

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.6575/Del./2016
(Assessment Year : 2012-13)**

Louis Dreyfus Company India Pvt. Ltd., vs. ACIT,
8th Floor, Tower A, Building No.5, Circle 15 (2),
Cyber City, DLF Phase III, New Delhi.
Gurgaon – 122 002 (Haryana).

(PAN : AAACL7361E)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ravi Sharma, Advocate

Ms. Shruti Khimta, AR

REVENUE BY : Shri Kumar Pranav, Senior DR

Date of Hearing : 10.10.2019

Date of Order : 30.10.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER

The Appellant, Louis Dreyfus Company India Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 20.10.2016 passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2012-13 on the grounds inter alia that :-

“That on the facts and circumstances of the case, and in law;

1. The Assessment Order passed by the Learned Assessing Officer ('Ld. AO') in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel ('DRP') is a vitiated order as the Hon'ble DRP erred in confirming the arbitrary transfer pricing adjustment made by the Ld. AO/Learned Transfer Pricing Officer ('Ld. TPO') to the international transaction pertaining to provision of back-office support services entered into by the Appellant with its Associated Enterprises ('AEs').

2. The Hon'ble DRP erred in confirming the addition to income of the Appellant to the extent of INR 50,13,634 by holding that the Appellant's international transaction pertaining to provision of back-office support services does not satisfy the arm's length principle envisaged under the Act. In doing so, the Hon'ble DRP has grossly erred in confirming the Ld. AO/Ld. TPO's action of:

2.1. not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;

2.2. disregarding the Arm's Length Price (ALP) as determined by the Appellant in the Transfer Pricing (TP) documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');

2.3. disregarding prior years' data as used by the Appellant in the TP documentation and holding that current year (i.e. FY 2011-12) data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation;

2.4. rejecting comparability analysis in the TP documentation and thus, without reason, the quantitative and qualitative screens/filters applied and set of comparables of the Appellant arrived at by following a detailed and robust search methodology carried out in the TP documentation, and conducting a fresh comparability analysis based on application of additional/revised filters in determining the ALP;

2.5. including high-profit making companies in the final comparables' set for benchmarking a low risk captive unit such as the Appellant (disregarding judicial pronouncements on the issue), thus demonstrating an intention to arrive at a pre-formulated opinion with the single-minded intention of making an addition to the returned income of the Appellant;

2.6. including certain companies that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

2.7. excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;

2.8. ignoring the business/ commercial reality that since the Appellant is remunerated on an arm's length cost plus basis, i.e. it is compensated for all its operating costs plus a pre-agreed mark-up based on a benchmarking analysis, the Appellant undertakes minimal business risks, as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the Appellant on account of this fact;

2.9. disregarding judicial pronouncements in India in undertaking the TP adjustment.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Louis Dreyfus Company India Pvt. Ltd., the taxpayer being a wholly owned subsidiary of Louis Dreyfus Commodities Asia Pte. Ltd., Singapore is into the trading of agri-based commodity products such as cotton, rice, corn, coffee, barley, sugar and oil seeds. The taxpayer is into trading of commodities with its Associated Enterprises (AEs) and unrelated parties in the domestic and international market. The taxpayer is also into providing back office support services (BSS) and crop research services to its AEs.

3. Ld. TPO accepted all the international transactions undertaken by the taxpayer during the year under assessment at arm's length except international transactions qua provisions of

business support services. The taxpayer in its TP study qua provisions for back office support services claimed that it is providing Information Technology Enabled Services (ITES) to its AEs, selected itself as the tested party and applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with OP/OC as Profit Level Indicator (PLI), taken seven comparables with mean margin of 13.62% as against margin of the taxpayer @ 10% of cost and found its international transactions at arm's length. However, the Id. TPO after applying various filters, which are not now under challenge, finally selected 9 comparables with average OP/OC at 20.44% and proceeded to compute the Arm's Length Price (ALP) of international transactions as under :-

<i>Operational Cost A</i>	8,09,95,709
<i>Arm's Length Price at a margin of 20.44% B=A* 120.44%</i>	9,75,51,232
<i>Price Received C</i>	8,90,95,280
<i>105% of the Price Received C* 105%</i>	9,35,50,044
<i>Proposed Adjustment u/s 92CA B-C</i>	84,55,952

