

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 333/DEL/2017
[Assessment Year: 2012-13]

M/s Fiserv India Pvt Ltd
Regus Elegance, Level - 2
Elegance Jasola Distt Centre
Old Mathura Road, New Delhi.

Vs

The A.C.I.T
Circle - 9(1)
New Delhi.

PAN : AACCR 0787 L

[Appellant]

[Respondent]

Date of Hearing : 22.09.2020
Date of Pronouncement : 28.09.2020

Assessee by : Shri Sachit Jolly. Adv
Revenue by : Shri Sukesh Kumar Jain, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the assessment order dated 26.12.2016 framed u/s 143(3) r.w.s 144C of the [hereinafter referred to as 'the Act' for short].

2. The grievances of the assessee can be summarised as under:
 - a) Transfer pricing addition of Rs.20.29 crores in respect of international transaction of software development services rendered by the assessee to its parent company;
 - b) Addition of Rs. 2,98,46,447/- by treating forex loss as speculative loss;
 - c) Addition of Rs.16,07,391/- by disallowing deduction for donation.
3. In addition to the above, the assessee is also aggrieved by the treatment of forex exchange gain as non-operating income.
4. Representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the judicial decisions relied upon by both the sides.

5. Briefly stated, the facts of the case are that the appellant was incorporated on May 31st, 2002 in India and is a closely held company with 498,051 shares being held by Fiserve Worldwide Solutions Inc. USA and balance 1% share held by ARTIUS Inc. USA. The appellant operates from three Software Technology Park Scheme Units located at Noida, Bangalore and Pune.

6. The appellant provides software development and maintenance services and ITES/BPO services to its Associated Enterprises [AE]. Based on the terms of service agreement with the AEs, the appellant is compensated on cost plus 15%.

7. The international transactions entered into by the appellant are as under:

Sl. No	International Transaction	Amount[Rs]
1.	Provision of software development services and ITES/BPO services	3,07,63,99,034
2.	Reimbursement of expenses to AEs	58,769,197
3.	Reimbursement of expenses from AEs	10,214,962
4.	Unbilled revenue	2,789,339
5.	Trade payables	5,848,182

8. For its software development services and ITES/BPO services, the appellant has used TNMM as the most appropriate method with OP/TC as PLI. The appellant has arrived at a set of 12 companies with average margin of 14.04% using multiple year data and worked out its own margin at 14.13%. Based on such analysis, the appellant has returned its international transaction at arm's length.

9. During the transfer pricing assessment proceedings, the TPO noticed that the assessee has considered forex fluctuation gain as operating item of income, which according to him, was not correct and excluding the same, computation of margin was re-computed as under:

Particulars	Software development
Operating Revenues	3,076,596,804
Operating Cost	2,766,666,351
Operating Profit	309,930,453
OP/OC	11.20%
Method	TNMM

10. The TPO noticed that the assessee has used the following companies as comparable companies:

Sl. No	Company Name	Weighted Average OP/OC%
1	Acropetal Technologies Ltd	26.19
2	R S Software [I] Ltd	14.09
3.	Akshay Software Technologies Ltd	-1.25
4.	Helios & Matheson Information Technology Ltd	14.39
5.	Maveric Systems Ltd	0.40
6.	Signti Technologies Ltd	8.10
7.	Spry Resources Ltd	26.97
8.	Informed Technologies Ltd	13.65
9.	Jindal Intellicom Ltd	13.61
10.	ICRA Online Ltd	24.01
11.	Caliber Point Business Solutions	13.65
12.	Omega Healthcare Management Services P Ltd	14.69
	MEAN	14.04%

11. Thereafter, the TPO applied the following filters:

- a) Use of current year data;
- b) Exclude companies having different accounting year from the financial year;
- c) Companies where the turnover is less than Rs. 1 crore is rejected;
- d) Companies selected having ratio of service income to total income is at least 75%;

- e) Companies where related party transaction exceeds 25% sales are rejected;
- f) Companies that have employee cost is less than 25% of sales and
- g) Companies that are affected by some peculiar economic circumstances are rejected.

