

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

I.T.A. No.1555/DEL/2016
Assessment Year: 2011-2012

Louis Dreyfus Commodities India Pvt. Ltd., Building No.5 Tower A, 8 th Floor, DLF Cyber City, DLF Phase- III, Gurgaon, Haryana.	Vs.	Asstt. Commissioner of Income Tax, Central Circle-15(2), New Delhi.
TAN/PAN: AAACL7361E		
(Appellant)		(Respondent)

I.T.A. No.1571/DEL/2016
Assessment Year: 2011-2012

Asstt. Commissioner of Income Tax, Central Circle-15(2), New Delhi.	Vs.	Louis Dreyfus Commodities India Pvt. Ltd., Building No.5 Tower A, 8 th Floor, DLF Cyber City, DLF Phase-III, Gurgaon, Haryana.
TAN/PAN: AAACL7361E		
(Appellant)		(Respondent)

Appellant by:	Shri Ravi Sharma & Anubhav Rastogi, Adv.		
Respondent by:	Shri M. Barnwal, Sr.D.R.		
Date of hearing:	23	07	2020
Date of pronouncement:	27	08	2020

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeals have been filed by the assessee as well as by the Revenue against final assessment order dated

29.01.2016, passed in pursuance of direction given by the Dispute Resolution Panel vide order dated 10.12.2015 for the Assessment Year 2011-12.

2. In the Revenue's Appeal, i.e., ITA No. 1571/Del/2016, it has been admitted by both the parties that tax effect on the disputed amount challenged in the appeal is less than Rs.50 lac. In support, following computation of tax effect has been given.

<i>Particulars</i>	<i>Reference</i>	<i>Amount (INR)</i>
<i>Amount of Income against which appeal is filed by the tax department (refer page no.1 of the department's appeal)</i>	<i>A</i>	<i>5,170,421/-</i>
<i>Tax on above @ 30%</i>	<i>B</i>	<i>1,551,126</i>
<i>Surcharge at 7.5% (If income exceeds 1 crore)</i>	<i>C</i>	
<i>Education Cess at 3%</i>	<i>D</i>	<i>46,534</i>
<i>Tax effect (computed as per CBDT circular no.17/2019 r.w. circular no. 3/2018) enclosed herewith as Annexure A and Annexure B, respectively)</i>	<i>[B+C+D]</i>	<i>1,597,660/-</i>

2.1 Thus, in view of CBDT Circular No. 17/2019 dated 08.08.2019, the appeal of the Department is dismissed in limine.

3. In the assessee's appeal, the assessee has challenged the transfer pricing adjustment of Rs.81,33,706/- on provision of back office support services. Though various ground have been taken, however, the ld. counsel for the assessee submitted that only one comparable has been challenged effectively, that is, TCS-e-Serve Ltd. for exclusion which has been included by the TPO and confirmed by the DRP. Further,

ld. counsel also submitted that in the case of the assessee, this Tribunal while deciding the appeal for the Assessment Year 2012-13 in ITA No. 6575/Del/2016 vide order dated 30.10.2019, has held that TCS-e-Serve Ltd. cannot be compared with the assessee. Since, same material facts are permeating in so far as comparability of assessee and TCS-e-Serve Ltd. is concerned, therefore, matter stands squarely covered.

4. On the other hand, ld. DR referred to the various observations made by the TPO as well as by the DRP.

5. The brief facts qua the issue involved are that assessee is subsidiary of Louis Dreyfus Commodities Asia Pte Ltd. Singapore. The assessee is an India based trader of Agri-based products such as crude palm oil, coffee, cotton, soybean, barley, maize, sugar and grain etc. The assessee company is into trading of commodities with AEs and unrelated parties in domestic and international market. In addition to the trading activities, the assessee is also engaged in providing back office business support services to LD commodities Asia Pvt. Ltd. During the relevant Financial Year the assessee has undertaken international transaction of back office support services of Rs.7,49,33,645/-. The assessee has rendered back office support services for various agri-based commodities to its AEs which include provision of logistic support execution along with man power services. These services primarily include related services, logistic support, trade support, travel support, international aid

services and inspection services. In consideration thereof, the assessee company was remunerated on a cost plus basis with a markup of 10%. In TP study report, the assessee claimed that it is providing IT enabled services to its AE and adopted TNM as a most appropriate method and PLI was taken as OP/OC. The operating revenue were at Rs.7,44,33,645/- and operating expenses at Rs.6,81,21,495/- and accordingly, the PLI worked out to 10%. The assessee had chosen 12 comparables and mean margin of the comparables after adjustment was arrived at 12.6%. Hence, it was reported that the assessee's transaction are at arm's length price. Ld. TPO selected 8 comparables and the average margin determined was at 29.53% which included the comparable company of TCS-e-Serve Ltd. which had a margin of 69.3%. However, after DRP's direction in the final assessment order, the margin was arrived at 29.4%.

6. After considering the rival submission and on perusal of the impugned orders, we find that the only dispute is with regard to the inclusion of TCS-e-Serve Ltd. by the TPO. The assessee had challenged the inclusion of the said comparable on the ground that, firstly, it is not functionally comparable, because, TCS-e-Serve in addition to business process outsourcing service, it is also providing technical and compilation of the software which falls under software consulting activities, for which it does not have any segmental data for such software consulting activities. Secondly, it has a huge brand value and a part of large business organization,

therefore, it has a huge leverage and client based which accordingly affects the profitability. Apart from that, it was also objected on the ground of turnover and large scale operations and also having huge brand equity. However, the Id. DRP has rejected the explanation on the ground that turnover cannot be the criteria for excluding the comparable and further the assessee has not shown how the Tata brand equity and ownership of tangible led to high profit. The assessee also gets leverage on the valuable IPR and another commercial intangible owned by the AEs which provide range of services. Thus, there is no fixed relation between brand and margins.

7. One of the key reason why the TCS-e-serve Ltd. cannot be held to be comparable with the assessee company which is providing back office support services, i.e., ITeS/BPO services, because TCS-e-Serve in addition to ITeS/BPO services also render technical services like software testing and validation of software which falls under software development services activity. Apart from that, from the perusal of the annual report it is seen that there is no segmental information with regard to the software development services activity. Admittedly, the assessee is a low risk captive unit involved in provision of back office support service to it's group companies for which it is remunerated at cost plus basis and is not exposed to any kind of risk. Whereas, the TCS-e-serve Ltd. bears significant risk such a macro economic risk, regulatory risk, financial

risk and risks from operations etc. which clearly indicates that the TCS-e-serve Ltd is a full risk bearing company. On risk analysis also it cannot be compared with the assessee. Besides this, TCS-e-serve Ltd is not comparable on account of intangible held by this company and has large scale of operation and huge brand value. Hon'ble Delhi High Court in the case Avaya India Ltd. vs. ACIT in ITA No.532/2019 has upheld the exclusion of TCS-e-Serve on account of large scale of operations, huge brand value, lack of segmental information with the comparables who are simply involved ITeS/BPO services which are captive services provider.

8. Apart from the above, this Tribunal in assessee's own case for the Assessment Year 2012-13 has excluded this comparable after detailed discussion, which for the sake of ready reference is reproduced hereunder:-

*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 Chryscapital 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-à-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-a-

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.”

9. Accordingly, we direct the TPO to exclude the TCS-e-Serve Ltd. from the comparability list and determine the Arms Length Price. Accordingly, the appeal of the assessee is treated as allowed.

10. In the result, the Revenue’s appeal is dismissed and the assessee’s appeal is allowed.

Order pronounced in the open Court on 27th August, 2020

Sd/-
[O.P. KANT]
[ACCOUNTANT MEMBER]
DATED: 27/08/2020
PKK:

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER