

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA No. 1173/DEL/2016  
[A.Y 2011-12]

M/s Integreon India Pvt Ltd  
602, 6<sup>th</sup> Floor, I.T. Building - 3  
Nesco I.T. Park, Nesco Complex  
Western Express Highway  
Goregaon [East], Mumbai

Vs.

The Dy. C.I.T  
Circle - 11(1)  
New Delhi

PAN: AACCG 7235 J

(Applicant)

(Respondent)

Assessee By : Shri Niraj Sheth, Adv  
Department By : Shri Sanjay I Bara, CIT-DR

Date of Hearing : 13.03.2019  
Date of Pronouncement : 02.04.2019

**ORDER**

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 29.12.2015 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short], pertaining to A.Y 2011-12.

2. The substantive grievances of the assessee are as under :

1.0 Adjustment/addition of Rs. 3,21,72,400/- on account of provision of back office support services to Associated Enterprises ("AEs") :

1.1 On the facts and in the circumstances of the case and in law the Assessing Officer ('AO')/ the Transfer Pricing Officer ('TPO')/ the Dispute Resolution Panel ('DRP') has erred in making an upward adjustment of Rs. 3,21,72,400/- to the total income of the Appellant by holding that the international transactions relating to the Information Technology Enabled Services (ITeS)/ back office support services provided by the Appellant to its AEs are not at an arm's length.

1.2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the international transactions relating to provision of ITeS/ back office support services by the Appellant to its AEs were at an arm's length and hence no adjustment in respect thereof was called for and the stand taken by the AO/DRP/ TPO in this regard is misconceived, erroneous and incorrect.

- 1.3 On the facts and in the circumstances of the case and in law the AO/ TPO/ DRP erred in disregarding the benchmarking analysis and comparable companies selected by the Appellant based on the contemporaneous data in the transfer pricing study report maintained as per section 92D of the Income Tax Act, 1961 ('the Act') read with Rule 10D of the Income-tax Rules, 1962 ('the Rules') and thereby rejecting the transfer pricing documentation maintained by the Appellant.
  - 1.4 On the facts and in the circumstances of the case and in law the AO/ TPO/ DRP erred in considering companies which are dissimilar/ not comparable to the Appellant.
  - 1.5 On the facts and in the circumstances of the case and in law the AO/ TPO/ DRP erred in not allowing the use of multiple year data as prescribed under Rule 10B(4) of the Rules read with the OECD Transfer Pricing Guidelines for Multinational Enterprise and Tax Administrations, for determining the arm's length price of international transactions of the Appellant.
- 2.0 Addition of Transfer Pricing Adjustment to the book profit as per section 115JB of the Act
- 2.1. The learned AO and DRP erred in making additions on account of the Transfer Pricing adjustment of Rs. 3,21,72,400/- while computing book profits u/s 115JB of the Act.

### 3.0 General

3.1. The learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act."

3. At the very outset, the ld. counsel for the assessee stated he would be quarrelling in respect of the exclusion of only one comparable, i.e. TCS E-Serve Limited. It is the say of the ld. counsel for the assessee that if this comparable is excluded the margin would be within +/- 5%.

4. On such concession, we have heard the rival submissions and considered the facts for exclusion of TCS E-serve only and other comparables objected by the assessee are not adjudicated upon.

5. Briefly stated, the facts of the case are that the assessee is a subsidiary of IMS Mauritius. The appellant provides IT enabled services and is mainly engaged in research support for a broad array of business challenges, including competitive intelligence, customer experience and branding customer analytics, investment and due diligence, market entry and product launch.

6. The international transactions transacted during the year are :

- (i) Provision for IT enables services
- (ii) Reimbursement of expenses
- (iii) Recovery of expenses

7. The factual matrix in respect of transfer pricing adjustment vis a vis comparables can be understood from the following charts:

(A) Updated single year margin of the comparable companies:

Sr No	Comparables	Single Year Margins
1	Caliber Point Business Solutions Ltd	11.04%
2	Cosmic Global Ltd.	8.06%
3	Datamatics Financial Services Ltd	-0.04%
4	e4e Healthcare Business Services Pvt. Ltd	9.14%
5	ICRA Techno Analytics Ltd	24.83%
6	Informed Technologies India Ltd.	11.64%
7	Microland Ltd	8.50%
8	R System International Limited	4.38%
	<b>Average</b>	<b>9.69%</b>

(B) Updated single year margin of the comparable companies as per TPO order:

Sr No	Comparables	Margins
1	Accentia Technologies Ltd	29.18%
2	Acropetal Technologies Ltd (seg)	14.36%
3	e4e Healthcare business services Pvt Ltd	9.77%
4	Eclerx Services Limited	56.82%
5	ICRA Techno Analytics Limited	25.24%
6	Infosys BPO Ltd.	17.86%

7	Jindal Intellicom Ltd.	13.70%
8	Microland Ltd. (ITES Segment)	8.50%
9	TCS E-serve Limited	69.31%
	<b>Average</b>	<b>27.19%</b>

(C) Updated single year margin with working capital adjustment of the comparable companies considered in the final assessment order :

Sr No	Comparables	Margins
1	Accentia Technologies Ltd	25.79%
2	Acropetal Technologies Ltd (seq)	9.31%
3	e4e Healthcare business services Pvt Ltd	10.41%
4	Eclerx Services Limited	55.24%
5	ICRA Techno Analytics Limited	22.42%
6	Infosys BPO Ltd.	15.08%
7	Jindal Intellicom Ltd.	14.08%
8	Microland Ltd. (ITES Segment)	2.17%
9	TCS E-serve Limited	79.78%
	<b>Average</b>	<b>26.03%</b>

8. The bone of contention is the inclusion of comparable TCS E-Serve Limited.

9. When TPO include this comparable, the assessee objected to it on the following grounds:

- (i) presence of brand;
- (ii) super normal profits; &
- (iii) peculiar eco circumstances.

10. The TPO dismissed the objections of the assessee stating that the issues like presence of brand and super normal profits have already been considered. According to the TPO, brand value in a service industry may drive its revenue but may not affect the profitability of a company as contemplated by the tax payer. The TPO further observed that any brand comes with a cost i.e. huge expenses are required to be incurred to build brand value. Thus a brand may generate revenue but with a cost compensating any extra benefit and all the decisions relied upon by the ld. counsel for the assessee for exclusion of this comparable were rejected.

11. The assessee raised objections before the DRP but without any success.

12. Before us, the ld. counsel for the assessee reiterated what has been stated before the lower authorities. Strong reliance was placed on the decision of the co-ordinate bench in the case of B.C. Management Services [P] Ltd 83 Taxmann.com 346, which was affirmed by the Hon'ble Jurisdictional High Court of Delhi in 89 Taxmann.com 68.

13. Per contra, the ld. DR strongly supported the findings of the TPO and reiterated the observations of the TPO mentioned elsewhere.

14. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. Having understood the business profile of the assessee, we have carefully considered the decision of the co-ordinate bench [supra]. We find force in the contention of the ld. counsel for the assessee. The Tribunal has considered this comparable on similar business profile in the case of B.C. Management Services P. Ltd [supra]. The relevant findings of the co-ordinate bench read as under:

"15. The learned TPO has included this company on the ground that services provided by the TCS E-Serve is more in the nature of BPO which is akin to assessee's function and so far as assessee's objection that it has a very high turnover is also not tenable, because high turnover does not necessarily has any co-relation with high profits earned. Further, the extraordinary event of acquisition of Citi BPO as pointed out by the assessee, does not affect FAR analysis of TCS E-Serve. The learned DRP too has merely confirmed the action of the TPO.

16. Before us, the Ld. Counsel's contention has been that:

- a. Functionally different: TCS e-serve operations broadly comprise of transaction processing and technical services primarily to Citigroup entities globally, which cannot be compared to the functions performed by the assessee.
- b. Technical services involve software testing, verification and validation of software at the time of implementation and data centre management activities which are clearly not comparable to the ITeS. However, segmental bifurcation ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016 between transaction processing and technical services is not available in the public domain.
- c. TCS E-Serve, being earlier entrants in the industry, has developed domain expertise, process excellence; ability to leverage technology etc., whereas, this is the first year of operation, of the assessee, hence cannot be compared to the TCS E-Serve.
- d. Presence of brand- TCS E-serve being a subsidiary of TATA Consultancy Services Limited and is a part of the eminent TATA Group, which inherently has an element of huge brand value associated with it, which tends to influence the pricing policy and thereby directly impacting the margins earned by the company. Huge payment has been made by TCS E-Serve to TATA Consultancy for use of brand name, TATA.
- e. TCS E-Serve provides services pre-dominantly to Citi Group.

f. Abnormal profit- The Ld. TPO stated super normal profit making companies cannot be rejected unless peculiar economic circumstances of such companies are pointed out. The assessee clearly demonstrated the abnormal circumstances, which led to super normal profits earned by TCS E-Serve. The company earned supernormal profits during the year i.e. 69.31% on cost. This fact is also substantiated in the table provided below:

g. Abnormal fluctuations in profits: TCS e-serve's widely fluctuating growth in operating revenue, operating costs and margins.

ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016 h. Size of the company: The employee cost base is more than 64 times that of the assessee. Further, its turnover is more than 67 times to that of the Appellant (i.e. 1,442.42 crores).

i. In the recent case law of Baxter India Pvt. Ltd. (ITA No. 345/Del/2016) -- AY 2011-12, the Hon'ble Delhi Tribunal has excluded this comparable on the ground of functional differences and non- availability of segmental.

j. In the case of Equant Solutions India Pvt. Ltd (ITA No. 1202/Del/2015), the Hon'ble Delhi Tribunal has excluded TCS E-Serve as a comparable to ITeS provider for AY 2010- 11 on the ground that it carries on business of software testing, verification and validation for which no segmental bifurcation is available. Further, it owns huge intangibles and also uses 'Tata'

brand. Though the above decision is for AY 2010-11, the facts are equally applicable.

17. The learned counsel also submitted that the issue of comparability of TCS E-Serve vis-a-vis., the company providing ITeS services had come up for consideration before this tribunal in the case of Amri Price India Private Limited vs. DCIT, ITA No. 2010/Del/2014 and ITA No. 7014/Del/2014 wherein this company has been held not comparable with the ITeS companies. This judgment of the tribunal has also been upheld by the Hon'ble High Court.

18. We have heard the rival submissions, perused the relevant finding giving in the impugned orders as well as the material placed on record. One of the main points of distinction which is ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016 quite ostensible is that the 'TCS E-Serve' is a subsidiary of 'Tata Consultancy Services Limited', which is one of the leading and giant company in the world and has an inherent element of very high brand value associated with it. Such a high brand value definitely has an impact on the pricing policy, niche market, contractual terms, etc. and thereby affecting the profit margins. Annual report of this company reflects that huge payments have been made by TCS E-Serve to 'TCS Limited' for the use of the brand as a "royalty". This fact itself shows the effect of brand value in the pricing mechanism. On a further analysis it is seen that the employee cost base is more than 64

times than the assessee and even the turnover is also more than 67 times as compared to the assessee. This only goes to suggest that assets employed by 'TCS E-Serve' alongwith huge intangibles in the form of brand value definitely has a huge effect in PLI and vitiates the comparability under FAR analysis with a company like assessee which is a captive service provider without much intangibles and risks. Another important thing which has been pointed out by learned counsel is that, the operation of 'TCS E-Serve' broadly comprise of transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation is available. In absence of such vital information of the margins of such varied segments it becomes quite difficult to put such company in the comparability basket so as to bench mark the correct profit margin. All the aforesaid factors have been held so in various decisions of this Tribunal in several cases as relied upon by the Ld. Counsel, including the decision of Amri Price India Private Limited (supra). Thus, in our opinion 'TCS E-Serve' cannot be held to be a good comparable for ITA Nos. 6134/Del/2015, 5829/Del/2015 & 6572/Del/2016 the purpose of bench marking the assessee's PLI and accordingly, we direct the Ld. AO/TPO to exclude TCS E-Serve from the comparability list."

15. Aggrieved by this order of the co-ordinate bench, the Revenue preferred appeal before the Hon'ble High Court of Delhi. The relevant question of law urged read as under:

"1. Whether the exclusion of four comparables i.e. e-Clerx Pvt. Ltd., M/s ICRA Techno Analytics Ltd., M/s TCS E- Serve Ltd. and M/s Accentia Technologies Pvt. Ltd., are sustainable and not erroneous?"

16. The Hon'ble High Court answered as under:

"The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity between that entity and the assessee, however, there is a close connection between TCS E-serve and TATA Consultancy Service Ltd. which was high brand value; that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable. The rationale for exclusion is therefore upheld. "

17. As no distinguishing decision has been brought on record in favour of the revenue, respectfully following the decision of the coordinate bench and the Hon'ble High Court of Delhi [supra], we direct the Assessing Officer/TPO to exclude TCS E-Serve Ltd. from the final list of comparables.

18. Ground No. 1, with all its sub-grounds, is allowed.

19. Ground No. 2 relates to addition of TP adjustment to the book profit as per section 115JB of the Act.

20. A similar issue was considered by the Mumbai Bench of the Tribunal in the case of Owens Corning [India] Ltd 70 Taxmann.com

395. The relevant findings of the Tribunal read as under:

“4. During the course of hearing Ld. Counsel also drew our attention on the additional ground wherein the assessee has contested the action of AO in increasing the books profits for the purpose of section 115JB by the amount of transfer pricing adjustment of Rs. 1,30,32.762/-, while computing the total income of the assessee under the normal provisions of the Act.

4.1 The additional ground being purely legal and not requiring any investigation of fresh facts, the same was admitted in view of the judgment of Hon'ble Supreme Court in the case of *NTPC v. CIT* j 19981 229 ITR 383. It is noted that section 115JB is self contained code. Only those adjustments are permissible to the book profit as have been prescribed u/s I 15JB. The adjustment/additions made under the transfer pricing regulations are governed by altogether different sets of provision as contained in Chapter X of the Act. There is no such provision under the law that permits the AO to make adjustment on account of transfer pricing addition to the amount of profit shown by the assessee in its profit and loss account, for the purpose of computing book profit u/s 1 15JB. The law in this regard is clear. Reference is made to the judgment of Hon'ble Supreme Court in the case of *Apollo Tyres Ltd. v. CIT* 255 ITR 273/122 Taxman 562. It is noted from the perusal of the assessment order that the AO has simply made addition by an amount of Rs. 1,30,72,762/- to the amount of net profit as per profit and loss account for the purpose of computation of income u/s 115JB without even mentioning that under what provisions this addition was being made. Such an approach is highly unfair and brings undue and avoidable hardship to the tax payers and we recommend that such a casual approach should be avoided by the revenue officers, as it may tarnish image of the income tax department, which may in turn discourage voluntarily compliance by the taxpayers. Thus, we delete the addition made by the AO. As a result, additional ground filed by the assessee is allowed."

21. As the facts are identical to the facts of the case in hand, respectfully following the findings of the co-ordinate bench [supra] , this ground is allowed.

22. In the result, the appeal of the assessee is allowed.

The order is pronounced in the open court on 02.04.2019.

Sd/-

**[SANDEEP GOSAIN]  
JUDICIAL MEMBER**

Sd/-

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

Dated: 02<sup>nd</sup> April, 2019

VL/

Copy forwarded to:

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2. Respondent
3. CIT
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5. DR

Asst. Registrar,  
ITAT, New Delhi

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