4. TPO accordingly proposed the adjustment on account of arm's length price at Rs.84,55,952/-.

5. The taxpayer carried the matter before the Id. DRP by way of filing objections, who has partly allowed the objections filed by the taxpayer by excluding Infosys Ltd. which has reduced the

average of comparable at 16.19%. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, Id. TPO has accepted TNMM as MAM with OP/OC as the PLI applied by the taxpayer. It is also not in dispute that the TPO had accepted all other international transactions except transactions of provision of business support services undertaken by the taxpayer with its AEs during the year under assessment. It is also not in dispute that after directions issued by the Id. DRP, proposed adjustment of Rs.84,55,952/- made by the TPO has been reduced to Rs.50,13,634/- and the final set of comparables have come up as under :-

<i>S.No.</i>	<i>Name of the Company</i>	<i>OP/OC</i>
<i>1</i>	<i>Accentia Technologies Ltd.</i>	<i>11.82%</i>
<i>2</i>	<i>Acropetal Technologies Ltd (segment)</i>	<i>26.30%</i>
<i>3</i>	<i>e4e Healthcare Business Services Pvt. Ltd.</i>	<i>19.85%</i>
<i>4</i>	<i>Informed Technologies India Ltd.</i>	<i>6.08%</i>
<i>5</i>	<i>Jindal Intellicom Ltd.</i>	<i>0.25%</i>
<i>6</i>	<i>Microgenetic Systems Ltd.</i>	<i>6.38%</i>
<i>7</i>	<i>R System International Ltd. (Seg)(BPO)</i>	<i>- 4.38%</i>
<i>8</i>	<i>TCS E-Serve Ltd.</i>	<i>63.674%</i>
	<i>Average</i>	<i>16.19%</i>

8. Ld. AR for the taxpayer in order to compress the controversy at hand contended that the challenge by way of filing this appeal is qua exclusion of two comparables chosen by the TPO and confirmed by ld. DRP, namely, *Acropetal Technologies Ltd. (segment)* and *TCS E-Serve Limited* only.

9. Now, we would examine the suitability of aforesaid comparables vis-à-vis the taxpayer as under.

ACROPETAL TECHNOLOGIES LTD.
(SEGMENT) (ACROPETAL)

10. This is TPO's own comparable. The taxpayer challenged the inclusion of Acropetal as comparable on grounds inter alia that it is functionally dissimilar; that its segmental profitability is not available; that it fails AMP/Sales filter; that Acropetal has undergone business restructuring/extra ordinary circumstances and relied upon the decisions rendered by the coordinate Benches of the Tribunal in *Inductis India (P.) Ltd. vs. ACIT (2019) 101 taxmann.com 110 (Delhi-Trib.)*, *Agilis Information Technologies India (P.) Ltd. vs. ACIT – (2018) 89 taxmann.com 440 (Delhi)* and *Shipnet Software Solutions India vs. DCIT – (2017) 81 taxmann.com 301 (Chennai – Trib.)*.

11. However, ld. DR for the Revenue on the other hand in order to repel the arguments addressed by the ld. AR for the taxpayer

relied upon the order passed by the Id. DRP and contended that the Id. DRP has dealt with all the arguments raised by the Id. AR before the Tribunal.

12. When we examine the annual report of Acropetal, relevant page 140 of the annual report compilation, it goes to prove that Acropetal is involved in product and is also developing IP, relevant portion of business profile is as under :-

“IP & Product Development

The Company has been making consistent investments in developing intellectual properties and products that can help the Company to grow non-linearly. Acropetal Inc. (HQ in CA, USA) will drive the IP development efforts while Acropetal Technologies will develop and deploy solutions to consumers globally. The Company has a strong pipeline of 7 IPs which will be developed and rolled out over the next 3 years. The first IP, in the field of education named as PM3, has been developed to deliver quality education across the world. Using this as a leading IP and Product, the Company plans to focus on K-12 education, higher education, lateral education and experiential learning starting from North America.

<i>IP</i>	<i>Description</i>
<i>Patent Life Cycle Management (Healthcare)</i>	<i>Integrating the universe of customers across Clinical Life Cycle Management, Disease Management, Drug Discovery & Management, Hospital Administration Management, and Revenue Life Cycle Management integrated with Electronic Medical Record (EMR).</i>
<i>PM3 (Education)</i>	<i>Connecting the universe of customers that facilitate a student to derive quality education.</i>
<i>Hreernm (Enterprise Innovation Management)</i>	<i>Energizing innovation excellence through Value, Intellectual and Human Capital Management</i>
<i>U & I (Universal Intentionalism)</i>	<i>A docu-vision platform to learn, share and collaborate globally and innovate in a networked environment</i>

<i>Extending the Moment of Truth (Consumer Experience Management)</i>	<i>Responding to the new experience oriented consumer loyalty management</i>
<i>Cradle to Grave (Government & Citizen Interaction)</i>	<i>Creating an interactive real-time experience between the government and citizens at all levels.</i>
<i>Green Environment (Energy & Environment)</i>	<i>Recommending optimization on consumption of energy and recommending alternate sources of energy.</i>

13. Furthermore, when we examine page 141 of the annual report compilation, it is evident that Acropetal has completed acquisition of two US based companies, namely, Line Beyond Inc. and Optech Consulting Inc. with 100% and 70% stock respectively for FY 2011-12. In the subsequent years, Acropetal has acquired remaining 30% shares of Optech Consulting Inc. which has become its wholly owned subsidiary. Furthermore, when we examine pages 194 to 205 of the annual report compilation, it proved that the segmental profitability is not available. Suitability of Acropetal has been examined by the coordinate Bench of the Tribunal in *Inductis India (P.) Ltd.* (supra), available at pages 37 to 45 of the case laws compilation, vis-à-vis Inductis India (P.) Ltd. having similar business model as that of the taxpayer for AY 2012-13 and found to be not a suitable comparable by returning following findings :-

“(iv) Acropetal Technologies Ltd (segment):

It has been submitted by the Ld. AR that this company is engaged in provision of healthcare services which include Electronic Medical Record, patient life cycle management, physical and clinical life cycle management, hospital administration management and disease life cycle management. It has also been submitted that segmental bifurcation pertaining to the various revenue streams was not disclosed. We find that these averments of the AR are correct. We also note that this company was directed to be excluded by the ITAT Delhi Bench in the case of Agilis Information Technologies Pvt. Ltd vs. ACIT reported in (2018) 89 taxmann.com 440 (Delhi – Trib.) on the ground that Acropetal Technologies Ltd. was engaged in provision of high end healthcare services and owns intellectual property. It has also been noted by the ITAT Delhi Bench that this company was engaged in sale of software products. Undisputedly, the assessee company i.e. Inductis India Pvt. Ltd. is a captive IT enabled service provider and, therefore, this cannot be compared to the services being offered by Acropetal Technologies Ltd. We also note that segmental data is not available for the year under consideration as is evident from the perusal of the annual report which has been placed on record. Therefore, we have no other option but to direct the exclusion of this company from the final set of comparables. It is directed accordingly.”

14. So, in view of the matter, we are of the considered view that Acropetal being engaged in development of products and intellectual property, having no segmental profitability available and has undergone business restructuring, extra-ordinary circumstances, cannot be a suitable comparable to benchmark the international transactions qua business support services vis-à-vis the taxpayer, hence ordered to be excluded.

TCS E-SERVICE LTD. (TCS E-SERVE)

15. TCS E-Serve is also TPO's own comparable which was challenged by the taxpayer before the TPO as well as DRP. The taxpayer challenged the inclusion of TCS E-Serve as a comparable on grounds of functional dissimilarity, non-availability of segmental information, difference in risk profile, ownership of intangibles, payment for Tata brand and incomparable scale of operations and relied upon the decision rendered by Hon'ble Delhi High Court in case of *Avaya India Ltd. vs. ACIT in ITA 532/2019 order dated 24.07.2019*.

16. However, on the other hand, Id. DR for the Revenue in order to repel the arguments addressed by the Id. AR for the taxpayer relied upon the order passed by the Id. DRP and contended that all these contentions now raised by the Id. AR for the taxpayer have been extensively dealt with by the Id. DRP and relied upon *Chryscapital Investment Advisors (India) Pvt. Ltd. vs. DCIT 376 ITR 183 (Del.)* and *Rampgreen Solutions Pvt. Ltd. (2015) 377 ITR 533* delivered by Hon'ble Delhi High Court.

17. When we examine the business profile of TCS E-Serve, available at pages 69, 83 and 21 of the annual report compilation, no doubt the TCS E-Serve is primarily engaged in providing Business Process Services (BPO) to its customers in banking,

financial services and insurance domain but, at the same time, company's operations include delivering core business processing services, analytics/insights and support services for both data and voice processes, which make TCS E-Serve as a KPO whereas the taxpayer is a routine captive BPO services provider to its AE.

18. When we examine page 66 of the annual report compilation i.e. profit and loss account, segmental information is not available. Furthermore, TCS E-Serve is a significant risk bearing company such as macro-economic risk, regulatory risk, financial risk etc., as is evident from annual report compilation under the head Risk and Risk Mitigation which includes macro-economic risks, ability to hire and retain, data protection, technology, network and telecommunication risks, risk from operations, financial risk, legal & statutory liabilities risk etc. whereas taxpayer is not providing low end support services on cost plus basis being a captive service provider.

19. Even otherwise, TCS E-Serve is having significant ownership of intangibles and it is a brand in itself as it has made payment for Tata brand equity contribution of Rs.3.67 crores during the year under assessment, as is evident from Notes to Financial Statement, available at page 81 of the annual report compilation. Furthermore, when we examine the scale of operation

of TCS E-Serve at page 66 of the annual report compilation, its total revenue is Rs.1733.34 crores as against revenue of the taxpayer at Rs.8,90,95,280/-.

18. Exclusion of TCS E-Serve has been upheld by the Hon'ble Delhi High Court in *Avaya India Ltd.* (supra) on ground of large scale operation, huge brand value and lack of segmental by distinguishing *Chrystcapital Investment Advisors (India) Pvt. Ltd.* and *Rampgreen Solutions Pvt. Ltd.* (supra) relied upon by the Id.

DR for the Revenue by returning following findings :-

“27. There is merit in the contention of the Assessee that the scale of operations of the comparables with the tested entity is a factor that requires to be kept in view. TCS E-Serve has a turnover of Rs.1359 crores and has no segmental revenue whereas the Assessee’s entire segmental revenue is a mere 24 crores. As observed by this Court in its decision dated 5th August 2016 in ITA 417/2016 (PCIT v. Actis Global Services Private Limited) “Size and Scale of TCS’s operation makes it an inapposite comparable vis-a-vis the Petitioner.” As already pointed out earlier there is a closer comparison of TCS E-Serve Limited with Infosys BPO Limited with each of them employing 13,342 and 17,934 employees respectively and making Rs.37 crores and Rs.19 crores as contribution towards brand equity. When Rule 10(B)(2) is applied i.e. the FAR analysis, namely, functions performed, assets owned and risks assumed is deployed then brand and high economic upscale would fall within the domain of “assets” and this also would make both these companies as unsuitable comparables.

28. The Director’s report of TCS E-Serve Limited bears out the contention of the Assessee that both entities have been leveraging TCSs scale and large client base to increase their business in a significant way. The submission that the two comparables offer an illustration of “an identical transaction being conducted in an uncontrolled manner” overlooks the effect of the Tata brand on the performance of the impugned comparables. The question was not merely whether the margins earned by the Tata group in providing captive service to the Citi entities were at arm’s length. The question was whether they

offered a reliable basis to re-calibrate the PLI of the Assessee whose scale of operations was of a much lower order than the two impugned comparables. The mere fact that the transactions were identical was not in terms of the law explained in the above decisions, either a sole or a reliable yardstick to determine the apposite choice of comparables.

29. For all of the aforementioned reasons, the Court finds merit in the contention of the Assessee that both the impugned comparables viz., TCS E-Serve Limited and TCS E-Serve International Limited ought to be excluded from the list of comparables for the purposes of determining the ALP of the international transactions involving the Assessee and its AEs.”

19. In view of what has been discussed above, we are of the considered view that TCS E-Serve cannot be a valid comparable vis-à-vis taxpayer on ground of its large volume of operations having huge brand value, lack of segmental and functional dissimilarity, hence ordered to be deleted.

20. Resultantly, the appeal filed by the taxpayer is allowed.

Order pronounced in open court on this 30th day of October, 2019.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 30th day of October, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**