

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-2": NEW DELHI  
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.5709/Del/2011  
(Assessment Year: 2007-08)

COWI India Pvt. Ltd.,  
121, Phase-I, Udyog Vihar,  
Gurgaon,  
PAN:AAACK0921H  
**(Appellant)**

Vs.

ACIT,  
Gurgaon Circle-I,  
Gurgaon  
**(Respondent)**

Assessee by :	Sh.Himanshu S. Sinha, CA Ms. Somya Seth, CA, Sh. Ankit Arora, CA
Respondent by:	Sh. Manu Chaurasia, Sr. DR
Date of Hearing	17/02/2016
Date of pronouncement	22/04/2016

**ORDER**

**PER PRASHANT MAHARISHI, A. M.**

1. This is an appeal filed by the assessee against the order of the ld. DRP-I, New Delhi for the Assessment Year 2007-08.
2. The assessee has raised the following grounds of appeal:-
  - “1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law and void ab-initio.
  2. That on facts and circumstances of the case and in law, the Ld. AO/Ld. TPO/Ld. Dispute Resolution Panel ("DRP") erred in making an addition of Rs.1,28,31,599/- to the returned income of the Appellant by re-computing the arm's length price of the international transactions under section 92 of the

Act. Thus, in passing the order the Ld. AO/Ld. TPO/Ld. DRP erred in:

- 2.1 *Rejecting the ALP as determined by the appellant under the TP documentation maintained by it as per section 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 ("Rules") as well as a new search carried by it during the proceedings before the Ld. TPO, without appreciating that none of the conditions given under section 92C (3) have been satisfied. The authorities have also erred in carrying out a fresh search by rejecting/modifying the filters applied by the appellant;*
- 2.2 *Rejecting the comparable companies set adopted by the Appellant and conducting a fresh benchmarking study on the basis of additional quantitative filters selected by him which lacked valid and sufficient reasoning.*
- 2.3 *Accepting companies which were not functionally comparable to the Assessee. Similarly, the Ld. AO/TPO erred by rejecting companies which were comparable to the Assessee.*
- 2.4 *Including high/abnormal growth companies, depicting abnormal economic circumstances, in the comparable set adopted by him;*
- 2.5 *Considering the international transactions to be at 70% of the total transaction and thus, limiting the amount of transfer pricing addition to that extent instead of 59% as was brought on to the records by the appellant vide submission dated May 16<sup>th</sup> 2011.*
- 2.6 *Using the power conferred under section 133(6) of the Act for collecting information that was not available to the assessee in the public domain and using the information so collected for the purpose of selection of comparable companies. The said action is in complete violation of the fundamental principles of natural justice as (a), information which was not available with the appellant has been used; and (b) the appellant was not given any opportunity to cross-examine the companies whose information has been used by the Ld. TPO;*
3. *That on facts and circumstances of the case the Ld. AO erred in considering the amount of transfer pricing adjustment to be at Rs.7,51,53,352 as against Rs.1,28,31,599 directed by the DRP.*
4. *That on facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/Ld. DRP erred in selecting the current year*

*(i.e. financial year 2006-07) data for comparability despite the fact that at the time of preparation of Transfer Pricing Documentation by the Appellant, the complete data for financial year 2006-07 was not available within the public domain.*

5. *That on facts and circumstances of the case and in law, the Ld. AO/ Ld. TPO/Ld. DRP erred in denying the benefit of 5% margin allowed under the Proviso to Section 92 C(2) of the Act by relying on an amendment applicable only from 1.04.2009 (and not applicable to the relevant assessment year 2007-08).*
  6. *That the Ld. AO erred in facts and in law in charging and computing interest under section 234B and 234C of the Income Tax Act, 1961*
  7. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings u/s 271(l){c} of the Income Tax Act, 1961, mechanically and without recording any adequate satisfaction of such initiation.*
3. COWI India Private Limited, (Herein referred to as "COWI India"/"The company"/ "Appellant") is a subsidiary of COWI A/S, Denmark. The Appellant provides mapping services mainly to COWI A/S, which is 59% of the total turnover of the Appellant during the financial year 2006-07. The Appellant provides mapping services mainly to COWI A/S, the AE of the Appellant. The Appellant also provides such mapping services to non AEs in India and abroad. As per the functional analysis documented in the Transfer Pricing documentation, the Appellant can be characterized as a service provider, which assumes less than normal risks associated with carrying out such business. The Appellant benchmarked its international transactions by applying TNMM as the most appropriate method with OP/TC as the Profit Level Indicator ("PLI").
4. The assessee filed its return of income on 29.10.2007 showing taxable income of Rs.NIL. reference u/s 92CA(1) of the Act was

made to the ld. TPO to determine Arm's length pricing u/s 92CA(3) of the Act in respect of following international transactions:-

Nature of international transaction	Most appropriate method applied as per TP Doc	PLI as per TP Doc	Value of International Transactions (INR)
Provision of Mapping services	TNMM	OP/TC	120,168,998
Payment for consultancy	TNMM	OP/TC	494,287
Reimbursement of expenses by AE	TNMM	OP/TC	1,879,388
Reimbursement of expenses to AE	TNMM	OP/TC	1,562,914

5. As per the TP Study report the PLI of the assessee was worked out as under:-

Particulars	(Rs.)
Total operating income	20.46
Total Operating Costs	18.12
Operating Profit	2.34
OP/OC	12.93%
Method used	TNMM
PLI	OP/OC
No of comparables	5
Mean margin of comparables	11.54% (adjusted)
No of comparables for which data used for FY 2006-07	02

6. Appellant in its TP Study report used certain quantitative filters and after identifying five comparable companies with the mean OP/TC margin of 11.54% against the margin of appellant at 18.08% submitted that international transactions were at Arm's length.
7. Ld. TPO rejected the TP Study report prepared by the assessee and after that selected his own quantitative filters and based on fresh search selected 25 comparables companies with the mean margin 28.34% and proposed and adjustment of Rs.26236170/-.

Assessee filed objections before the ld. DRP and after the direction of the ld. DRP TPO recalculated the amount of adjustment to international transactions only with respect to transaction with AE which is almost 70% of the revenue and has reduced the adjustment to Rs.12831599/-. Pursuant to direction of ld. DRP an order u/s 154 of the Act was passed on 02.02.2012 by the ld. Assessing Officer wherein the difference in ALP of Rs.12831599/- was made and assess the total income at the above figure. Against the order of the ld. Assessing Officer passed u/s 143(3) pursuant to direction of ld. DRP assessee is in appeal before us.

8. Ground No.1 of the appeal is general in nature and therefore same is dismissed.
9. Ground No.2.3 to 2.4 are against the comparable companies selected by TPO to which assessee is objecting.
10. Before we proceed to examine the comparables several decisions of various tribunals have been cited by the rival parties regarding inclusion or exclusion of certain comparables submitting that these comparables should be excludible or includible at the first instances based on those decisions. We are of the view that each decision has rendered a particular comparable excludible or includible based on the facts of that case as well as the FAR of the assessee whose issues are decided. We are really aware about the precedent value of those decisions while deciding the comparables regarding its suitability. However we feel that the paramount importance shall be on Rule 10B (2) of the Income Tax Rules 1962 which is as under:-

“(2) For the purposes of sub-rule (1), the comparability of an international transaction <sup>55c</sup>[or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:—

- (a) the specific characteristics of the property transferred or services provided in either transaction;
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;
- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.”

Therefore it may so happen that a comparable company engaged in the similar business which is having the similar FAR may be generally included though same might have been held to be not includible by the courts in some other cases. Further the contractual terms as well as host of other factors stated in above sub rule may determine the comparability analysis. If the difference arising on comparability analysis does not affect the price or profitability of comparable or if so it can be reasonably adjusted same should be taken as good comparable for the Comparability analysis. Therefore it cannot be ever assumed that if a comparable is held to be excludible in one case, it shall always be excluded in the decisions to follow subsequently. Therefore while deciding the comparability the decisions CITED definitely would be perused from this angle.

11. Each of the comparables are discussed as under:-

i. **Accentia Technologies Ltd.**

- a. This comparable is selected by Id. TPO and obtained the annual report of the company for FY 2006-07 by issuing notice u/s 133(6) of the Act. The assessee objected to this

comparables stating that it has an extra ordinary event during the year as it has been formed as a result of amalgamation between two companies. Assessee further objected stating that it is under the single segment of healthcare receivables management. Ld. TPO rejected the contention of the assessee. Ld. DRP accepted the view of TPO. Before us it was contended that the company was formed as a result of an amalgamation between Geosoft Technologies (Trivandrum) Ltd. and Iridium Technologies (India) Pvt. Ltd. during the Financial Year 2006-07. It has now been settled that a company impacted by an extraordinary event like merger or demerger cannot be taken as a comparable. The company earns revenue from various sources viz. Medical Transcription, Billing & Coding and Software Development & Implementation. No segmental information available in the annual report^ Segmental disclosure is not provided in Annual audited accounts for the segmental revenue of the above different class of services. The Ld. TPO has considered the profitability of Accentia at an overall entity level which includes income from software development (19.13%) which is not comparable to the Appellant. Thus, the Appellant wishes to submit that income from software development services is significantly high to consider an entity level margin. Assessee further submitted that it has the fluctuating profitability in respective years. Therefore it was submitted that this company should be excluded. Ld. DR relied on the orders of lower authorities.

b. We have carefully considered the rival contentions. We have seen that the TPO has considered this company as comparable though the company is also engaged in medical transcription services, medical coding services and therefore according to us the company is functionally different. The comparable company has come into existence as a result of an amalgamation and therefore the extra ordinary events have taken place. However, it was mentioned by TPO that taxpayer did not adduce any evidence that this event had any influence on the margin or on pricing of the company therefore same was rejected. It has been held in Capital IQ information system India Pvt. Ltd. In ITA No.1961/Hyd/2012 that companies with extra ordinary circumstances such as merger and demerger impacting the financial results could not be treated as comparables. The coordinate bench has also held that such events with have an effect on the profitability of the company in the financial year in which such events takes place. As in this case the amalgamation has taken place during the financial year 2006-07 relevant to AY 2007-08 therefore following the decision of coordinate bench we direct the TPO to exclude this comparable.

ii. **All SEC Technologies Ltd.**

The arguments against this comparable has been withdrawn during the course of hearing because before ld. TPO assessee did not argue that the company is functionally different. The only argument before ld. TPO was regarding RPT filter. According to us this company is satisfying the RPT filter

adopted by the ld. TPO hence, we hold that this company has been rightly included by the TPO.

iii. **Ashit C. Mehta Financial Services ltd.**

The ld. TPO has included this company as it is engaged into ITES and meets all the qualitative filters applied by the TPO. Before TPO assessee contended that it is functionally different. Ld. TPO rejected this argument. Before DRP assessee raised an objection that it has a high advertisement and marketing expenses and also functionally different. Ld. DRP also held that the company performs broadly the same ITES functions. Before us ld. AR submitted that the employee cost to sales ratio of the company is only 22.40% whereas appellant employee cost is 47.33%. This is an altogether new argument taken before us and same was not at all either before ld. TPO or ld. DRP. Further it is not submitted before us that how the employee cost to sales ratio as impacted the price or the margin of the assessee vis-à-vis comparables. The AR has relied on the decision of C3i Support Services ltd. In ITA No.2183/Hyd/2011 and decision of ITAT of M/s. Goldman Sech Services Pvt. Ltd. 1423/Bang/2010 wherein both the cases it is submitted that the employee cost to sales if less than 25% hence the comparable should be rejected. There cannot be any dispute with respect to the decisions taken by the coordinate benches however; such quantitative filter has not been applied by the assessee while preparing its TP Study Report as well as by ld. TPO. Further while perusing the decision of the coordinate bench in C3i Support Services Pvt. Ltd. This comparable has been rejected since it belongs to a different vertical. Before us it is not argued that the company

is functionally different and belongs to a different vertical. In view of this we reject the argument of the assessee for the exclusion of this comparable.

iv. **Bodhtree Consulting Limited**

This comparable is selected by TPO and held that the company to ITES segment. However Assessee objected submitting that the primary business of company is software development services hence, it cannot be compared with the assessee. Against this the TPO has held that it has considered only the data cleansing services and e-paper activities and has only considered the ITES segment. Before DRP assessee contended that it is earning extra ordinary profit, functionally different and has RPT of 38.54%. Ld. DRP rejected the contention of the assessee holding that ld. TPO has taken into consideration only the ITES segment of the comparable. Before us it was submitted that the comparable has the unreliable books of account and therefore same should be rejected. It was also submitted that it is functionally different. We have carefully considered that it is undisputed that the comparable company is also engaged in software development services. However the ld. TPO has obtained information u/s 133(6) of the Income Tax Act and after that he has excluded the segmental information pertaining to software development services and has only considered the information pertaining to segment of data cleansing solution. This fact is apparent from the Page No.124 of the Paper Book wherein according to annexure C margins were computed. The argument of ld. AR that it has unreliable books and has apply the accounting concept of matching wrongly is a new argument which was neither before ld. TPO

