

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision : 30.10.2019

1. ITA No.419 of 2016 (O&M)

The Principal Commissioner of Income Tax,
Gurgaon

..... Appellant

versus

M/s Equant Solutions India Pvt. Ltd.

..... Respondent

2. ITA No.405 of 2016 (O&M)

The Principal Commissioner of Income Tax,
Gurgaon

..... Appellant

versus

M/s Orange Business Services India
Solutions (P) Ltd.

..... Respondent

3. ITA No.405 of 2018 (O&M)

Orange Business Services India Solutions Pvt. Ltd.

..... Appellant

versus

Deputy Commissioner of Income Tax, Circle 3,
Gurgaon

..... Respondent

**CORAM : HON'BLE MR.JUSTICE AJAY TEWARI
HON'BLE MRS.JUSTICE ALKA SARIN**

Present : Mr. Tajender K.Joshi, Advocate
for the appellant (ITA-419-2016) and ITA-405-2016)
for the respondent (ITA-405-2018)

Ms. Radhika Suri, Senior Advocate with
Mr. M.S.Kanda, Advocate
for the appellant (ITA-405-2018)
for the respondent(s) (ITA-419-2016) and
(ITA-405-2016).

AJAY TEWARI, J. (Oral)

ITA No. 419 of 2016

1. The present appeal is directed against the order of the Income Tax Appellate Tribunal dated 21st January, 2016 for the A.Y. 2010-11. The revenue has raised the following questions of law:-

“1. Whether in the facts and circumstances of the case and in law, the Hon’ble ITAT was correct in excluding M/s Persistent Systems Limited used as a comparable for determining the ALP in the case of the assessee company when the assessee company as well as comparable company were predominately software development service providers?

2. Whether in the facts and circumstances of the case and in law, the Hon’ble ITAT was correct in excluding M/s Wipro Technology Services Limited used as a comparable for determining the ALP in the case of the assessee company when services provided by the assessee company and comparable company are similar in the nature of software development services?

3. Whether in the facts and circumstances of the case and in law, the Hon’ble ITAT was correct in excluding M/s Zylog Systems Limited used as a comparable for determining the ALP in the case of the assessee company in the absence of any evidence that there is impact of amalgamation on the profitability of the comparable?

4. Whether in the facts and circumstances of the case and in

law, the Hon'ble ITAT was correct in excluding M/s Accentia Technologies Limited used as a comparable for determining the ALP in the case of the assessee company when the assessee company and comparable company are providing similar nature of services in the category of ITES as these services are notified in the category of ITES in notification of CBDT dated 20.09.2009 and there is no further sub-classification of this segment?

5. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s Fortune Infotech Ltd used as a comparable for determining the ALP in the case of the Assessee Company when the Assessee Company and comparable company are providing similar nature of services in the category of ITES as the services are notified in the category of ITES in notification of CBDT dated 20.09.2009 and there is no further sub-classification of this segment?

6. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s Infosys BPO Ltd used as a comparable for determining the ALP in the case of the Assessee Company when the Assessee Company and comparable company are providing similar nature of services in category of ITES?

7. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s TCS E-Service International Ltd used as a comparable for determining the ALP in the case of the Assessee Company when the Assessee Company and comparable company are providing similar nature of services in the category of ITES?

8. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s TCS E Service Ltd used as a comparable for determining the ALP in the case of the Assessee Company when the Assessee Company and comparable company are providing

similar nature of services in the category of ITES?”

2. The respondent assessee Equant Solutions India Pvt. Ltd. is a wholly owned subsidiary of EGN BB Netherlands. The assessee is engaged in providing information technology and I.T. enabled services to its associated enterprises.

3. For the A.Y. 2010-11, the Respondent- Assessee filed its return of income declaring a total income of Rs.2,76,18,542/- on 30.09.2010. During the relevant financial year the assessee in its transfer pricing analysis selected Transaction Net Margin Method (TNMM) as the most appropriate method with operating profit divided by total costs (“OP/TC”) as relevant profit level indicator for both the segments under consideration. Under the IT services segment, the Assessee selected 16 comparable companies with a mean OP/TC of 12.21% whereas under the ITES services the assessee selected 13 comparables with a mean OP/TC of 12.12%. The OP/TC earned by the assessee under both the segments was 15.02%. Thus, it was contended on behalf of the assessee that its transactions with the associated enterprises are at arms length.

4. A reference was made to the transfer pricing officer to determine the arms length price. The transfer Pricing officer passed an order under Section 19 CA(3) of the Income Tax Act, 1961 (for short the 'Act') on 9th January, 2014 accepting TNMM as the most appropriate method, however, the Transfer Pricing Officer chose certain comparables for IT services and ITES services with a mean “OP/TC” of 25.17 of IT services and 30.45% for IT enabled services and proposed transfer pricing adjustments at Rs.23,57,03,932/-. The draft assessment order was passed

by the Assessing Officer on 14th March, 2014 making additions Rs.23,57,03,932/- on account of transfer pricing adjustment.

5. The assessee moved before the Dispute Resolution Panel, New Delhi contending that the comparables chosen by the Transfer Pricing Officer were functionally dissimilar and hence should be excluded. The Dispute Resolution Panel excluded only one comparable M/s. Infosys Ltd. from the list of comparable companies and the objections regarding the exclusion of other companies were rejected. The final assessment order U/s 143(3) of the Act was passed by the Assessing Officer on 30th January, 2015 at an income of Rs.25,97,19,410/-. The assessee preferred an appeal before the ITAT. The ITAT accepted the submissions of the assessee that the comparables chosen by the Transfer Pricing Officer were functionally dissimilar and were liable to be rejected vide order dated 21st January, 2016.

6. Being aggrieved by the impugned order dated 21st January, 2016 of the Tribunal, the revenue is in appeal raising the above mentioned question for consideration.

Re: Question No.1

Persistent Systems Ltd.

7. The Transfer Pricing Officer had taken Persistent systems Ltd. which had a margin of 29.02% holding that the company is engaged in Software Developing Services. The Dispute Resolution Panel rejected the claim of the assessee for its exclusion. Before the ITAT, the assessee submitted that the company was functionally different because it rendered outsourced product development services and developed product as

Paxpro, ChemLMS etc. The assessee further contended that segmental information of sale of software services and sale of product were not available and therefore, it should be excluded.

8. The finding of the ITAT for its exclusion is as under:-

“Further it is seen from the details of record that this company i.e. Persistent Systems Ltd. is engaged in product development and product design services, while the assessee is engaged in contract software development services. We find that as submitted by the Assessee the segmental details are also not available separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India (P) Ltd. Vs. Asstt. 0712012] 137 ITD 1/22 taxmann.com 96 (Mum). That in the absence of segmental details/information a company it cannot be taken into account for comparability analysis. We hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration, it is ordered accordingly”.

9. The said finding of fact has not been shown to be perverse by the revenue and thus, the finding of fact that the comparable is functionally dissimilar and in the absence of segmental details of revenue generated from its services of product development and product design services has been rightly excluded by the ITAT.

Re: Question No.2

Wipro Technology Services

10. Transfer Pricing Officer had included Wipro Technology services having a margin of 73.35% which was upheld by the Dispute Resolution Panel before the Income Tax Appellate Tribunal, the assessee

contended that this company had huge related party transactions as its total revenue was governed by Master Service Agreement with Citi Technology Services Ltd. where the equity was owned by Wipro. The turnover of the comparable was 24 times that of the assessee and had huge brand value of Wipro and therefore, it should be excluded. The ITAT recorded the following findings while excluding the said comparable:

“We carefully considered that rival contention regarding exclusion of this comparable. This company had agreed an agreement with Citi Technology Services Ltd. which is 100% subsidiary of Wipro Technology Ltd. The entire revenue during the year is covered by a Master Service Agreement entered into by Wipro with Citi Group Services. Further, this company is also a subsidiary with Wipro Ltd. which company has a considerable brand name, therefore benefit accruing to this company from the brand name of Wipro cannot be denied. Therefore, relying on the decision of the Coordinate Bench in the case of Agnity Technology Pvt. Ltd. in ITA No.955/Del./2015 for A.Y. 2010-11 wherein the Infosys Owns of its own brand name was held to be incomparable on the same analogy brand value of Wipro does help this comparable hence, we direct TPO to excluded this comparable in its order accordingly.”

11. The finding of fact has not been shown to be perverse in any manner, the comparable excluded has a turnover which is 24 times that of the assessee and has also the benefit of the brand name of Wipro and the assured revenue from its agreement with Citi Technology Services. Thus, the comparable has been rightly excluded.

Re: Question No.3**M/s. Zylog Systems Ltd.**

12. The Transfer pricing Officer had included Zylog System Ltd. which had a margin of 25.07% as it was functionally similar to the assessee according to the Transfer Pricing Officer. The DRP concurred with the TPO before the ITAT, the Assessee submitted, that this company derive its income from sale of Software Services as well as products and has diversified operation in Wifi Space and Broadband connectivity. It was predominately an onsite service company, therefore it was functionally different. The company had commenced acquisition during the year and therefore, due to extra ordinary special events the comparable should be rejected. The assessee also submitted that 62% of the assets of the company were intangible and therefore it should be excluded. The ITAT while excluding the said comparable returned the following finding:-

“We have considered the rival contention wherein it is stated that the Zylog Systems Ltd. is engaged in the sale of Software Services as well as its products and has operation in Wifi place and broadband connectivity. It is apparently an onsite service company. This is evident from the various comparables of only reports and related documents produced before us. Zylog Systems Ltd. has also undergone into the business of restructuring where it is clear dugout fair flex matrix. Therefore, it is apparent that the company has undergone the business restructuring process during the year. It cannot be held to be comparable in view of the extra ordinary circumstances. The company also owning significant intangibles and carrying on research and development activity ownership significant intangibles

cannot be held to be comparable with the assessee and therefore, on this ground too, this comparable with the assessee and therefore on this ground too this comparable is ordered accordingly to be excluded”.

13. The said finding of the ITAT has not been shown to be perverse and thus, the exclusion of the comparable on the ground that the intangible assets owned by it are significant as compared to the assessee and it has also restructured its business is completely justified both in facts and in law.

Re: Question No.4

IT Enabled Services

Accentia Technologies Ltd.

14. The Transfer Pricing Officer while evaluating the information technology enabled services segment of the assessee had taken this comparable as it was functionally similar. The said inclusion was upheld by the Dispute Resolution Panel. Before the ITAT the assessee submitted that the comparable company provides high and functions such as knowledge process outsourcing, legal process outsourcing. Further, the company is providing software in a service in health care outsourcing area. The company also developed software products in BPO Management and Healthcare. Therefore it is functionally dissimilar to the assessee. The assessee also conducted that comparable had significant amount brand and IPR and further, it did not contain segment wise results. Further, it was submitted by the ITAT during the financial year 2009-10, there was an amalgamation in the comparable company which was an extra ordinary event and therefore it

affected overall profitability of the company. The ITAT while excluding the comparable returned a finding as under:-

“We have considered the rival contention during the year that this comparable has gone into substantial business restructuring resulting into extraordinary circumstances during F.Y. 2009-10 subsidiary of ASCENTIA got amalgamated with this company and the figure of the business results for the year ending 31st March, 2010. In this case also excluded the figures of amalgamated company due to which comparable has high OP by TC margin”.

15. The finding of fact recorded by the tribunal has not been shown to be perverse in any manner. The fact that the amalgamation has resulted in a higher OP by TC is an aberration and thus, the tribunal has rightly excluded the said comparable.

Re: Question No.5

Fortune Infotech Ltd.

16. The Transfer Pricing Officer included the said comparable which had a margin of 22.80%. The assessee contended before the Transfer Pricing Officer and the DRP that the profile of the comparable was not similar to that of the assessee. The said submission was rejected and before the ITAT, the main contention of the assessee was that the comparable was engaged in Web Application, Mobile Application, Web Designing and SEO Provider. Therefore, it was functionally different and was liable to be excluded.

17. The ITAT returned the following findings:

“We have carefully considered the rival contentions. We have heard both the parties and considered the material on record. There is no dispute that the assessee is operating

purely in the ITES Sector providing services to its associates enterprises, whereas comparable selected by the TPO has developed and owns its unique web based software by which it provide niche services to its customers”.

18. The finding of the fact recorded by the ITAT has not been disputed or shown to be perverse in any manner. The ITAT has concluded that Fortune Infotech has unique web based software and provided niche services to its customers and thus, was dissimilar to the assessee and has been right excluded as a comparable.

Re: Question No.6

Infosys BPO Ltd.

