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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 04.11.2024

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ITA 34/2020

SEQUENTIAL TECHNOLOGY INTERNATIONAL INDIA PVT.
LTD.(FORMERLY KNOWN AS OMNIGLOB INFORMATION
TECHNOLOGIES(INDIA)PVT.LTD)Appellant

Through: Mr. Neeraj Jain, Mr. Aniket D.
Agrawal & Mr. Abhisek Singhvi,
Advocates.

versus

ADDL. CIT, SPCL.RANGE-7,

.....Respondent

Through: Mr. Debesh Panda, SSC with Mr.
Zehna Khan, JSC, Mr. Vikramaditya
Singh, JSC, Mr. Anaunta Shanmkar
& Mr. Aditya, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The assessee has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 15.10.2018 (hereafter *the impugned order*) passed by the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) in ITA No. 6980/Del/2017 in respect of the assessment year (AY) 2013-14 captioned "*Omniglobe Information Technologies (India) Pvt. Ltd. v. Addl. CIT, Spcl. Range-7*".



The assessee had filed the said appeal impugning the final assessment order dated 16.10.2017, passed by the learned Assessing Officer (AO) under Section 143(3) of the Act read with Section 144C of the Act.

2. The controversy in the present appeal relates to inclusion of an entity named E4e Healthcare Business Services Private Limited (hereafter *E4e Healthcare*), as a comparable entity for benchmarking the international transaction of provision of IT-enabled services. The Assessee's objections in regard to the use of the said entity as a comparable, were rejected on the ground that the same were based on a factually erroneous premise. The learned ITAT as well as the learned Dispute Resolution Panel (DRP) had noticed the Assessee's objections as those relating to the use of an employee filter, which the authorities found to be unsustainable. However, it is the Assessee's case that he had never raised any objection regarding the said entity (E4e Healthcare) not satisfying the employee filter as used by the learned Transfer Pricing Officer (TPO). The Assessee's objections related to non-provision of the audited accounts for examining the comparability of the said entity.

QUESTIONS OF LAW

3. In the aforesaid context, the Assessee has projected the following questions, for consideration of the Court:

“(i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in rejecting the contention of the appellant seeking exclusion of e4eHealthcare as comparable for benchmarking the international transaction of provision of IT-enabled services, simply on the basis that no objection with



respect to functional dissimilarity of e4e Healthcare as well as the nonavailability of the segmental data in its annual report had been raised by the appellant before the lower authorities?

(ii) Whether on the facts and in the circumstances of the case, the findings arrived at by the Tribunal are perverse and unsustainable in law?"

4. The present appeal is admitted on the aforesaid questions. And, with the consent of the counsel has been finally heard.

CONTEXT

5. The Assessee had filed its return of income for the AY 2013-14, and had also disclosed the international transactions including the transaction for provision of services. The learned AO had made a reference under Section 92CA(1) of the Act to the TPO for determining the Arm's Length Price (ALP) for the international transactions undertaken by the assessee.

6. The Assessee had used Transactional Net Margin Method (TNMM) as the most appropriate method and selected Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI). The Assessee computed the PLI for the relevant AY at 7.94%. The learned TPO neither disputed the profile of the Assessee nor the use of TNMM with OP/OC as a PLI and accepted the same. However, the learned TPO did not accept some of the comparable entities used by the Assessee. Additionally, the learned TPO also included certain other entities, and accordingly, passed an order dated 13.10.2016, determining the ALP.

7. As noted above, the controversy in the present appeal relates to the inclusion of E4e Healthcare as a comparable entity. The Assessee had



objected to the use of the said entity as a comparable on the ground that its annual report was not available in the public domain. It was the Assessee's case that in the absence of annual report in the public domain, the question whether the said entity was functionally comparable could not be ascertained. However, it appears that the learned TPO did not address the said objection. The relevant extract of the order dated 13.10.2016, passed by the learned TPO which seeks to address the objections raised by the assessee, is reproduced below:

“iii. Igate Solutions, Capgemini Business Services (India) Pvt. Ltd., New V C Services Pvt. Ltd., Tech Mahindra, E4e Healthcare - The assessee has objected about inclusion of these comparables on various general grounds such as data not available, functionally not comparable, extra ordinary events etc. However, from going through the submission of the assessee carefully and the material available on record, the assessee's contention is found incorrect. Accordingly, these are included in the final set of comparables.”