and nor before the ld. DRP. However, the ld. AR has relied on the decision of coordinate bench of Ciena India Pvt. Ltd. In ITA No.1453/Del/2014 for AY 2009-10. We have carefully considered the above decision wherein at para 9.4 the accounting of the comparable is considered. On perusal of para No.9.4, to 9.6 it is apparent that coordinate benches considered the accounting policy of the comparable with respect to software development services for AY 2009-10. However in the present case assessment year involved is 2007-08 and furthermore the segment of the comparable of software development is not at all considered by ld. TPO, he has considered ITES segment of the comparable. Therefore reliance placed upon the above decision of the coordinate bench is misplaced. In view of this we reject the argument of ld. AR for exclusion of the above comparable.

v. **Eclerx Services Limited**

Ld. TPO has included this company after obtaining information u/s 133(6) of the Act. The assessee objected that the RPT of the comparable is 9.97% however ld. TPO rejected this holding that the threshold limit of RPT is considered as 25%. Before DRP it was submitted that the company is functionally different. DRP held that company is engaged in similar function. Before us it is submitted that the company is operating in data analytics space and provides operations management, audit and reconciliation service. It was submitted that it falls in the domain of KPO segment. It was further submitted that the company is providing high end services and therefore same should be excluded. For this ld. AR submitted a corporate presentation of the comparable

wherein it is apparent that the company became first KPO in 2008 which is listed on BSE and NSE. From the above it is apparent that the company is engaged in the KPO business and therefore same is not comparable with the appellant which is carrying on admittedly ITES services. Hon'ble Delhi High Court in case of Rampgreen Services Pvt. Ltd. In ITA No.102/2015 has held that KPO segment cannot be compared with ITES segment. Therefore respectfully following the decision of the Hon'ble High Court we direct to exclude this comparable.

vi. **Informed Technologies India Ltd.**

Ld. TPO has included this comparable as it was also the comparable considered in its TP report in accept/ reject matrix. However, assessee rejected this company as it was under persistent losses. TPO has included this as it passed all the filters. Before TPO it was submitted that it has an RPT of 15.72% and it has abnormal growth patterns hence it should be excluded. The ld. TPO rejected both the contentions of the assessee as the comparable was functionally similar and same was not challenged by the assessee. Before us it was submitted that the company has an abnormal growth and also low employee cost to sales ratio of 17.79% and therefore it should be excluded. Before DRP also the same argument were taken which were rejected by the ld. DRP. Abnormal growth of the company cannot be a ground for rejection of a comparable if it is found to be functionally similar. Hence we reject the contention of the assessee that because of abnormal growth this comparable should be rejected. Regarding low cost employees the ld. AR relied on the decision of C3i Support

Services Pvt. Ltd. And M/s. e4e Business Solutions India Pvt. Ltd. However, on consideration of the decision cited above we find that this decisions did not consider the above comparable at all. Further it is not argued by the assessee that how this company is functionally not comparable with the assessee company as that is the utmost requirement for exclusion or retention of any comparable. Therefore we held that this company has been rightly included as comparable by ld. TPO and we reject the argument of the ld. AR for its exclusion.

vii. **Infosys BPO Limited and Wipro Limited**

The above companies have been selected by TPO as its comparable. However the assessee objected the above comparable that they own intangible and are having brand value. Ld. TPO rejected the above contentions. Before DRP the submission of the assessee was rejected. Wipro Ltd. Was also objected that it is engaged in BPO services. Before us the argument of brand value and economies of scale of both the comparables was cited. It was also submitted that Hon'ble Delhi High Court in case Aginity India Technologies Pvt. Ltd. Has considered these comparables. We have carefully considered the rival contentions and respectfully following the decision of Hon'ble Delhi High Court direct exclusion of both these comparables as they have brand value and also owns the intangible which are not comparable with the business of the assessee.

viii. **Inserve India private limited**

The above comparable was not challenged before TPO or before ld. DRP. Hence, In view of this respectfully following the

decision of honourable special bench in Deputy Commissioner of Income-tax V Quark Systems (P.)Ltd. 2010] 38 SOT 307 (CHD.) (SB) We remit this comparable back to the file of the Ld. TPO for exclusion or retention of this comparable as plea for its exclusion has been raised before us for the first time.

ix. **Maple E-Solutions Limited**

This comparable has been selected by TPO however, assessee objected stating that this company has been taken on by M/s. Triton Corp Ltd. We.f.01.01.2007 and therefore there is an extra ordinary event. However ld. TPO rejected the argument of assessee stating that assessee could not demonstrate as to in what manner the extra ordinary event has impacted the comparability. Ld. DRP also rejected the contention of the assessee. Before us the same argument was repeated. We have carefully considered the rival contentions it is undisputed fact that this company has been acquired by Triton Corp Ltd. Which has also been taken as comparable by the ld. TPO as there is an extra ordinary event this company is directed to be excluded as comparable.

x. **Triton Corp Limited**

This comparable was selected by TPO and has dealt with at Para No.12.23 of the order of the ld. TPO. Assessee did not object the inclusion of this comparable before ld. TPO as well as before DRP. Hence, In view of this respectfully following the decision of honourable special bench in Deputy Commissioner of Income-tax V Quark Systems (P.)Ltd. 2010] 38 SOT 307 (CHD.) (SB) We remit this comparable back to the file of the Ld. TPO for exclusion or retention of this comparable as plea for its exclusion has been raised before us for the first time.

xi. **Mold-Tek Technologies Limited**

Ld. TPO has selected this comparable. Before ld. TPO assessee objected that the company is not functionally comparable as It is engaged in engineering services which are high end in nature and it is a KPO. Ld. TPO rejected the argument of the assessee. Ld. DRP also confirm the findings of the ld. TPO however as the assessee is engaged in ITES services and admittedly the comparable is a KPO and therefore both are not functionally comparable. In view of this we reject this comparable and direct for its exclusion based on the decision of Hon'ble Delhi High Court in case of Rampgreen Solutions Pvt. Ltd.

xii. **Vishal Information Technologies Limited**

This comparable has been selected by the TPO. The assessee objected inclusion of this comparable stating that the most of work of that comparable is outsourced and hence functionally different. Same arguments were advanced before ld. DRP and both the them rejected the arguments of the assessee. Before us it is contended that as the comparable is engaged in though ITES services but the model of the company is not comparable as it gets work done through outsourcing model. We have carefully considered the rival contentions and we are of the view that comparable is working on outsourcing model there 76% of the company's payments are made to vendors and therefore it cannot be compared with the business model of the assessee, hence it is functionally different. In view of this we direct exclusion of this comparable.

12. Ground No.2.5 of the appeal is against error in computing the addition to the international transactions. The appellant submitted before the ld. TPO and ld. DRP that its AE segment transactions constitutes only 59% of the total transactions of the assessee however, ld. DRP has held that percentage at 70% without any basis. Therefore the assessee has submitted before us that its total income is Rs.203898658/- whereas income from provision of mapping services from an Associated Enterprises only 120168998/- which is only 58.94%. ld. DRP while deciding ground No.4.4 and 4.5 has held that a portion of the transaction of the assessee is with domestic and non AE customers hence same should not be subjected to transfer pricing does have merit. It was further held that AE segment constitutes 70% of the revenue and that adjustment should be made on proportionate basis only is a tenable argument and therefore the TP adjustment was directed to be made 70% of the transactions of the assessee. Before us assessee has submitted that it is only 59% and not 70%. The same facts were also put before ld. DRP vide letter dated 16th May 2011 placed at Page No.804 of the Paper Book. In view of the above facts to verify this factual matter as principal has already been accepted by ld. TPO on direction of DRP we set aside this matter to the file of ld. TPO to work out the correct adjustment after verification. In the result ground NO.2.5 of the appeal is allowed.
13. Ground Nos. 3 and 4 of the appeal are not pressed and hence dismissed.
14. Ground No.5 of the appeal regarding the benefit of proviso to section 92C (2) of the Income Tax Act is submitted that it is now infructuous in view of this we dismiss ground no.5.

15. Ground No.6 of the appeal is against charging of interest u/s 234B, 234C of the act which are consequential in nature and hence are dismissed.
16. Ground No.7 of the appeal is against initiation of penalty proceedings u/s 271(1)(c) of the Act which is premature and hence dismissed.
17. In the result appeal filed by the assessee is partly allowed.

**Order pronounced in the open court on 22/04/2016.**

-Sd/-

**(RAJPAL YADAV)  
JUDICIAL MEMBER**

-Sd/-

**(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

Dated: 22/04/2016  
*A K Keot*

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
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ASSISTANT REGISTRAR  
ITAT, New Delhi