12. Based on the afore-mentioned filters, the Assessing Officer analysed the comparable companies used by the appellant as under:

S. No	Company Name	TPO's Observation
i.	Acropetal Technologies Limited	This is an appropriate comparable as it passes all the filters applied by the TPO. It is being considered as comparable.
ii.	R S Software (India) Private Limited	This is an appropriate comparable as it passes all the filters applied by the TPO. It is being considered as comparable.
iii.	Akshay Software Technologies Limited	This is an appropriate comparable as it passes all the filters applied by the TPO. It is being considered as comparable.

iv.	Helios & Matheson Information Technology Limited	The annual report of the company is available for FY 2011-12. It is seen that the financials are available for a period of 12 months ending September. Accordingly, the 6 months period of the FY 2011-12 is only covered. Since reasonably accurate adjustments can't be made for the relevant period, this company is not being considered as a comparable.
V.	Maveric Systems Limited	For the updated margin, it is submitted that no details are available for this entity. Since, no data is available for the F. Y. 2011-12, this is rejected.
VI.	Cigniti Technologies Limited	This is an appropriate comparable as it passes all the filters applied by the TPO. It is being considered as comparable.
vii.	Spry Resources Limited	This is an appropriate comparable as it passes all the filters applied by the TPO. It is being considered as comparable.
viii.	Informed Technologies Limited	The Annual report of the company is available. From perusal of the same, it is seen that it had earned non operating income of Rs 14099852. In earlier years there was no bifurcation of expenses pertaining to the income and thus the entity was rejected. In this year there is a change in representation and one new item has appeared. (Brokerage). Accordingly, the information was called under section 133(6) and on the basis of information submitted, the company can be considered as a comparable.

ix.	jindal Intellicom Limited	This company engaged in providing voice based services. It is stated in the annual report that the entity is an international call centre. Since the assessee is engaged in providing ITES services in the nature of data processing, this entity is not being considered as a comparable.
X.	ICRA Online Limited	In the updated margins provided by the assessee, it is noted that no data for F.Y 2011-12 is available. This company is not being considered as a comparable due to non availability of data.
xi.	Caliber Point Business Solutions	The data for this company is available for December ending. In order to examine the comparability, the data for March ending is required. The data was called u/s 133(6) but it was not submitted. Since the data is not available for March ending, it is not considered as a comparable.
xii.	Omega Healthcare Management Services Private Limited	This company has employee cost less than 25% of the total cost. This company is not being considered as a comparable.

13. After analysing the comparable companies of the assessee as above, the Assessing Officer added some more comparable companies and came to the final set of comparables as under:

S.No	Company Name	OP/OC(%)
1	Acropetal Technologies Limited	65.92
2	R S Software (India) Limited	15.43
3	Akshay Software Technologies Limited	7.77
4	Cigniti Technologies Limited	8.28
5	Spry Resources Limited	33.59
6	Informed technologies Limited	19.11
7	Infosys Limited	42.15
8	Lucid Softwares Limited	11.10
9	Mindtree Limited	19.19
10	Persistent Systems Limited	26.92
11	Sankhya Infotech Ltd.	5.68
12	Sasken Communication Technologies Ltd.	14.58
13	Tata Elxsi Ltd (Seg)	14.32
14	Zyilog Systems Limited	33.01
15	Accentia Technologies Ltd.	11.95
16	Eclerx Services Ltd.	58.4
17	Excel Infoways Ltd.(Seg)(IT/BVPO)	41.48
18	TCS E Serve Limited	63.69
	Average	27.36%

14. Accordingly, the arm's length price was computed as under:

Operational cost	2,76,66,66,351
Arm's length price at a margin of 27.36%	3,52,36,26,265
Price received	3,07,65,96,804
105% of the price received	3,23,04,26,644
Proposed adjustment u/s 92CA	44,70,29,461

15. Aggrieved by this, the assessee raised objections before the DRP but the objections raised by the assessee were dismissed by the DRP and the Assessing Officer finally framed the assessment order by making addition on account of ALP at Rs. 33,69,16,140/-.

16. During the assessment proceedings, the Assessing Officer noticed that the assessee, in its profit and loss account, has shown net income of Rs. 8.09 crores on account of foreign exchange transactions. The assessee was asked to furnish complete details and break-up of the same.

