India LLP, <i>(Earlier known as M/s.Xerox Business India Pvt Ltd & M/s.Affiliated Computer Services of India Pvt.Ltd),</i> Unit 2, Level 6, ITPL Innovator Block, Intl Tech Park, Whitefield Road, Bengaluru 560066
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PAN – AAAFX2366G (Erstwhile AADCA8386M)

Appellant

Respondent

Assessee by:	Shri Nageshwar Rao, Advocate
Revenue by:	Dr. Manjunath Karkihalli, CIT-DR

Date of Hearing: 24.03.2022

Date of Pronouncement: 08.04.2022

ORDER

Per: Chandra Poojari, AM

These are cross appeals directed against the assessment order passed under Section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 dated 28.12.2015 in consequence to the directions of the DRP, Bangalore under Section 144C(5) of the Act dated 29.10.2015.

2. Assessee raised the following grounds: -

“That on the facts and circumstances of the case and in law:

A. Order being bad in law

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Learned Deputy Commissioner of Income-tax, Circle 1 (1)(1), Bangalore ("the AO") under section 143(3) read with section 144(C)(13) of the Act is erroneous and bad in law.*
2. *That on the facts and in circumstances of the case and in law, the Learned AO erred in assessing the returned income of INR 1,54,99,871 at INR 15,35,12,304.*
3. *The learned collegium of Commissioners comprising the DRP erred in law and on facts, by not adhering to the procedure laid down in section 144C(6) and 144C(7) of the Act.*

B. Transfer Pricing issues

4. *The learned Transfer Pricing Officer ("TPO") has erred, in law as well as on facts while making the following adjustments in the order passed under section 92CA and holding that transactions between the Appellant and its associated enterprise ("AE") were not at arm's length.*
5. *The learned AO/TPO has erred in law as well as on facts while incorrectly following the directions of the Hon'ble DRP and incorrectly computing an adjustment of INR 13,80,12,433 in the final assessment order.*
6. *The learned AO/DRP/TPO has erred, in law and on facts by not appreciating that the Appellant is a captive service provider, carrying out limited functions and assuming limited risks and therefore needs to be compared with appropriate comparable set.*
7. *The learned AO/DRP/TPO have erred in law and on facts by not appreciating the Transfer Pricing documentation prepared by the Appellant in the manner as required under the provisions of the Act and Income-tax Rules, 1962 ("the Rules").*
8. *The learned AO/DRP/TPO have erred in law by conducting a fresh-search for comparable companies and by rejecting the search process carried out by the Appellant, without giving adequate reasons for the rejection of comparables.*
9. *The learned AO/DRP/TPO erred in law and on facts by replacing the filters adopted by the Appellant with the new filters based on his own judgment and perception and that the filters applied by the TPO were not correctly applied.*
10. *The learned AO/DRP/TPO erred in law and on facts by identifying incorrect set of comparable companies.*
11. *The learned AO/DRP/TPO have erred in law and on facts by*

rejecting certain comparables considered by the Appellant, on the grounds of functional dissimilarity and by applying the filters of export earnings, employee cost, different year ending, revenue from relevant segment less than 75 percent of total revenue, peculiar economic circumstances and persistent loss.

12. The learned AO/DRP/TPO has erred in law and on facts by not applying appropriate sales turnover filter.
13. On a without prejudice basis to the filter adopted by the learned AO/DRP/TPO, the learned AO/DRP/TPO has erred in law and on facts by not following a consistent approach while applying filters in the software support and BPO support services segment.
14. The learned AO/DRP/TPO have erred in law and on facts by including companies in view of their turnover, b and and high profitability as comparable to Appellant.
15. The learned AO/TPO erred in law and on facts by not following a consistent approach while applying said filters and adding certain companies as comparables, that are engaged in development and sale of software p oduct, that hold high brand value, and that fail qualitative and I or quantitative filters, adopted by TPO himself.
16. The learned AO/DRP/TPO erred in law and on the facts of the case by using only the current year data for computation of arm's length price and ignoring the provisions of Rule 10B(3) of the Rules, international commentaries and judicial pronouncements, which advocate usage of multiple year data of comparable companies for the purpose of determination of the arm's length price.
17. The learned AO/DRP/TPO erred in law and on facts by not taking into consideration foreign exchange fluctuation gain/loss and othe income while computing the operating margin of the comparable companies.
18. The learned AO/DRP/TPO erred in law and on facts of the case by not providing a relief on account of differences in risk profile levels between the Appellant and the potential comparable for both Software support and BPO support services segments.
19. The learned AO/DRP/TPO-has erred in by failing to appreciate the fact that transfer pricing is an anti-avoidance mechanism and since the Appellant is registered as an entity registered under the STPI and has claimed tax benefits under section 10A of the Act, the TP adjustment was not required to be made in view of the order passed by **the Bangalore ITAT in the case of Philips Software Centre (P) Limited.**
20. The learned AO/DRP/TPO erred in law and on the facts of the case by not correctly implementing the formula prescribed by the Organization for Economic Co-operation and Development

("OCED") to carry out working capital adjustment to the operating profit margins of the comparable companies.

21. The learned AO/DRP/TPO has failed to appreciate the appellant's commercial judgment about the application of arm's length principle which is tied to the business realities.
22. The learned AO/DRP/TPO has erred in law and on facts of the case, in making several observations and findings which are based on incorrect interpretation of law and contrary to facts of the case.
23. The learned AO/DRP/TPO has erred, in law and on facts of the case, by not providing the Appellant the benefit of 5 percent range as provided by the proviso of section 92C(2) of the Act.
24. The learned AO/DRP/TPO has erred by not carrying out the determination of arm's length price as required under section 92C of the Act read with rule 10D of income Tax Rules, 1962.

C. Corporate Tax issues

25. The learned AO / DRP have erred in law and on facts in not following **CBDT Circular no. 14(XI-35) of 1955 dated April 11, 1955** by not granting the relief claimed by the Appellant during the assessment proceedings in relation to an inadvertent mistake committed in the return of income, on the grounds that the same was not claimed vide original or revised return.
 - 25.1. The learned AO / DRP have erred in law and in facts not following the principle laid down by **the Hon'ble Supreme Court in case of Jute Corporation of India Limited** by not restricting the disallowance under section 43B(f) to the actual amount incurred by assessee on account of Leave encashment i.e. INR 8,15,69,471
 - 25.2. The learned AO / DRP have erred in computing the assessed income on the basis of an erroneous amounts considered in the computation of income i.e. INR 21,97,70,402 which is actually the cumulative balance of Leave encashment at the year-end, leading to double taxation to the extent of INR 13,83,00,931 in the subject year.
26. The learned AO / DRP have erred in facts and in law in not recalculating the deduction under section 10A of the Act post .enhancing the income during the assessment proceedings.
27. The Learned AO erred in facts and in law, in initiating penalty proceedings u/s 271(1)(c) of the Act in the absence of any concealment or furnishing of inaccurate particulars.
28. The assessee craves leaves to add/alter any of the grounds of appeal before or at the time of hearing."

Assessee has raised the following additional grounds: -

"Based on the facts and circumstances of the case and In law,

Conduent Business Services India LLP (Erstwhile Xerox Business Services India Private limited) (hereinafter referred to as the 'Appellant'), respectfully craves leave to file additional grounds of appeal, In addition to the grounds of appeal filed previously by the Appellant on March 4,2016 (revised Form 36 filed on October 15, 2020), which Is detailed herein below.

29. *The learned AO/TPO/DRP erred In facts and In law, by excluding following comparables from-the-final list of comparables:*

- (a) Microgenetics Systems Limited*
- (b) Informed Technologies India Limited*
- (c) Cosmic Global limited*
- (d) Mindtree Limited*
- (e) e4e Healthcare Business Services Private Limited.*

30. *The learned AO/TPO/DRP erred in facts and In law, by Including ICRA Online Limited In the final list of comparables.*

31. *Without prejudice to other grounds of appeal, in the facts and in the circumstances of the case and In aw, the learned AO/TPO has erred in computation of operating margin of following companies:*

- (a) ICRA Online Limited*
- (b) Mindtree Limited*

32. *The learned AO/TPO/DRP have erred, in law and in facts, by making negative working capital adjustment In relation to the services provided by the Appellant without appreciating the fact that the Appellant Is a captive service provider and does not bear any working capital risk.”*

3. The assessee filed petition for admission of additional grounds stating that inadvertently these additional grounds were not raised o earlier occasion and these grounds are necessary for adjudication of these issues and prayed that these additional grounds may be admitted in view of the judgement of the Hon'ble Supreme Court in the case of NTPC 229 ITR 383.

4. We have heard the rival submissions and perused the record. These grounds were not raised before the Tribunal and there is no necessity of investigation of any fresh facts other than on record. Accordingly in the interest of justice we admit the additional ground for adjudication.

5. Ground Nos. 1 to 3 are general in nature which do not require any adjudication.

6. At the time of hearing the learned A.R. not presses Ground Nos. 4 to 24. Accordingly, these grounds are dismissed as not presses.

7. Corporate Tax: Ground Nos. 25, 25.1 and 25.2. The learned A.R. submitted that the assessee had inadvertently deleted excess amount of leave encashment under Section 43B of the Act in the return of income. Even though, actual provision created had been debited to the P & L Account during the year amounted to Rs.8,65,69,471/- which should have been considered as disallowance under Section 43B of the Act, an amount of Rs.21,97,70,402/- which represented closing balance of provision was inadvertently disallowed. He prayed that the issue may be remitted back to the AO to consider the aggregate amount of provision for leave encashment while framing the assessment.

7.1. We have heard the rival submissions. In our opinion the plea of the assessee is justified. Accordingly in the interest of justice, we remit this issue to the file of the AO to consider the aggregate amount of provision for disallowance on leave encashment and AO has to decide the issue after giving opportunity of hearing to the assessee.

8. Ground No. 26 is with regard to non-granting of deduction under Section 10A of the Act on the enhanced assessed income. This ground is academic only. Accordingly, this ground does not require any adjudication as we have remitted Ground No. 25 to 25.2 to AO for fresh consideration. However, this ground is kept open to argue in appropriate stage if so warranted.

9. Ground No. 27 is with regard to initiating penalty proceedings under Section 271(1)(c) of the Act, which does not require adjudication at this stage.

10. Further, Ground No.28 is only consequential.

11. With regard to ITES segment (Ground 29 (a) (b) & (c) which are not pressed, accordingly dismissed as not pressed.

12. Ground No.29 and additional ground with regard to ITES segment in ground No.29(d) and 29(e), assessee wanted inclusion of the following comparables: -

- i) Mindtree Limited
- ii) e4e Healthcare Business Services Pvt. Ltd.

12.1. It is noted that the Department also in appeal Ground No.7 and 11 wanted inclusion of these two comparables in ITP segment. Accordingly, we direct the AO/TPO to include these 2 comparables in the list of comparables while determining the ALP in segment. These grounds of the assessee as well as the Revenue are allowed.

13. In Ground No. 30, the assessee wanted exclusion of ICRA Online Limited from the list of comparables. The learned A.R. submitted that this comparable has been considered in the case of Lam Research India (P) Ltd. IT(TP)A Nos. 405 & 406/Bang/2016 dated 17/09/2021 for AY 2011-12 wherein it has been held as under:

“The company is functionally dissimilar for the reason that the outsourced services segment of the company was engaged in the provision of high end consultancy services which cannot be compared to the assessee who was into provision of low end IT enabled services which are routine in nature. Further, the company fails the TPO’s filter of export turnover in excess of 75 per cent of total sales as the export turnover of the company amounts to only 61.88 per cent of its sales. Therefore, the company cannot be held as comparable to the assessee.”

13.1. Accordingly, we direct the AO/TPO to exclude ICRA Online Ltd. from the list of comparables while determining ALP of the international transactions.

14. In Ground No. 31 assessee seeking correct computation of operating margin of Mindtree Limited. The learned D.R. put no objection on this issue. Accordingly, we direct the AO/TPO to consider the correct operating margin of Mindtree Limited after giving opportunity to the assessee.

15. In Ground No. 32 assessee challenge the negative working capital adjustment. After hearing both the parties, we find that the position is

covered by the order of the Tribunal in the case of ACIT vs. e4e Business Solutions India Pvt. Ltd. in ITA No. 2900/Bang/2018 dated 08.12.2020 wherein it is held as under: -

“14. We find that the facts of the Assessee's case are similar to that of the case of the Bangalore ITAT in the case of M/s. Software AG Bangalore Technologies Pvt. Ltd. and therefore we are inclined to delete the negative working capital adjustment. In determining ALP under TNMM, the correct approach would be to look at the costs incurred by the assessee only and should not impute any additional cost as done by TPO, which indirectly enhances the ALP artificially. The contrary view expressed in decision cited by the learned DR takes the view that Working capital adjustment is required in all cases as any credit extended to customers will result in cash "locked up and will result in the assessee borrowing money from the banks and incur additional cost towards interest on these borrowings which cost will have effect on the price charged. It is the reasoning in these decisions that under TNM method that every ingredient of profit margins of comparable companies are analysed whether it is positive or negative. The decision proceeds on the basis of effect on price owing to working capital requirement. We are of the view that working capital adjustment itself is computed on the basis of outstanding current assets and liabilities at the year end. It means that other things being equal, an entity having higher working capital will incur more interest cost which will reduce profitability. Hence no importance shall be given to pricing aspect. Since the assessee does not have any working capital risk, the question of negative working does not arise.”