8. It is apparent from the above that the assessee's contention that the financial data of E4e Healthcare was not available in the public domain was not specifically addressed, but was summarily disposed of. It is material to note that the order passed by the learned TPO also reproduces the Show Cause Notice (SCN), proposing to reject the objection raised by the Assessee. The objections as noted in the said SCN and the learned TPO's response to the same as noted in the order passed by the learned TPO is reproduced below:



Sr. No.	Name of the company	Taxpayer's observation	TPO Remarks
9.	E4e Healthcare	Companies having compensation to employees lesser than 25% of their Total expenses	<p>The comment of the assessee is factually incorrect. As per annual report of the company, it is primarily engaged in the business of providing healthcare outsourcing services for the healthcare industry in United States of America.</p> <p>Since the company is engaged in providing ITES services which are the same as being provided by the assessee, this company is being considered as comparable.</p>

9. It appears from the above that the TPO had rejected the Assessee's objection on the premise that it related to the employee cost being less than 25% of the total expenses.

10. Based on the order passed by the learned TPO, the draft assessment order was framed. The Assessee filed its objections before the learned DRP. The Assessee's objections in regard to the inclusion of E4e Healthcare remained the same – that the annual report was not available in the public domain, and that the learned TPO had not addressed the said objection. It is relevant to set out the objection raised by the Assessee in this regard, before the learned DRP. The same is reproduced below:



“(v) E4e Healthcare

The TPO included e4e Healthcare in the final set of comparable companies with an operating profit margin of 17.11%.

It is respectfully submitted, in this regard, that the annual report of the company for financial year 2012-13 is not available in public domain. Vide submission dated 23.09.2016, the assessee requested to provide the audited financial statement of the company for the financial year 2012- 13. However, no such financial statement was provided to the assessee.

In view of the aforesaid, it is submitted that e4e Healthcare ought not to be considered in the final set of comparable companies due to unavailability of financial data.”

11. It is apparent from the above that the Assessee had not raised any objection in regard to E4e Healthcare by not satisfying with the criteria of the employee cost being more than 25%. Notwithstanding the same, the Assessee’s objections were rejected, *inter-alia*, on the ground that the Assessee had not raised any issue of non-availability of annual report before the learned TPO.

12. The relevant extract of the order passed by the learned DRP in regard to the assessee’s objection regarding the inclusion of E4e Healthcare as a comparable is set out below:

	Comparable	Assessee	TPO	DRP
5	e4e Healthcare	The annual report of the company for financial year 2012-13 is not available in public domain. Vide	The comment of the assessee is factually incorrect. As per annual	Issue of non availability of annual report was not raised by the assessee



		<p>submission dated 23.09.2016, the assessee requested to provide the audited financial statement of the company for the financial year 2012-13. However, no such financial statement was provided to the assessee.</p>	<p>report of the company, it is primarily engaged in the business of providing healthcare outsourcing services for the healthcare industry in United States of America. Since the company is engaged in providing ITES services which are the same as being provided by the assessee, this company is being considered as comparable</p>	<p>before the TPO. The assessee claimed that the company failed employee cost filter. This clearly means that the assessee was in possession of the annual accounts of the company. Since no other objection has been raised against selection of the company, the company should be retained as comparable, if it passes employee cost filter.</p>
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13. The finding of the learned DRP that the Assessee had not raised the issue of non-availability of annual report before the learned TPO is *ex-facie* erroneous. The learned DRP had proceeded on the basis that the Assessee had claimed that E4e Healthcare had failed the employee cost filter, perhaps on the basis of the objections as erroneously noted in the SCN issued by the learned TPO and as reflected in its order dated 13.10.2016. However, according to the Assessee, no such objection was raised. The learned counsel appearing for the Revenue has also been unable to point out from



the record that the assessee had raised any such objection. The learned DRP had drawn an inference that since the Assessee had raised an objection regarding the employee cost filter, it was apparent that the Assessee was in the possession of the annual accounts of the company. Since the fundamental premise that the Assessee had raised an objection regarding the employee cost filter is incorrect, the inference drawn by the learned DRP is *ex facie* flawed.

14. Based on the order dated 17.12.2016 passed by the DRP, the learned AO framed the final assessment order on 16.10.2017. The Assessee appealed the said order before the learned ITAT.