17. In its reply, the assessee explained that the net foreign exchange gain has been derived after adjusting foreign exchange loss of Rs.2,98,46,447/- pertaining to loss on market to market forward

contracts and Rs. 27,10,161/- which pertains to advances given to the employees who went for travel outside India and, accordingly, balance foreign exchange fluctuation gain of Rs.11,34,78,629/- was offered to tax after adjusting the foreign exchange loss of Rs. 3,25,56,608/-.

18. The Assessing Officer was not convinced with the reply of the assessee and was of the firm belief that provisions of section 43(5) of the Act, which defines “Speculative Transaction” and therefore, loss of Rs.2,98,46,447/- is nothing but a speculation loss and, accordingly, disallowed the same.

19. Proceeding further, the Assessing Officer noticed that the assessee has claimed donation of Rs.16,07,391/- on which it claimed deduction under section 80G of the Act. The Assessing Officer noticed that neither the assessee has claimed such deduction in its return of income nor the return of income was revised but the same has been claimed in the computation of income. Applying the ratio laid down by the Hon’ble Supreme Court in the case of Goetz India Ltd 284 ITR 323, the Assessing Officer disallowed the claim of donation and completed the assessment proceedings.

20. Before us, the learned counsel for the assessee, at the very outset, stated that in so far as forex gain is concerned, the claim that it is part of operating income has been settled in the favour of the assessee and against the revenue by the decision of the Hon'ble Jurisdictional High Court in assessee's own case in ITA No 602/2016 order dated 07.10.2016. The relevant findings of the Hon'ble High Court read as under:

"The revenue in this appeal urges two substantial questions of law. The first pertains to exclusion of two comparables i.e. M/s Infosys Ltd. and M/s. Persistent Systems Ltd. The second question urged is the treatment of foreign exchange gain or loss in the transfer price determination of ALP. It is urged that foreign exchange gain or loss, as the case may be, has to be included. Learned counsel appearing on the advance notice urges that the assessee is engaged in the business of software development. He supports the conclusions of the ITAT with respect to the exclusion of two comparables in question and highlights that M/s Infosys Ltd. is engaged not merely in software development both offsite and onsite and that it receives the substantial revenues on account of onsite software financial development - the activity which the assessee does not carry out. It is also submitted that besides this, the other distinguishing factor vis-a-vis that M/s Infosys Ltd. is that concern also owns brand intangibles- an advantage which the assessee does not possess. Lastly, the assessee is captive as opposed to status of M/s Infosys Ltd. With respect to M/s

Persistent Technologies, it is pointed out that in a previous order in ITA No. 279/2016 dated 04.05.2016 (Principle Commissioner of Income Tax vs. M/s Cashedge India Pvt. Ltd) held that having regard to the rules i.e. Rule 10 B to 10 E of Income Tax Rules, the data of M/s Persistent Systems Ltd- could not have been included. Here, it is urged that the assessee is also a member of the Cashedge India group and is engaged in same and identical business. The AY also coincides with that of assessee i.e. AY 2010-2011. For these reasons, we are of the opinion that no substantial question of law arises on the first issue urged. As far as the second question i.e. foreign exchange gain or loss is concerned, the ITAT was of the opinion that the reliance upon the Safe Harbour Notification dated 18.09.2013 was not appropriate since having regard to the fact that the Rule was introduced prospectively and could not have been applied to AY 2010-2011. The assessee also relies upon the decision in the previous order for the AY 2009-20010 in ITA No. 17/2016 (Pr. Commissioner of Income Tax-3 vs. Fiserv India Pvt. Ltd.) where the identical question was settled in its favour. For this reason too, the second question urged does not arise. In view of the above discussion, no substantial questions of law arise. The appeal is therefore dismissed.

21. In light of the aforesaid said decisions of the Hon'ble Jurisdictional High Court, we direct the Assessing Officer/TPO to consider forex gain as operating item of income.

22. In so far as exclusion of three companies, namely Infosys Ltd, Zylog System Ltd and Persistent Systems Limited, we find that these companies were excluded by the Tribunal in assessee's own case in A.Y 2011-12 in ITA 700/DEL/2016 order dated 31.8.2020. The relevant findings read as under:

"Infosys Ltd.

10. Before the learned TPO, the assessee objected inclusion of this company on the ground that the company was engaged in developing products, income from sale of the software products, sales being brand driven, and high scale of operations/turnover. The Learned TPO rejected all these arguments of the assessee. According to him, the company is primarily Software Development company, sale of products being miniscule (4.98%), no impact of the brand on the profitability, and no impact of the turnover on the profitability. According to him business model using software development sector in India, the operational size is not having any impact on the profit margin as for providing software development services, "teams of software employees" are formed, which remain same in all the companies and only difference is that in case of the giant companies the teams will be more than the taxpayer, for rendering the Software Development services. The learned DRP upheld the finding of the Learned TPO.

10.1 Before us, the Learned Counsel of the assessee submitted to exclude the company on the ground of segment result for the software services not available, different functional profile and

different scale of the operations. The learned Counsel submitted that the company has been rejected by the Hon'ble Delhi High Court in the assessee's own case for assessment year 2009-10 and 2010-11. According to him, not being substantial change in the functioning of the assessee as well as the company in the year under consideration as compared to assessment year 2010-11, the company need to be rejected following the decision of the Hon'ble Delhi High Court in the case of assessee itself.

10.2 The learned DR, on the other hand, relied on the order of the lower authorities.

10.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Tribunal in ITA No.6737/Del./2014 for assessment year 2010-11 on the issue of the comparability of M/s. Infosys Ltd has observed as under:

"11.4 We have considered rival submissions, perused the material on the record. In the case of Agnity Technologies, ITA No.3856/Del/2010, a coordinate Bench has held as under:- "It is argued that the case of the assessee is not comparable with Infosys Technologies Ltd., the reason being that the latter is giant in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited Currency risk. Having considered these points, we are of the view that the case of aforesaid Infosys and the assessee are

not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in this order. Therefore, we are of the view that this case is required to be excluded"

11.5 The aforesaid order was upheld by the Hon'ble Delhi High Court after taking note of the chart as given below: Basic Particular Infosys Technologies Ltd. Assessee Risk Profile Operate as full-fledged risk taking entrepreneurs Operate at minimal risks as the 100 percent services are provided to AEs Nature of services Diversified-consulting, application design, development, reengineering and maintenance system integration, package evaluation and implementation and business process management, etc. (refer page 117 of the Paper Book) Contract software development services Turnover 20,264 crores 209.83 crores Ownership branded/proprietary products Develops/owns proprietary products like Finacle, Infosys Actice Desk, Infosys iProve, Infosys mConnect. Also the company derives substantial portion of its proprietary products (including its flagship banking product suite 'Finacle') Onsite vs. Offshore As much as half of the software development services rendered by Infosys are onsite (i.e. services performed at the customer's location overseas). And offshore (50.20 per cent) Refer p. 117 of the Paper Book) than half of its service, income from onsite services. The appellant provides only offshore services (i.e. remotely from India) Expenditure on advertising/sales promotion and brand building Rs. 80 crores Rs. Nil (as the 1-percent services are provided to AEs) Expenditure on Research and Development Rs. 236 crores Rs. Nil Other 100 per cent offshore (from India)

11.6 On the basis of the above chart, the Hon'ble High Court affirmed the conclusion that a captive unit of a comparable company which assumed only a limited risk, cannot be compared with a giant company in the area of development of software who assumes all types of risks leading to higher profits. The facts of the appellant are akin and therefore, do not warrant any different conclusion. The appellant is also captive service provider to its AE and as such, M/s. Infosys Ltd. is not a valid comparable with the appellant."

10.4 The Hon'ble Delhi High Court in ITA No. 602/2016 & CM No.30032/2016 in case of assessee, on the issue of the comparability of M/s. Infosys has observed as under: "Learned counsel appearing on the advance notice urges that the assessee is engaged in the business of software development. He supports the conclusions of the ITAT with respect to the exclusion of two comparables in question and highlights that M/s Infosys Ltd. is engaged not merely in software development both offsite and onsite and that it receives the substantial revenues on account of onsite software financial development - the activity which the assessee does not carry out. It is also submitted that besides this, the other distinguishing factor vis-a-vis that M/s Infosys Ltd. is that concern also owns brand intangibles- an advantage which the assessee does not possess. Lastly, the assessee is captive as opposed to status of M/s Infosys Ltd. With respect to M/s Persistent Technologies, it is pointed out that in a previous order in ITA No. 279/2016 dated 04.05.2016 (Principle Commissioner of Income Tax vs. M/s Cashedge India Pvt. Ltd) held that having regard to the rules i.e. Rule 10 B to 10 E of Income Tax Rules, the

data of M/s Persistent Systems Ltd- could not have been included. Here, it is urged that the assessee is also a member of the Cashedge India group and is engaged in same and identical business. The AY also coincides with that of assessee i.e. AY 2010-2011. For these reasons, we are of the opinion that no substantial question of law arises on the first issue urged."

10.5 We find that the Tribunal has rejected the company mainly on the ground of giant company vis-à-vis the assessee being a captive service provide. Since this ground of the rejection is valid in the year under consideration also, respectfully following the decision of the Tribunal (supra) and decision of Hon'ble Delhi High court (supra), we direct the Learned AO/TPO to exclude this company from the final set of the comparables.

Persistent Systems Ltd.

13. The learned TPO held the company as functionally similar and rejected the objection of the assessee of the different business model, intangible and intellectual property etc. Before the learned DRP, the assessee sought exclusion of the company on the ground of functional difference, significantly high turnover and significant related party transactions (> 10%). The learned DRP observed that Tribunal in the case of the assessee for assessment year 2010-11 has excluded the company on the ground of high turnover. But the Learned DRP referred to the decision of the Hon'ble Delhi High Court in the case of Chrys Capital Investment Advisors (India) Ltd

(supra) and Rampgreen Solutions Pvt. Ltd (supra) and held that high profit only cannot be a ground for exclusion of the company as a comparable. The learned DRP observed that revenue from licensing royalty was merely 5% and this company is primarily a software service company providing development services as per the requirement of its clients and, therefore, it was functionally comparable to the assessee.

13.1 Before us, the Learned Counsel of the assessee submitted that the company has been rejected by the Hon'ble Delhi High Court and the Tribunal in the case of the assessee for assessment year 2010-11. The learned Counsel further referred to page 553 of the paper book and submitted that the company was focused on software product development. He also referred to page 571 of the paper book and submitted that company has incurred research and development expenditure during the year. He also referred to page 656 of the paper book to demonstrate that the company has 26 ITA No. 700/Del./2016 earned revenue from sale of the software services and the products. In view of the arguments, he submitted to exclude this company from the set of the comparables.

13.2 The learned DR on the other hand relied on the order of the lower authorities.

13.3 We have heard rival submission of the parties and perused the relevant material on record. We find that in assessment year 2010-11, the company was rejected by the Tribunal on the ground of high turnover, but in view of the decision of the Hon'ble Delhi High

Court cited by the Learned DRP in their order, we agree with the finding of the learned DRP that high turnover cannot be a ground for rejection of the company as comparable if it is otherwise functionally similar to the taxpayer. Further, Hon'ble Delhi High Court in the assessment year 2010-11 rejected the company mainly on the ground that published data was not available in the case of the company. But in the year under consideration there are no such circumstances and the assessee has filed annual report on page 541 to 732 of the paperbook. On perusal of page 656 of the paperbook, we find that revenue from sale of software services and product has been shown that ₹ 6,101.27 million. There is no separate bifurcation of the revenue from the software services and therefore in absence of segmental data of software services, the company cannot be included as a comparable at entity level. Accordingly, on the ground of the functional dissimilarity of the entity level, we direct the Learned AO/TPO to exclude the company from the final set of the comparables.

Zylog Systems Ltd.