15.1. Respectfully following the above order of the Tribunal we are of the opinion that the assessee having no working capital risk no negative working capital adjustment is called for. Accordingly, this ground of the assessee is allowed. The appeal of the assessee is allowed for statistical purposes.

ITA No.202/Bang/2016 : AY 2011-12 (Revenue's Appeal)

16. Ground Nos. 1 to 4 of the appeal is infructuous in view of issue is settled by the MAP and this issue relates to Corporate Segment in assessee's appeal. Accordingly, these grounds are dismissed.

IT Enabled Segment

17. With regard to Ground No. 5 the learned D.R. challenged the exclusion of the following comparables:

i) Accentia Technologies Ltd.: We find that this company is not considered as comparable in the case of Lam Research India (P) Ltd. in ITA No. 468/Bang/2016 for AY 2011-12 vide order dated 17.09.2021 wherein it was held as under: -

“Details regarding its diverse functions were reported under one segment. In the absence of segmental details being made available, the comparability of the company with assessee cannot be determined. In any event, Accentia is engaged in providing high end services in the nature of Knowledge Process Outsourcing (KPO) whereas, the assessee is engaged in rendering routine low end information technology enabled services. Further, the said company not only engaged in medical transcriptions, but has also ventured into healthcare receivables cycle management and high end consultancy to start-ups requiring field experts. As can be seen from the annual report, coding income is contributing 15 per cent of the total income which activities are akin to software development activity while the assessee is a mere provider of IT enabled services. The company has invested huge sums in the development of EMR software. Segmental details of its various activities are unavailable. The company further owns significant intangibles. The Tribunal in similar circumstances and for the same assessment year directed the exclusion of the company from the list of comparables. Accentia Technologies Ltd., is, therefore, not comparable to the assessee and rejected as comparable.”

17.1. In view of the above order of the Tribunal, the above said company is to be excluded from the list of comparables.

ii) Acropetal Technologies Ltd. We are of the opinion that this is excluded in the case of Lam Research India (P) Ltd. (supra) wherein it is held as under:

“The company is engaged in the business of software development services, contract centre service and IT enabled services and the same are reported together as one segment. In the absence of segmental details made available, the company could not be treated as a comparable. The TPO, while choosing the company as a comparable, has selected its Engineering Design Segment (EDS) which is in the nature of high end IT enabled services which are in the nature of Knowledge Process Outsourcing (KPO). The high end services provided by the company cannot be compared with the routine services provided by the assessee. This company is therefor to be excluded from the list of comparable companies.”

In view of the above order of the Tribunal, the above said company is to be excluded from the list of comparables.

iii) e4-e Healthcare Business Services Pvt. Ltd. and Mindtree Ltd.: As discussed in the earlier part of this order vide para 15, these companies are excluded while deciding the assessee's appeal. Accordingly, these companies are excluded from the list of comparables.

iv) Infosys BPO Ltd.: After hearing both the parties this company is excluded in the case of Dell International Service India P. Ltd. in ITA No. 593/Bang/2016 for AY 2011-12 dated 01.09.2021 wherein it is held as under: -

25. The revenue is challenging exclusion of Infosys BPO Limited by Ld. DRP. Before us the Ld. A.R. placed reliance on the decision rendered by Hon'ble Delhi High Court in the case of PCIT Vs. H&S Software Development and Knowledge Management Centre Pvt. Ltd. (Order dated 3.1.2018 passed in ITA No.912/2017). We notice that the Ld. DRP has followed the decisions rendered by the coordinate benches in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) and in the case of International Speciality Products Pvt. Ltd. (ITA No.218/Hyd/2014), wherein it is observed that Infosys BPO Limited cannot at all be considered as comparable to the assessee not only because of its size but also due to its brand value, diversified activities and other functional disabilities. The Hon'ble Delhi High Court in the case of H & S Software Development and Knowledge Management Centre Pvt. Ltd. (supra) has expressed the view that the ITAT has correctly held that the Corporate entities had a significant brand presence for profits and large corporate size, which could not be compared with the assessee before the Hon'ble High Court of Delhi. In view of the above, we are of the view that Ld. DRP has rightly excluded this company.

In view of the above order of the Tribunal, the above said company is to be excluded from the list of comparables.

v) Jeevan Scientific Technology Ltd. After hearing both the parties we are of the opinion that in similar circumstances this company has been excluded from the list of comparables in the case of Lam Research India (P) Ltd. wherein it is held as under: -

"The company is engaged in diverse functions and the same were reported under one segment. In the absence of segmental details being made available, the comparability of the company with the assessee cannot be determined. In any event, the ERP segment of the company is not comparable to the assessee, the BPO segment of the company fails the filter of service income being greater than 75 per cent

of total revenue, and the company suffers from huge fluctuations which indicate that certain peculiar circumstances influencing the profit margin of the company exist, for which appropriate adjustments cannot be made to balance the effect. This company is therefore excluded as comparable company.”

In view of the above order of the Tribunal, the above said company is to be excluded from the list of comparables.

vi) Igate Global Solutions: This has been excluded in similar circumstances in the case of TRX Technologies India Pvt. Ltd. in IT(TP(A) No. 487/Bang/2916 for AY 2011-12 dated 25.09.2020 wherein it is held as under: -

As far as iGate Global Solutions Ltd., is concerned DRP rejected this company as comparable company for the reason that the details regarding its diverse functions are reported under one segment without segmental details regarding the same being made available. Therefore, the comparability of the company cannot be determined. It is seen that iGate is engaged in provision of varied services and no segmental breakup of the same is available in its Annual Report. Further, the company's software services segment is clubbed with its ITES segment and there is no breakup between the revenues generated from the two segments. During the year under consideration, the company has acquired majority equity interest in Patni Computer Systems Ltd. rendering it incomparable due to it failing the TPO's own filter of having peculiar economic circumstances. In addition, the company owns significant intangibles in its name, which is evident from the balance sheet of the company for the Financial Year 2010-11. For the reasons above, the company is not comparable to the Assessee and the DRP's findings on exclusion of iGate is right in law. As far as the company ICRA Online Ltd., is ITA No. 2900/Bang/2018 Page 8 of 16 concerned, the DRP excluded this company for the reason that the details regarding its diverse functions are reported under one segment without segmental details regarding the same being made available. Therefore, the comparability of the company cannot be determined. In any event, this company is functionally dissimilar for the reason that the outsourced services segment of the company is engaged in the provision of high end consultancy services which cannot be compared to the assessee who is into provision of low end IT enabled services which are routine in nature. Further, the company fails the TPO's own filter of export turnover in excess of 75% of total sales as the export turnover of the company amount to only 61.88% of its sales. Therefore, the company cannot be held as a comparable to the assessee.”

In view of the above discussion, we direct the AO/TPO to exclude the same from the list of comparables.

18. Non-TP issue: Disallowance of deduction under Section 10A of the Act.

Exclusion of telecommunication expenses both from export sales and total turnover. After hearing both the parties we are of the opinion that this issue is settled by the judgement of Hon'ble Supreme Court in the case of CIT vs. HCL Technologies Ltd., [404 ITR 719] wherein it is held that the expenditure incurred in foreign currency, towards telecommunication to be excluded both from export turnover and total turnover for the purpose of computation of deduction under Section 10A of the Act. Being so, respectfully following the above judgement of the Hon'ble Supreme Court we dismiss the ground taken by Revenue.

19. Last ground with regard to deduction claimed only on interest earned from fixed deposits.

19.1. After hearing both the parties, we find that this issue is covered by the judgement of Hon'ble Karnataka High Court in the case of CIT vs. Hewlett Packard Global Software Ltd. 403 ITR 453 in favour of the assessee. As such the interest earned from fixed deposit invested in the export earning of the assessee to be included in the profit of the undertaking while computing the deduction under Section 10A of the Act. Accordingly, this ground of Revenue is dismissed.

20. In the result, the appeal filed by the assessee is partly allowed for statistical purposes and the appeal filed by the Revenue is partly allowed.

Order pronounced in the open court on 8th April, 2022

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore, Dated: 8th April, 2022

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -*
4. *DRP, Bengaluru*
5. *The DR, ITAT, Bangalore*
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By Order

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Assistant Registrar
ITAT, Bengaluru

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