15. Before the learned ITAT, the Assessee raised a specific ground that the learned TPO had erred in including certain companies (including E4e Healthcare) as comparable entities for the purpose of benchmarking analysis. The relevant ground raised by the assessee before the learned ITAT in this regard, is set out below:

“6. That the TPO erred on facts and in law in considering the following companies in the final set of comparable companies not appreciating that there were not functionally comparable to the appellant for the purpose of undertaking benchmarking analysis applying TNMM

- i. Igate Solutions Ltd.
- ii. Capgemini Business Services (India) Pvt. Ltd.
- iii. e4e Healthcare”

16. The Assessee’s objection in regard to the use of E4e Healthcare as noted by the learned ITAT in the impugned order is reproduced below:



“18. **E4e Healthcare:** The Id. AR for exclusion of this company from the list of comparables has stated as under :

a) Functionally not comparable and segmental data not available

As per page 54 (227 of the paper book), besides providing IT enabled services, the company is also engaged in the business of rendering software development services.

However, segmental data with respect to IT enabled services segment is not available in the audited financial statement of the company.

Further, as per page 56 (page 229 of the paper book), the company derives its revenue primarily from Revenue Cycle management of U.S. Based the Healthcare client. Revenue is derived from billing, coding and claim process services.

A further scrutiny of the nature of services provided by the company from the website of the company revealed that the company is providing host of services and end – to - end solutions to the healthcare industry. A few snapshot of the website of company is as under;

Healthcare Business Solutions

Enhance your margins

Our 23 - year experience has taught us that there is no magic potion are silver bullet for improving financial performance. It can only be achieved by leveraging best practices, tested process, and innovative technology. Our approach historically addresses Revenue Cycle Management – from the moment a patient enters the system to the final dollar being collected or paid – all this, while delivering better outcomes in quality, turnaround times, and productivity.

The various services and solutions provided by the company, as demonstrated on the website is reproduced hereunder



Provider solutions

Medical Billing Companies

Integrated Practice and RCM

Coding and Compliance

Hospital Services

Hospital Coding

Payer Solutions

Claims Management and Admin

Cost Avoidance and Audit

Medical Record Audit

Contact Centre Solutions

Technology Solutions

Payer Platforms

Computer – Assisted Coding

Workflow Tools

Value – Added Services

Case Studies

Healthcare & Life Science Analytics

Detailed services as extracted from the website of the company is enclosed at pages 606 to 609 of the paper book.

From the aforesaid, it shall be noted that for the revenue cycle management services provided to its health clients, the company is not only providing just billing, coding and claim processing services, but also providing audit services as well as technology solutions such as payer platform, workflow tools etc. It is submitted that the diverse services provided by the company is in the nature of IT services and KPO services apart from IT enabled services.

Hon'ble Tribunal in the case of appellant for the assessment year 2011 – 12[ITA No. 1003/Del/2016] excluded Accetia Technologies Ltd. form the final set of comparable companies, inter alia, on the basis that the company provides services in healthcare division and also engaged in the business of providing KPO services. The company was also excluded on account of non-availability of segmental accounts.

Following the decision for assessment year 2011 – 12



the Hon'ble Tribunal in the appeal for assessment year 2012 – 13 in ITA No. 6014/Del/ 2016, excluded Acropetal Technologies Ltd and BNR Udyog Ltd from the final set of comparable companies, being engaged in provision of KPO services in healthcare segment.

A company engaged in provision of KPO services cannot be regarded as an appropriate comparable for the purpose of benchmarking the international transition of provision of BPO services [Rampgreen Solutions Pvt. Ltd vs. CIT (377 ITR 533)].

The company has itself been rejected as comparable is to a ITES enabled services provider in the following cases:

HOV Services Ltd. Vs. JCIT (2016) 73 Taxmann.com 311 – CL 787 – 818 Schlumberger India Technology Centre Pvt. Ltd. Vs. DCIT (ITA No. 640/Pn/2014) – CL 741– 758”

17. It is not disputed that at the stage of an appeal before the learned ITAT, the Assessee was in the possession of the final accounts of E4e Healthcare. It is contended by the learned counsel for the Assessee that the same was provided to the assessee pursuant to the directions issued by the learned DRP. However, the said directions are not on record.

18. The learned ITAT did not examine the Assessee's contention that the functional profile of E4e Healthcare was materially different from the functional profile of the assessee. The learned ITAT proceeded on the basis that the Assessee had confined his objections to the use of the said comparable on the ground that it failed the employee cost filter – an objection that was never raised by the Assessee. The Assessee's objection was also rejected on the ground that the Assessee had not raised any



objection regarding functional dissimilarity, either before the learned TPO or before the learned DRP. In addition, the learned ITAT noted that E4e Healthcare was also used as a comparable for determining the ALP in respect of the international transactions pertaining to the earlier AY 2012-13. The relevant extract of the impugned order setting out the reasons for rejecting the Assessee's objections is reproduced below:

“20. In our opinion, the Id. DRP has given direction that if this company passes the employee cost filter, it can be retained as comparable. We further observe from the paper book of assessee that in assessee's own case for A.Y. 2011-12, this company was selected as comparable on which no objection was raised by the assessee upto the stage of Tribunal. Similarly, in the case of assessee for A.Y. 2012-13, the DRP had mentioned that assessee has no objection on inclusion of this company. However, keeping in view the objection of assessee in the submissions made before the Tribunal, the ITAT remitted this matter back to the file of DRP for re-deciding the same after affording reasonable opportunity of hearing to the assessee. No further information pursuant to the remand proceedings, is furnished by the assessee before us. It is notable that before the Id. DRP, the assessee raised objection on this company only on account of non-comparability of employees cost and no objection was raised either on functional test. The objection regarding nonavailability of annual report was not raised by the assessee before the TPO. The Id. DRP was also of the view that when the assessee challenged the employees cost filter having not been passed, it leads to say that the assessee was having annual accounts of the said company. Keeping in view these facts, the Id. DRP remitted it to the AO to compare this company on the basis of employees cost filter. In pursuance to this, the AO/TPO after going through the annual report of this company found that this company passes the employees cost



filter and therefore, in our considered opinion, has rightly included this company as an appropriate comparable. In presence of above facts, the objections of the assessee on functional dissimilarity or nonavailability of segmental data are not found acceptable at all. We, therefore, conclude that the Id. Authorities below have rightly included this company as an appropriate comparable in the instant case.”

19. It is apparent from the above that the fundamental flaw that permeated the decisions of the learned TPO, the learned DRP and the decision of the learned ITAT as well. The assumption that the Assessee had raised objections regarding the inclusion of E4e Healthcare as a comparable on the ground that it failed the employee cost filter, is erroneous. And, the learned DRP as well as the learned ITAT drawn their inferences on the said basis. As noted above, the Assessee had not raised any such ground and therefore, the decisions rendered by the learned DRP and learned TPO in this regard are fundamentally flawed. The impugned order also suffers from the same flaw.

20. It is also important to note that the learned ITAT had referred to the case of the Assessee for the AY 2012-13, to support the inclusion of E4e Healthcare as a comparable on the basis that the same was accepted as a comparable in the earlier AY 2012-13. The Assessee has filed additional documents which indicate that the learned ITAT had, in an appeal preferred in respect of the AY 2012-13, remanded the matter to the learned TPO for considering afresh, *inter-alia*, on the basis of the challenge raised by the Assessee to the inclusion of four entities, which also included E4e Healthcare as comparable entities. The learned TPO, by an order dated 09.05.2018, rejected the said challenge in a summary manner on an



understanding that the learned ITAT had remanded the matter only to enable the learned TPO to confront the Assessee with the data pertaining to E4e Healthcare. The relevant extract of the order dated 09.05.2018 passed by the learned TPO in respect of the AY 2012-13, on remand from the learned ITAT, is set out below:

“(iv) E4e healthcare Services Pvt. Ltd.- The Hon'ble ITAT has remitted this issue back to DRP, who should redecide the inclusion of this comparable after confronting the assessee with the figures and after affording reasonable opportunity of being heard. Thus, this comparable should be included in the final list of comparable while giving the effect to Hon'ble ITAT direction.”

21. A bare reading of the said order indicates that none of the objections of the Assessee with regard to the inclusion of E4e Healthcare were adjudicated. However, the assessee did not agitate the matter further, because the learned TPO had determined the ALP adjustment for the AY 2012-13 as NIL. It is thus, clear that the Assessee's contention that E4e Healthcare is functionally dissimilar to the assessee and therefore, could not be included as a comparable, has not been considered by any authority. As noted above, the orders passed by the learned DRP, the learned TPO and the learned ITAT proceeded on an assumption which are *ex- facie* incorrect.

22. The questions as framed in paragraph no. 3 are, accordingly, answered in favour of the Assessee and against the Revenue. Accordingly, the matter is restored before the learned TPO, to the limited extent, to examine the inclusion of E4e Healthcare as a comparable entity.

23. It is clarified that all rights and contentions of the parties in this regard



are reserved.

24. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 04, 2024

at

[Click here to check corrigendum, if any](#)