15. Before the learned TPO, the assessee objected inclusion of the company on the ground of company engaged in software development as well as sale of the product and no separate segment available for software development. The assessee also sought rejection on the ground that DRP in financial year 2009- 10 has rejected this company as comparable. However, the Learned TPO held this company to be functionally comparable, in view of the decision of the Delhi Tribunal in the case of Interra Information

Technologies India P. Ltd Versus DCIT (2012) 27 taxmann.com 1 wherein it is held that while adjudicating transfer pricing cases, there is no binding legal precedence. Before the Learned DRP the assessee sought exclusion of this company on the ground of the functional difference and significant intangibles. However the Learned DRP accepted the company as valid comparable in view of the functional similarity.

15. Before us, the Learned Counsel of the assessee submitted that the company is engaged in provision of the various business activities and no segmental result for software development services is available. He referred to Annual Report of the company 33 ITA No. 700/Del./2016 for Financial Year 2010-11. He referred to page 1022 and 1051 of the paper book Volume 3 and submitted that the company earns its revenue from software development services and products. He also referred to page 1061 of the paper book and submitted that company derives its revenue primarily from software development services, consultancy services, projects and e-governance projects. He further submitted that company does not meet the 75% software development services to revenue filter adopted by the learned TPO. He referred to page 1024 of the paper book and submitted that contribution of the revenue from software development is only 21.6%. He sought to exclude this company on these grounds.

15.1 The learned DR, on the other hand, relied on the order of the lower authorities.

15.2 We have heard rival submission of the parties and perused the relevant material on record. On perusal of the profit and loss account of the company which is available on page 1051 of the paper-book, we find that the Revenue of ₹ 899,11,06,874/- has been shown from Software Development services and the products and no separate revenue or segmental result for software development services have been reported in the annual report. In absence of any separate segmental result of software development services available in public domain, we reject the company as comparable on functional dissimilarity at entity level. Accordingly, we direct the Ld. AO/TPO to exclude this company from the set of the final comparables."

23. As no distinguishing decision has been brought to our notice by the ld. DR, respectfully following the findings of the coordinate bench, we direct the TPO/AO to exclude these three companies from the final set of comparables.

24. Strong arguments have been made for the exclusion of Eclerx Services Ltd, TCS e-Serve Ltd and Excel Infoways Ltd.

25. The ld. DR has strongly supported the orders of the authorities below. It is the say of the ld. DR that these companies have rightfully been included by the TPO as they are good comparables.

26. We will now address these companies

Eclerx Services Ltd

27. It was a strongly contended that this company is functionally not comparable as it is having unreliable data and has been rejected by the Tribunal in several cases.

28. We have carefully perused the financial report of this company. In its financial report, part of which is exhibited at page 1248 of the paper book, under the heading “Who we are”, it has been mentioned that the Eclerx services Ltd is a knowledge process outsourcing company providing data analysis and process of sales to global enterprise clients. In our considered opinion, when this company itself claims that it is a KPO company, the same should not be used as a comparable company in case of BPO, like the assessee.

29. For similar reasons, this company was excluded by the Tribunal in ITA No. 86/DEL/2017 vide order dated 29.05.2019 and also by the Tribunal in ITA No 402/DEL/2017 order dated 01.01.2018. In light of

the fact that this company is a KPO a company, we direct for exclusion of this company from the final set of comparables.

TCS E- Serve Limited

30. Before the TPO, objections were raised on inclusion of this company on the ground that it is functionally not comparable and is a giant company with presence of brand. The TPO included this company stating that it is purely a ITES company, functionally similar.

31. We have carefully perused the financial reports of this company. It is an undisputed fact that this company has huge brand value being part of Tata group, which is evident from the fact that in the Notes to Financial Statement under the head "Other Expenses", Tata brand contribution has been shown at Rs. 3.67 crores. For similar reasons the co-ordinate bench in the case of Cadence Design System India Pvt Ltd ITA No. 86/DEL/2017 has directed for exclusion of this company and the same was followed in the case of Samsung Heavy Industries Pvt Ltd in ITA No. 402/DEL/2017.

32. Considering the brand value of this company, in light of the findings of the coordinate bench [supra]we direct for exclusion of this company from the final set of comparables.

Excel Infoways Ltd

33. The main objections raised are that this company fails employee cost sales filter and also fails service cost to total income filter.