19. The Transfer Pricing Officer included Infosys BPO as a comparable which had a margin of 31.44%. Before the TPO, the assessee contended that this comparable had a very high turnover and had huge brand value. The TPO rejected the contention of the assessee holding that the assessed had failed to establish which brand has influenced the increased profitability of the comparable. Before the ITAT, the assessee submitted that the comparable was engaged in high and integrated services in improving the comparative position of the clients and managed their business process and provided value added services to them. The ITAT concluded as under:-

“We have considered the rival contentions regarding exclusion of Infosys BPO which is engaged in high and integrated services and therefore it is functionally dissimilar. The Infosys Branch is indisputably a huge brand and definitely result of this brand goes to this comparable. Therefore, the brand of Infosys definitely results in opening higher profits to this company. In view of

the following decision the same is required to be excluded and hence is ordered accordingly”.

20. The findings of the ITAT have not been shown to be perverse in any manner. The brand of Infosys definitely results in higher profits and hence the ITAT has rightly excluded the same from the list of comparables.

Re: Question No.7.

TCS E Serve International Ltd.

21. The Transfer Pricing Officer had included the comparable which had a margin of 54.02% holding it to be comparable. The contention of the assessee that the company was functionally dissimilar was rejected by the TPO and the DRP. Before the ITAT the contention of the assessee was that in addition to BPO Services the comparable company was engaged in providing technical services like software testing, common verification and validation of software which falls under Software Development Activity which includes transaction process, technical services, therefore, it was functionally dissimilar. Further it was also contended that there was no segmental data ITES and Software Development Activity of the company and the comparable own such substantial intangibles and had a volatile margin which had gone up by 173% in the present year. The ITAT concluded as under:-

“We have considered the rival contention regarding the exclusion of TCS E Service International Ltd.. The comparable is engaged in the business of BPO Service and provides high and technology service such as Software Testing, Verification and Validation of the Software. Therefore, it is functionally dissimilar to the assessee.

Further, annual report of the company does not provide any segmental information related to ITES as well as Software Development Services. The company also owns intangible of substantial amount and is benefited usually by the TATA brand". The company is also making the appellant use of such brand, therefore, this aspect also makes this comparable in appropriate and therefore, the order to exclude this comparable".

22. The finding recorded by the ITAT have not been shown to be perverse and cogent reasons have been given showing the dissimilarity of the comparable to the assessee and thus, the exclusion of the above comparable cannot be faulted in any manner.

Re: Question No.8.

TCS E Serve Ltd.

23. The Transfer Pricing Officer included this comparable which had a margin of 63.42%. The assessee before the ITAT contended that the company was dissimilar functionally. In addition to BPO Service is also engaged in technical service such as Software Testing, Verification and Validation. It has also developed software such as transport management Software. The ITAT concluded as under:

"We have considered rival contention for exclusion of TCS E Serve Ltd. it is mainly involved in transaction processing and technology services. It carries on business of providing technology service such as software testing, verification and validation. It is also developed a software such as transport management software. Therefore, functionally this company is dissimilar to the assessee company. It also owns huge intangible and use of TATA brand which has definitely benefited this comparable. It is directed to be excluded".

24. The findings of facts regarding exclusion of the comparable have not been shown to be perverse in any manner. The ITAT has thus rightly concluded that the comparable is functionally dissimilar and thus, has to be excluded.

25. The findings of fact by the ITAT regarding exclusion of the comparables are thus upheld and thus the same do not merit any interference. The questions of law are answered against the revenue and in favour of the assessee. Similar views have been taken by the Bombay High Court in the case of CIT Vs. PTC Software 395 ITR 176 and in the case of Principal Commissioner of Income Tax Vs. Barclays Technology Centre India Pvt. Ltd. 409 ITR 108 and by the Karnataka High Court in Principal Commissioner of Income Tax Vs. Softbrands India Pvt. Ltd. 406 ITR 513.

ITA No. 405 of 2016

26. The appeal filed by the Revenue for A.Y. 2011-12 has assailed the order of the ITAT dated 31st May, 2016 whereby the exclusion of comparables mentioned below is disputed:

- i) M/s. Persistent Systems Ltd.
- ii) Wipro Technology Services Ltd.
- iii) Zylog Systems Ltd.
- iv) Accentia Technology Ltd.
- v) Infosys BPO
- vi) TCS E Service Ltd.

27. The following questions of law have been raised :-

“1. Whether in the facts and circumstances of the case and in law, the Hon’ble ITAT was correct in excluding M/s

Persistent Systems Limited used as a comparable for determining the ALP in the case of the assessee company as the assessee company as well as the comparable company were software service providers?

2. Whether in the facts and circumstances of the case and in law the Hon'ble ITAT was correct in excluding M/s Wipro Technology Services Limited used as a comparable for determining the ALP in the case of the assessee company as the assessee company and the comparable company were providing similar nature of services in the nature of software development services?

3. Whether in the facts and circumstances of the case and in law the Hon'ble ITAT was correct in excluding M/s Zylog Systems Limited used as a comparable for determining the ALP in the case of the assessee company as there is no impact of amalgamation on the functionality of the comparable and, thus, the same cannot be rejected on the ground of amalgamation only ?

4. Whether in the facts and circumstances of the case and in law the Hon'ble ITAT was correct in excluding M/s Accentia Technologies Limited used as a comparable for determining the ALP in the case of the assessee company as the assessee company and comparable company are providing similar nature of services in the category of ITES?

5. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s Infosys BPO Ltd used as a comparable for determining the ALP in the case of the assessee company when the assessee company and comparable company are providing similar nature of services in the category of ITES?

6. Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT was correct in excluding M/s TCS E Service Ltd used as a comparable for determining the ALP in the case of the assessee company when the assessee

company and comparable company are providing similar nature of services in category of ITES?”

28. The Income Tax Appellate Tribunal has followed its own order for A.Y. 2010-11 to exclude the comparables mentioned above. The order passed by the ITAT has been examined and upheld in ITA No. 419 of 2016 and the findings of fact recorded by the ITAT have not been shown to be perverse in any manner.

29. The questions of law thus raised in the present appeal are answered against the revenue and in favour of the assessee holding that the exclusion of comparables was correct both in law and in facts and merits no interferences.

ITA No. 405 of 2018

30. The present appeal has been filed by the assessee for A.Y. 2013-14 raising the following substantial question of law:-

“i) Whether the Hon’ble ITAT erred in rejecting the segmental information pertaining to IT and ITES presented by the Appellant?

ii) Whether the Hon’ble ITAT erred in law in setting aside the matter for carrying out the benchmarking analysis by aggregating the IT and ITES segment of the Appellant?

iii) Whether the Hon’ble ITAT erred in law in setting aside the matter for carrying out the benchmarking analysis by selecting the comparable companies involved in provision of both ITES and IT services?.

iv) Whether the Hon’ble ITAT erred in law in not giving sufficient time to the Appellant, during the course of proceedings, for placing relevant evidence on records?”

31. The brief facts leading to the present appeal are that the Appellant is a company engaged in IT Services and IT Enabled Services

which has been accepted by the assessing officers and the Transfer Pricing Officer vide orders for A.Y. 2010-11 and 2011-12, however, for the present year i.e. A.Y. 2013-14, the Transfer Pricing Officer characterized the Appellant as ITES Service Provider only rejecting its claim of providing IT Services in the nature of Software Development which had been accepted for all preceding years. The claim of the assessee before the Dispute Resolution Panel that it had two distinct segments of IT i.e. Software Development and ITES were also rejected and the findings of the TPO were upheld. The Assessee appellant filed an appeal before the ITAT and during the course of hearing on 8th February, 2018, the Appellant was directed by the ITAT to submit additional evidence demonstrating that the appellant was engaged in IT services including software development activity. The hearing on 8th February, 2018 being a Thursday was adjourned to 12th February, 2018, thus, the Appellant was provided one working day before the final hearing on 12 February, 2018 which was a Monday. The present appeal has been filed alongwith an application for additional evidence wherein voluminous evidence has been filed by way of Annexure A-6 to A-13 indicating that the assessee was engaged in software development.

32. Keeping in view the fact that the Transfer Pricing Officer had in the preceding years accepted that the assessee was engaged in IT Services (i.e. including software development and ITES) as is evident from the assessment order, which are part of the ITAs 419 of 2016 and 405 of 2016 and considering the fact that due to paucity of time, the assessee could not produce evidence before the ITAT. The order of the

ITAT dated 15th February, 2018 is set aside and the ITAT is directed to examine the issue whether the assessee is engaged in the activity of software development after considering the additional evidence placed before this Court namely Annexures A-6 to A-13 and any other evidence which may be produced after hearing both the parties and allowing sufficient opportunity to the revenue to verify the same.

33. Appeals stand disposed of in the above terms.

34. Since the main cases have been decided, the pending Civil Misc. Applications, if any, also stand disposed of.

(AJAY TEWARI)
JUDGE

(ALKA SARIN)
JUDGE

30.10.2019

pooja sharma-I

Whether speaking/reasoned

Yes/No

Whether Reportable :

Yes/No