

IN THE INCOME TAX APPELLATE TRIBUNAL “J”, BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM & SHRI PAWAN SINGH, JM
ITA No. 6394/Mum/2017(Assessment Year: 2013-14)

Maersk Global Service Centres India Pvt. Ltd., 3 rd , 4 th & 5 th Floor, Prudential Building Central Avenue Road, Hiranandani Business Park, Powai, Mumbai-400076.	Vs.	A.C.I.T.-15(2)(2), Room No. 357, 3 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
PAN/GIR No. AACDM 7786 M		
(Appellant)	..	(Respondent)

Assessee by	Shri Porus Kaka (AR)
Revenue by	Shri A. Mohan (CIT-DR)
Date of Hearing	09/01/2020
Date of Pronouncement	05/ 02/2020

ORDER

Per Pawan Singh, Judicial Member;

1. This is the appeal filed by the assessee is directed against the directions of the Dispute Resolution Panel-3, Mumbai (In short, the DRP) dated 31/05/2017 for the A.Y. 2013-14 which was given effect by the order passed U/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (in short, the Act), wherein following grounds have been taken:

“Transfer Pricing addition to total income of Rs. 40,94,88,782/-

1. *On the facts and in circumstances of the case and in law, the learned Assessing Officer ('AO') the learned Transfer Pricing Officer ('TPO') erred and the Hon'ble Dispute Resolution Panel ('DRP') further erred in making an addition of Rs. 40,94,88,782/- to the Appellant's total income based on the provisions of Chapter X of the Income-tax Act,1961 ('the Act')*

Functional Profile of the Appellant

2. *On the facts and in circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in not appreciating that the Appellant is mainly a low- end back office support service provider, i.e. a low-end Business Process Outsourcing ('BPO') service provider thereby ignoring the findings of Hon'ble Income Tax Appellate Tribunal ('Tribunal') - Special Bench (I.T.A. No.7466/Mum/2012) in Appellant's own case.*

3. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not considering the observations of the Hon'ble Tribunal-Special Bench (I.T.A. No.7466/Mum/2012) in Appellant's own case wherein it had stated that the principal functions performed by the Appellant should be identified and the same should be compared with the principal functions performed by the comparable companies selected to find out the relatively equal degree of comparability in accordance with Rule 10B(3) of the Income-tax Rules, 1962 ('the Rules').*

Incorrect selection of comparables by the learned TPO

4. *On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in upholding/confirming action of TPO in selection MPS Limited as comparable. The Appellant submits the said company ought not to be taken as comparable.*

On the facts and circumstances of the case and in law, the learned AO / TPO further erred in not even providing the search process for selection of additional comparable company, and therefore, any such selection of additional comparable without following any methodical process amounts to cherry picking of the comparable by the learned TPO.

Incorrect rejection of Appellant's benchmarking analysis and comparables

5. *On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in upholding/confirming the action of the learned AO/TPO of disregarding most of the comparable companies selected by the Appellant i.e. Allsec Technologies Limited caliber Poi Business Solutions Ltd, Cameo Corporate Services Limited, Cosmic Global Limited, Datamatics Financial Services Limited, In House Production Limited, Informed Technologies India Limited, Microland Limited, R System International Limited, Spanco Limited and Sparsh BPO Services Limited based on the contemporaneous data in the transfer pricing study report maintained as per Section 92D of the Act read with Rule 10D of the Rules and various submissions made by the Appellant. Your Appellant prays that such companies be included as comparables.*

6. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the learned TPO in rejecting companies merely on the basis of different accounting period despite the same being functionally comparable.*

The learned AO / TPO erred and the Hon'ble DRP further erred in not following the principles laid down by the jurisdictional Mumbai Tribunal in Appellant's own case for AY 2010-11 (I.T.A. No. 1082/Mum/2015), wherein it had held different accounting year end should not be a sole reason for rejection of a functionally comparable company.

7. *On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in applying additional filter of rejecting companies with less than 75 percent earnings from exports, which is unwarranted in the comparability analysis.*

8. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in not accepting the Appellant's filter of rejecting companies having turnover of less than INR 1 crore and applying additional lower turnover filter of 1/10th times of the Turnover of the Assessee and higher turnover filter of 10 times the turnover of the Assessee, which is unwarranted in the comparability analysis.*

9. *On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble DRP further erred in rejecting companies with losses / diminishing revenue, which is unwarranted in the comparability analysis.*

The learned AO / TPO erred and the Hon'ble DRP further erred in not following the principles laid down by the jurisdictional Mumbai Tribunal in Appellant's own case for AY 2009-10 (I.T.A. No. 2594/Mum/2014), wherein it is principally held that further investigation should be made to ascertain whether losses reflects normal business conditions and the company satisfies the comparability aspects.