34. To verify the objections raised by the assessee, the TPO issued notice under section 133(6) of the Act asking this company for information pertaining to its operations. In its reply, this company stated that the employee cost Rs. 2.02 crores pertains to only ITES/BPO segment. Accordingly, the TPO concluded by stating that its employee cost is more than 25%.

35. We find from the statement of profit and loss of account that the net revenue from operations of this company is Rs. 15.49 crores and other income is Rs. 73.56 lakhs. We further find that the total foreign exchange earned is Rs.7,07,63,822/-whereas the income in foreign currency received from BPO/ITES is shown at Rs.1,36,93,935/-. It is not

clearly coming out from the financial report as to how the earnings in foreign currency in relation to the BPO/ITES is higher than ITES/BPO segmental revenue as mentioned here in above.

36. With no clarity on such a huge difference, we are not inclined to allow this company in the final set of comparables. We, accordingly, direct the Assessing Officer/TPO to exclude this company from the final set of comparables.

37. The inclusion of Omega has been argued before us. We have already mentioned the filter adopted by the TPO elsewhere and one of such filters is that the companies that have employee cost that is less than 25% of sales are excluded, whereas this company has been excluded by the TPO by stating that this company has employee cost of less than 25% of the total cost. We fail to understand why the TPO has adopted an altogether different filter for this company. Nothing has been mentioned by the TPO about the FAR analysis of this company with that of the appellant. In the interest of justice, we deem it fit to restore this issue to the file of the TPO. The TPO is directed to decide the inclusion or exclusion of this company from the final set of

comparables on the basis of FAR analysis after giving reasonable opportunity of being heard to the assessee.

38. We will now address to the corporate issue. The Assessing Officer has disallowed claim of forex loss of Rs.2.98 crores on the ground that it is a speculation loss.

39. Facts on records show that forex loss of Rs.2.98 crores arose on settlement of foreign exchange forward contracts which were taken by the assessee company to cover the trade receivables of the assessee. The Hon'ble High Court of Bombay in the case of Badridas Gauridu Pvt. Ltd 261 ITR 256 has held that loss from forward exchange contracts is not speculative business. Relevant findings of the Hon'ble High Court read as under.:

"3. The assessee was not a dealer in foreign exchange. The assessee was a cotton exporter. The assessee was an export house. Therefore, foreign exchange contracts were booked only as incidental to the assessee's regular course of business. The Tribunal has recorded a categorical finding to this effect in its order. The Assessing Officer has not considered these facts. Under [Section 43\(5\)](#) of the Income-tax Act, "speculative transaction" has been defined to mean a transaction in which a contract for the purchase or sale of a commodity is settled

otherwise than by the actual delivery or transfer of such commodity. However, as stated above, the assessee was not a dealer in foreign exchange. The assessee was an exporter of cotton. In order to hedge against losses, the assessee had booked foreign exchange in the forward market with the bank. However, the export contracts entered into by the assessee for export of cotton in some cases failed. In the circumstances, the assessee was entitled to claim deduction in respect of Rs. 13.50 lakhs as a business loss. This matter is squarely covered by the judgment of the Calcutta High Court, with which we agree, in the case of [CIT v. Soorajmull Nagarmull](#) [1981] 129 ITR 169.

4. In the circumstances, there is no merit in the appeal. The appeal fails and the same is dismissed with no order as to costs."

40. Considering the facts of the case in hand in light of the aforesaid decision of the Hon'ble High Court of Bombay, we direct the Assessing Officer to allow claim of loss of Rs.2.98 crores. This ground is, accordingly, allowed.

41. Next grievance relates to disallowance of donation paid.

42. We find that the Assessing Officer has denied the claim of deduction under section 80G of the Act by relying on the decision of

the Hon'ble Supreme Court in the case of Goetz[supra].In the interest of justice, we restore this issue to the file of the Assessing Officer. The assessee is directed to furnish documentary evidences in respect of claim of donation eligible under section 80 G of the Act and the Assessing Officer is directed to examine the same as per provisions of law. This ground is, accordingly, treated as allowed for statistical purposes.

43. In the result, the appeal filed by the assessee in ITA No. 333/DEL/2017 is allowed in part for statistical purposes.

The order is pronounced in the open court on 28.09.2020.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

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

Dated: 28th SEPTEMBER, 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	