Erred in using single year data for margin computation

- 10. On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in not considering the requirement of proviso to Rule 10B(4) of the Rules while analyzing the data for comparability of companies.*

Risk adjustment Disallowed

- 11. On the facts and in circumstances of the case and in law, the learned AO / TPO erred and Hon'ble DRP further erred in upholding/confirming the action of the learned AO/ TPO in not allowing risk adjustment in accordance with the Rules to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned AO /TPO.*

Disallowance on account of delayed payment of employee's ESI Contribution

- 12. On the facts and in circumstances of the case and in law, the learned AO erred in disallowing payments made towards employee's ESIC Contribution aggregating to Rs. 478,028/- even though the same has been paid within due date of filing return u/s 139(1) of the Act.*
- 13. On the facts and in circumstances of the case and in law, the Hon'ble DRP erred in not adjudicating the appellant's objections against the disallowance of payments made towards employee's ESIC Contribution aggregating to Rs. 478,028/-*

Initiation of Penalty Proceedings

- 14. On the facts and in circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under Sec 271(1)(c) of the Act.*

Levy of Incorrect Interest under Section 234B & 234C of the Act

15. On the facts and in circumstances of the case and in law, the learned AO has erred in computation of interest under Section 234B and 234C of the Act.

The Appellant prays that the addition made by the learned AO / TPO be deleted.

2. Brief facts of the case are that the assessee-company is engaged in the business of providing captive support/ back office support services to its associated enterprises (AE). The assessee-company filed its return of income for Assessment Year 2013-14 declaring total income at Rs.72,80,85,640/-. Along with the return of income, the assessee furnished report under Form 3CEB. The assessee reported international transaction with its AE for providing IT-enabled services / data processing services and business processing outsourcing of Rs. 5210803840/-. Consequent upon reporting international transaction the assessing officer made a reference to transfer pricing officer (TPO) for computation of arms lengths Price of the said international transaction. The assessee selected Transaction Net Margin Method (TNMM) as most appropriate method to bench mark provision of IT enabled services/data processing/business processing services. The profit level indicator (PLI) selected was operating profit/ total cost (OP/TC). The assessee has shown its margin at 14.52%. The assessee selected itself as tested party. The assessee bench marked its ALP under Transaction Net Margin Method

(TNMM),the assessee selected 12 company as comparable and computed the margin in the following manner:

Sr.No.	Name of the comparable company
1	Allsec Technologies Limited
2	Caliber Point Business Solutions Limited
3	Cameo Corporate Services Ltd.
4	Cosmic Global Limited
5	Datamatics Financial Services Limited
6	E4e Healthcare Business Services Private Ltd.
7	In House Productions Limited
8	Informed Technologies India Limited
9	Microland Limited
10	R Systems International Limited
11	Spanco Limited
12	Sparsh BPO Services Ltd.

3. The margin on comparable based on average of was 4.28% and the assessee's margin for international transaction was 14.45%. Thus, the assessee claimed its transaction at the Arms Length. During the proceedings before TOP, the TPO accepted only one comparable i.e. e4e Healthcare Business Services Private Ltd. and included IRIS Business Services Ltd. and MPS Ltd.

4. The TPO after including 2 comparable worked out the Arithmetic mean of Profit Level Indicator (PLI) of 3 comparable company and arrived at margin of 24.78 % against PLI of assessee at 14.45% as under:

Sr. No.	Name of comparables	NCP margin (%)
1	E4e Healthcare Business Services Private Limited	17.36
2	IRIS Business Service Limited	27.29
3	MPS Limited	29.71
	Arithmetic Mean	24.78

5. The TPO worked out difference between ALP of sales and value of international transaction and made adjustment of Rs. 47,82,41,475/- in the following manner:

Detail		Amount in Rs.
International Transaction ('IT')	A	5210803840
Operating Cost	$B=A/112.17\%$	4545452296
Arm's Length Price & 124.78%	$C=B*124.78\%$	5796595374
Adjustment		585791534.5
IT x 1.03		5367127955
IT x 0.97		5054479725

Thus, the ALP of the International transaction is determined at Rs. 579,65,95,374/- leading to an adjustment of Rs. 58,57,91,534/-. It is seen that the assessee has made suo motto adjustment of Rs. 10,75,50,059/- on account of transfer pricing. Accordingly, the net adjustment works out to Rs. 47,82,41,475/-

6. On receipt of report of TPO, the Assessing Officer made upward adjustment/addition of Rs. 47,82,41,475/-. In the draft assessment order passed under section 143(3) r.w.s. 144C(1). The assessee filed its objections before DRP. The DRP after considering the objection of assessee affirmed the rejection of assessee's comparable and further affirmed the inclusion of comparable by TPO. On receipt of direction of

DRP dated 31.05.2017, the Assessing Officer passed the final assessment order under section 143(3) r.w.s. 144C(13) dated 28.08.2017. Further, aggrieved by the direction of DRP, the assessee has filed present appeal before the Tribunal.

7. We have heard the submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and perused the material available on record. The Id. AR of the assessee submits that he has very limited submission. The Id. AR submits that if Caliber Point Solutions Ltd. (Caliber Point) is included in final set of comparable and MPS Limited is excluded, the assessee's margin would be within tolerance range and that the assessee would not pressed any other grounds of appeal. The Id. AR further submits that Caliber Point is functionally comparable with assessee. This fact has been accepted by Id. DRP in its direction for A.Y. 2013-14 and 2012-13 as well as by Tribunal for A.Y. 2012-13. The Id. AR of the assessee furnished the copy of direction of DRP for A.Y. 2012-13 & 2013-14 and copy of decision of Tribunal in assessee's own case for A.Y. 2009-10, 2010-11 & 2012-13. The Id. AR further submits that the Hon'ble Bombay High Court in PTC Software (395 ITR 176 Bom.) held that a different year ending cannot be a mere rejection of comparable, which is otherwise functionally comparable.

8. For exclusion of MPS Limited, the Id. AR of the assessee submits that this comparable company is engaged in business of software development and providing technology solution for publishing industry. MPS Limited is professional expertise, having Caliber Professional employee who have undertaken various research and development initiatives to develop end – to- end cloud based publishing platform and solutions. This comparable was rejected by TPO in A.Y. 2014-15 after considering the submission/objection of assessee in its order dated 09.05.2017. The Id. AR submits that Hon’ble Bombay High Court in PCIT vs. J.P. Morgan Services Ltd. (ITA No.4/2017 & 170 of 2017) and in CIT vs. L’Oreal India Pvt. Ltd. (ITA No. 1046/2012) and Mumbai Tribunal in assessee’s own case for A.Y. 2005-06 held that software development company cannot be compare with low and back office service provider. The Id. AR further submits that product portfolio of this comparable is also placed on record as per page 2 of PB II.
9. On the other hand, the Id. DR for the revenue for exclusion of Caliber and against the exclusion of MPS Limited relied upon the order of TPO/DRP. The Id. DR for the revenue submits that TPO as well as Id. DRP has given detailed reasoning while excluding and including the comparables.
10. We have considered the submission of both the parties and perused the material available on record. There is no dispute that assessee is low end

support services provider to its AE. This fact is duly accepted by TPO while benchmarking the international transaction. So far as inclusion of Caliber Point is concerned, we have noted that in assessee's own case for A.Y. 2012-13 this comparable was rejected by TPO and affirmed by DRP. However, on appeal before the Tribunal, this comparable was directed to be included by Tribunal vide its order dated 20.11.2018 in ITA No. 653/Mum/2017 by passing the following order:

“iv) CALIBER POINT SOLUTION LTD.

20. This comparable was proposed by the assessee. However, the Transfer Pricing Officer rejected it on the ground that the accounting period of the company ends in December, whereas, assessee's accounting period ends in March.

21. The DRP has also upheld the rejection of the company as a comparable for the very same reason.

22. We have considered rival submissions and perused materials on record. As could be seen from the observations of the DRP, the fact that the company is otherwise functionally similar to the assessee has been accepted by the DRP. However, the DRP has upheld the rejection of the company on the ground of different accounting period on the reasoning that when substantial comparables having same accounting period as the assessee are available there is no need to consider a comparable having different accounting period. We do not find substance in the aforesaid reasoning of the DRP. As could be seen from the material on record as well as while considering similar issue arising in respect of comparability of R. System International Ltd., this company was treated as comparable to the assessee in assessment years 2009-10, 2010-11 and 2011-12 by the Tribunal in the orders referred to above notwithstanding the fact that it has a different accounting period. That being the case, following the consistent view of the Tribunal, we direct the Assessing Officer to treat this company as a comparable.”

11. Considering the decision of Co-ordinate bench, wherein no variation of fact for this year is brought to our notice, therefore, respectfully following

the same, we direct the AO to exclude Caliber Point from final set of comparable.

12. MPS Limited. This comparable was included by TPO while making benchmarking. The assessee objected for inclusion of this comparable on the ground that MPS Limited is engaged in business of providing publishing solution, typesetting and data digitization and in wide variety of services including data coding, conversion, indexing, editing, copy editing, editorial services, software development, maintenance and support services. However, the TPO rejected the objection of assessee by taking view that after going through the annual report of this comparable, it was noted that this comparable is functionally comparable with the assessee. The Id. DRP affirmed the action of assessee held that clause-28(i) of Notes forming part of final statement of this comparable show that this company operates in one business segment of providing publishing solution viz., typesetting and data digitization services and is considered to constitute a single segment. Business activity of this comparable is primarily low end ITeS. The Id. DRP further held that assessee being an ITeS is in between high end BPO and low end BPO i.e. ITeS provider and broadly functionally comparable with assessee. The Id. AR of the assessee strongly relied upon the annual report showing the product portfolio of MPS Limited. We have noted that this comparable

company while reporting revenue recognition has shown revenues from website design and development. Further, on perusal of its function as shown on page II of its annual report, this comparable has shown to have engaged in smart cloud based digital public platform and engaged in multifarious activities.

13.The Id. AR of the assessee vehemently submitted that MPS Limited was rejected/drop by TPO from final set of comparable in A.Y. 2014-15. Perusal of TPO order under section 92CA(3) dated 27.10.2017 for A.Y. 2014-15, copy of which is placed on record. Perusal of the order of TPO for AY 2014-15, reveals that no show-cause notice was issued by TPO for inclusion of this comparable. The TPO issued show-cause for inclusion of eClerx, BNR Udyog Limited and Crossdomain Solutions Pvt. Ltd. Thus, the submission of Id. AR of the assessee is devoid of merit.

14.So far as comparability of this comparable on other aspect is concerned. This comparable company is in the business of providing publishing solution and data digitization. Providing variety of services including data coding, conversion, indexing, editorial services and software development. This comparable is in a different model of business and cannot be compared with assessee company. We have further noted that coordinate bench of Mumbai Tribunal in Emersion Electric Company Vs

ACIT (ITA No. 531 & 6098/MUM/2018) DATED 14.06.2019, while examining the comparability of MPS Limited, with that assessee which provides IT services including database administration and help desk support to various members of the Emerson group, excluded this comparable holding as under;

“9.1 Exclusion of MPS Limited

We find from the annual report of MPS Ltd., for the year ending 31/03/2014, the said comparable provides end to end print and digital publishing solutions to its partners across the entire value chain from contained provision, enhancement and transformation to delivery and customer support, making it a trusted partner to the biggest publishers in the world. The Director's report under the heading "Management Discussion and Analysis" reflect that MPS Ltd., has developed end to end cloud based publishing platform, MPS Digicore, which addresses the need for an integrated work flow that publishers have started to ask for. As such, MPS Ltd., has a first mover advantage in exploiting the market and establishing it as a premier technology solutions provider for publishers. The same market forces have also created immense opportunities for MPS Digitrak, the production targeting system developed by MPS Ltd., and MPS Digicamp, automated composition. Similar other solutions are being developed at MPS Ltd., as research and development (R&D) continues based on the market requirement. The assessee stated before the Id. TPO that MPS Ltd., is functionally not comparable by stating various functions performed by MPS Ltd., as under:—

- (a) As per the Corporate information disclosed in the financial statements for the year ending 31/03/2013, MPS Ltd., the company is engaged in the business of providing publishing solutions viz., typesetting and data digitization services for overseas publishers. The company has a 100% Export Oriented Unit in Bengaluru, and units registered under the Software Technology Park of India (STPL) scheme that are located in Chennai, Delhi, Gurgaon and Dehradun. The Company also operates through its branch in United States of America. The company provides publishing services relating to typesetting of books and journals, composing of yellow page advertisements and catalogues, data coding,

conversion, indexing, editing, copy editing, editorial services, software development, maintenance and support to global publishers.

- (b) MPS Ltd. is engaged in developing of software projects such as Digicore and Digitrak.
- (c) MPS Ltd. has incurred outsourcing costs which indicate that it follows different business model.
- (d) From the annual report of the said comparable it is noted as under:—

"MPS Ltd, provides content creation production, transformation and technology services to global academic, scientific and educational publishers. The company has a team of more than 2,860 employees based in offices in Bengaluru, Chennai, Gurgaon, Noida and Dehradun in India and at Portland, Oregon, Orlando, Florida, Durham, North Carolina and Effingham, Ittinos in the United States.

Established as an Indian subsidiary of Macmillan (Holdings)Ltd, in 1979, the company had evolved over its forty five year history to become one of the most experienced and dominant players in the publishing services outsourcing space. "

9.2 We find that the Id. TPO however did not appreciate the contentions of the assessee and held that this comparable is functionally comparable with that of the assessee in ITeS segment. The Id. DRP on perusal of the annual report of the MPS observed that the said comparable operates in only one segment of providing publishing solutions and it does not sell any software based services to its customers. The Id. DRP further observed that software forms part of its intangible assets and it is more of a tool to offer ITeS to customers.

9.3 From the perusal of the annual report for the year ended 31/03/2014 of the said comparable, we find from page 707 of the paper book that the said comparable had incurred outsourcing cost of Rs. 1078.76 Crores which is included under the head "miscellaneous expenses" which goes to prove that it has got a different business model. From the various functions performed by MPS Ltd., we find that the said comparable is predominantly in the business of digital publishing which cannot be treated at par with ITeS which is the case of the assessee in ITeS segment. In this regard, we find

that the reliance placed by the Id. AR on the Co-ordinate Bench decision of Bangalore Tribunal in the case of *Google (India) (P). Ltd., v. Dy DCIT* [2013] 29 taxmann.com 412/55 SOT 489 is well founded wherein it was held as under:—

"16. As far as (4) Apex Knowledge Solutions Pvt. Ltd., is concerned, we find that the assessee had taken objections before the TPO that it is functionally different, as it provides services such as E-publishing knowledge based services etc. But TPO has rejected the objection on the ground the assessee has not considered the verticals or functional lines during the search process conducted by it and, therefore, it is not proper to make any objection on this basis now. We are not able to agree with the finding of the TPO as confirmed by the DRP on this issue. Merely because, the assessee itself has not considered the said filter while making its TP study; it cannot be said that it cannot raise such an objection before the TPO. It is the TPO who has adopted this company as comparable. On such adoption, the assessee has every right to raise the objections as regards the functional differences between the assessee and comparable. It is the bounden duty of the TPO to consider the said objections in accordance with law. As brought out by the assessee, the assessee is in the IT enabled services, whereas the said company Apex Knowledge Salutation Pvt. Ltd., is in the business of E-publishing which cannot be said to be in the same line of business. The functional differences are likely to affect the profit marking capacity of both the companies. In view of the same, we are of the opinion that this company is also to be excluded from the list of comparables."

9.3.1 In view of the above, we hold that the comparable chosen by the Id. TPO, M/s. MPS Ltd., is functionally not comparable with that of the assessee and accordingly, we direct the Id. TPO to exclude the same from the list of comparables."

15. In view of the aforesaid discussions, we are of the view that MPS Limited is not comparable with the assessee-company, which is admittedly engaged in low end support services. Resultantly, we direct the TPO/AO to include the Caliber Point and exclude MPS Limited from final set of comparable and recompute the ALP of International

Transaction with regard to IT enabled services; data process services and business process outsource services.

16.The Id. AR for the assessee has neither pressed any other grounds of appeal nor made any submissions therefore, all other grounds of appeal are treated as not pressed and dismissed as such being not pressed.

17.In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 05-02-2020.

Sd/-

Sd/-

(R.C. Sharma)	(Pawan Singh)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Mumbai, Dt : 05th February, 2019

Sk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai