

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

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 2516/Del/2015
Assessment Year: 2009-10**

Evalueserve SEZ (Gurgaon) Pvt. Ltd., vs. ACIT, Circle 8(2)
8th, 9th & 10th Floor, Building No. 4, New Delhi
Unitech Realty Projects Ltd., SEZ Tikri,
Sector- 48, Gurgaon.

PAN :AAACE8812A

**ITA No. 2966/Del/2015
Assessment Year: 2009-10**

DCIT, Circle 8(1) vs. Evalueserve SEZ (Gurgaon) Pvt. Ltd.,
New Delhi 701, Guru Apartments, Sector – 14,
Rohini, New Delhi
(Appellant) (Respondent)

Assessee by : Ms. Ananya Kapoor, Adv.
Revenue by : Sh. K. Mahboob, Sr. DR

Date of hearing: 02.02.2021

Date of order : 02.02.2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Challenging the order dated 27.02.2015 passed by learned
Commissioner of Income-tax (Appeals)-44, New Delhi ("CIT(A)) for

assessment year 2009-10, both assessee and Revenue filed these cross appeals.

2. Brief facts of the case is that the assessee is a company incorporated on 17.12.2007 and began its operation from August 2008. It carries on IT enabled services[ITes] in the form of research activities according to the terms of its agreement with its AE which is driven by business information, market research and intellectual property research. It carries on precisely three activities and its functional profile, assets employed and risk assume are-

“a) Business Information : EVS SEZ India carries out business information research based assignments of the following nature:

- Periodic Research: Periodic research projects are ongoing in nature.

The projects include database content creation, management and updation of existing research.

- Project Research: Project research involves research from secondary sources. It also makes use of forecasting, modelling and financial analysis. Typically, it involves industry studies covering the market size, value chain analysis, growth rates and demand and supply projections. EVS SEZ India has conducted studies and prepared research reports for the sectors like the telecom sector, pharmaceutical sectors, etc. The intellectual property rights for the reports are owned by the end customer.
- Rapid Research: Rapid research assignments typically have 24 hours as tie turnaround time. These are mostly based on brief client requests received from AEs.

b) Investment Research and Financial Analytics: EVS SEZ India has a team of employees exclusively dedicated to tracking stocks and mutual funds. Typically, an investment research and financial analytics assignment as discussed above could also be periodic or project based.

EVS SEZ India makes use of a variety of research tools including the web, databases and publications apart from analytics and forecasting. The industries covered include financial services (banking and insurance), hi-tech (software,

electronics, engineering, nano technology, networking, biomedical engineering), telecom equipment and operators, pharmaceuticals and biotech, chemicals, energy and consumer products.

c) **Market Research:** This segment caters to primarily market research firms based overseas. It focuses on primary research in the nature of business to business surveys only where data is collected via telephonic surveys. The surveys are carried out on a case to case basis and as per the specific client requirements. The employees comprise mainly graduates, undergraduates, and MBA. The surveys carried out by the market research segment include surveys like analyzing the trends in IT and telecom spending, etc. These surveys are normally carried out on the basis of a questionnaire received from the client. Depending on the work load at times, some employees may be shifted to the business research segment for short term projects.

d) **Intellectual Property Research:** The intellectual property research services includes research on patents, drafting of patent applications, prior art search, etc. Essentially, EVS SEZ India offers the following kind of services to its AEs:

- **Patent Assessment:** This is concerned with evaluating whether a product can be patented or not. It involves finding out whether a patent exists for a similar product in the global market.
- **Drafting of Patent Applications:** The AEs are responsible for end to end patent application filing through patent counsels in the relevant jurisdiction. EVS SEZ India prepares a draft and sends it either to the client or patent attorney associated with AEs, to be filed. Thereafter, lawyers, associated with the AE vet the draft and file it.
- **Intellectual Property Asset Management:** EVS SEZ India offers patent to product mapping, IP research and analysis and patent consulting as part of Intellectual Property Research. It assists in maintaining a relevant portfolio of patents, offers consulting in overlap and infringement and helps in locating potential companies that may be interested in licensing a particular invention.

Marketing and After Sales: EVS SEZ India does not undertake any marketing and sales efforts as it carries out offshore research activities on behalf of its AE. The/AE is responsible for the business development, marketing activities and quality assurance for every project undertaken by EVS SEZ India. The AEs, based on the market and economic scenario prepares the general worldwide marketing strategy for the Group.

EVS SEZ India secures contracts owing to the brand name and goodwill enjoyed by its AEs.

For provision of the aforementioned services, AEs remunerate EVS SEZ India on an hourly basis. Additionally, AEs also reimburse EVS SEZ India at a cost plus

6% for expenses on telephone calls, translation charges, research reports purchased, web hosting and miscellaneous expenses.

Routine Functions: These business support functions are a part of the normal course of business and are indispensable in the economic environment.

Strategic Policies: All long-term policies are developed and formulated by EVS SEZ India in consensus with its AEs. The company's management personnel handle the corporate communications and deal with the direct customers, Associate Enterprises, etc.

Finance and Accounting and IT: EVS SEZ India prepares its own financial statements.

Human Resource Management: EVS SEZ India performs recruitment, soft skills training, performance evaluation and other related functions.

The employee strength of EVS SEZ India was about 616 personnel including the corporate group as on March 31, 2010.

Assets

Any business requires assets without which it cannot carry out its activities. The assets might be clearly recognisable i.e. tangible (plant and machinery, equipment, building etc) or they might be intangible assets (brand-name, trademarks, technical know-how, patents, etc). Following is the list of assets used by EVS SEZ India:

Tangible Assets

The tangible assets employed in EVS SEZ India are considered essential for running the business. They are described below:

EVS SEZ India being an ITES service provider does not have a significant tangible asset base for carrying out its operations. EVS SEZ India does not own any land and carries out its operations on rented premises. Its tangible asset base comprises computers, office equipment, furniture and fittings, etc.

Intangible Assets

'As EVS SEZ India operates in the research domain, human capital forms its core resource. However, the employees of EVS SEZ India typically only comprise undergraduates, graduates, engineers and MBAs.

The business of the Evalueserve group does not result in the development of any form of intellectual property rights. The copyrights relating to the reports, if any are held by the client only. Further, the marketing intangible is owned by the Associated Enterprise - Evalueserve Limited, Bermuda.

Accordingly, EVS SEZ India does not own any non-routine intangibles and does not own trade secrets or undertake research and development activities on its account that would lead to the development of non-routine intangibles.

Risk Analysis

Risks are those business factors that may expose a company to the possibility of loss or damage. In other words, risk is the probability that a particular adverse event may occur during a stated period of time, or may result from a particular challenge. The following section discusses the risk borne by Company vis-a-vis Group Companies.

Customer Credit Risk

When a company provides services to a customer in advance of customer payment, the company runs the risk that the customer will fail to make payment. This risk is known as customer credit risk.

EVS SEZ India is engaged in the provision of IT enabled services to its AEs for which it gets remunerated on the basis of the service agreement. Accordingly, EVS SEZ India is not exposed to the customer credit risk.

The AEs cater to end customers and are responsible for recovery of payments. Accordingly, they are exposed to the customer credit risk.

Foreign Exchange Risk

Exchange rate risk relates to the potential variability of profits that can arise because of changes in foreign exchange rates. Such risks arise when doing business in any market that is affected by international trade and can arise even if a company does not conduct actual transactions in a foreign currency.

EVS SEZ India is remunerated by its AEs for services provided to it in US Dollars. However, in the case of third party domestic contracts, EVS SEZ India receives its payments in INR. Accordingly, EVS SEZ India is exposed to foreign currency risk for the AE services.

The AEs do not bear this risk to any significant extent with respect to EVS SEZ India's operations.

Entrepreneurial Risk

There are two distinct sources of uncertainty in entrepreneurial ventures: 1) uncertainty regarding market demand, and 2) uncertainty regarding capability. The first type of uncertainty is characterised as "exogenous uncertainty" because it emerges as a state of nature. The second type of uncertainty is referred to as "endogenous" uncertainty because entrepreneurs realise that there is high risk of failure as it is tied to their capability.

As EVS SEZ India is remunerated on an hourly basis by its AEs, it is exposed to this risk.

The AEs are indirectly exposed to this risk for the Indian operations.

Price Risk

This risk arises due to the competitive pressures prevailing in the market, which lead to price undercutting thereby adversely impacting the profitability of the Company.

EVS SEZ India is compensated for the services rendered by it to its AEs, on an hourly rate basis. As this compensation is subject to market dynamics, the Company is exposed to price risk.

As the AEs compete in the open market, they are exposed to this risk.

Manpower Risk

Manpower is one of the most valuable resources employed by an organisation for carrying out its day-to-day operations. The increasing competition in the market place combined with other uncontrolled variables result in exposure to manpower risk.

As the ITES industry is characterised by a high level of attrition,, EVS SEZ India is exposed to this risk.

The AEs are indirectly exposed to this risk for the Indian operations.”

3. For the assessment year 2009-10, the assessee filed its return of income on 29.09.2009 declaring loss of Rs.2,10,68,613/-.The assessee is a subsidiary of Evalueserve Limited (“EVS Barmuda”) located at Bermuda providing knowledge Process Outsourcing (“KPO”) Services (Intellectual Property, Market Research, Business Research, Financial and Investment Research and Data Analytics Services) to its clients. EVS SEZ India is engaged in the business of providing IT enabled services to its AEs. The company is a 100% Export Oriented Unit under the Special Economic Zone Act guidelines issued by the Government of India. In the Accountant’s Report in Form 3CEB and in the transfer pricing study report following international transactions have been reported :

Nature of transaction	Value of international
Provision of IT Enabled Services (ITES)	231,329,060
Cost of Reimbursements Received	2,136,683

The financial results of the taxpayer and the method of benchmarking as reported in the transfer pricing report is as under:

Particulars	ITES
Operating Revenues	236,696,941
Operating Expenses	258,746,715
Operating Profit	(22,049,7731)
OP/Sales	
GP/Sales	
OP/OC	0.94%
OP/OC after undertaking a capacity	23.28%
adjustment on EVS SEZ India	
Method used	TNMM
PLI	OP/OC
No. of Comparables	8
Mean Margin of Comparable after adjustments for working capital and capacity	-3.37%
Mean Margin of Comparables after adjustments for working capital	12.84%

Ld TPO, however, rejected the TP study of the appellant. Ld. TPO has taken TNMM as the most appropriate method and aggregated both the transactions for the purpose of benchmarking. The margins of comparables have been recomputed by Ld. TPO after considering forex gain/loss as operating in nature as under:

S.No.	Company	PBIT/Cost(%)
1	Aditya Birla Minacs Worldwide Ltd.	0.50%
2.	Cosmic Global Ltd.	48.20%
3.	Genesys International Corporation (Seg.)	58.45%
4	Eclerx Services Ltd.	47.00%

5	Omega Healthcare Management Services Pvt. Ltd.	15.43%
6	Microgenetic. System Ltd.	9.98%
7	Motif India Infotech Pvt. Ltd.	10.41%
	Average	27.14%

Ld. TPO has determined the TP adjustment as under:

Operational Cost	234,494,328
Arm's Length Price at a Margin of 27.14%	298,136,089
Price Received	236,696,941
105% of International Transaction	248,531,788
Adjustment u/s 92CA	61,439,148

4. Pursuant to the order of TPO, Id. Assessing Officer completed the assessment by making upward adjustment on account of Arm's Length Price at Rs.6,14,39,148/-.

5. Aggrieved by such adjustment, the assessee preferred appeal before the Ld. CIT(A), who by way of impugned order allowed it in part. In that process, so far as relevant to these appeals, the CIT(A) excluded the entities Eclerx Services Ltd. and Genesys International Corporation Ltd. while retaining the Cosmic Global Ltd.. Ld. CIT(A) also directed the Ld. A.O./TPO to grant working capital adjustment based on OECD formula and by taking PLR as were taken by State Bank of India for assessment year 2008-09 for working the capital loans. In these circumstances, the assessee filed ITA No. 2516/Del/2015 challenging the inclusion of Cosmic Global Limited in the list of comparables whereas the Revenue filed ITA No. 2966/Del/2015, challenging the exclusion of Eclerx Services Ltd and Genesys International Corporation Ltd. Apart from challenge in respect of comparables, the assessee also complains against capacity

underutilization adjustment made by TPO in spite of the fact that there was a detailed analysis in the TP study. Ld. TPO proceeded on an incorrect basis that this claim was not made in the TP study whereas the order of the Id. CIT(A) is silent on this aspect. In respect of the working capital adjustment granted by CIT(A), the Revenue is in appeal. We shall deal with these aspects hereunder.

6. Firstly, coming to the entity retained by Id. CIT(A), i.e., Cosmic Global Ltd, it is the submission made on behalf of the assessee that this comparable is functionally dissimilar, inasmuch as Cosmic is engaged in the provision of medical transcription services, translation services and software development services; that it is engaged in medical transcription and translation services and hence not comparable with the Assessee; that it has different business model-Cosmic is engaged in outsourcing model- it is engaged in vendor outsourcing as it pays translation charges 57% of the total expenses; that there are insufficient segmental details; that there were abnormal growth of sales (106%); that Cosmic has revenue from 3 sources, i.e., medical transcription and consultancy services, translation and BPO services- it earns 95% of the revenue from translation services which are not comparable to the assessee – the revenue from BPO is only Rs. 27.7 lakhs (less than 75% and less than Rs. 5 crores) hence it fails two filters applied by Ld. TPO himself.at pg. 21 of Ld. TPO order Companies whose ITES revenue is <5 crores and ITES revenue is less than 75% of total operating revenues; and that it has volatile profits at 23.4%, 23.4%, 48.2%, 18.28% and 8.06% for F.Yrs. 2006-07 to 2010-11 respectively. It is therefore, argued on behalf

of the assessee that this is not a good comparable and needs to be excluded.

7. Assessee placed reliance on this aspect on the following decisions (i). NCS Pearson India Pvt. Ltd.- ITA No. 2556/Del/2014, (ii).UT Starcom Inc., ITA No. 1829/Del/2014 – Delhi ITAT, (iii). PCIT vs. Xchanging Technology Services India Pvt. Ltd.-ITA No. 813/2015 –Delhi High Court and (iv).Quark Systems (2010) 132 TTJ (Chd) (SB) and submitted that having regard to the functional profile of the assessee in all these cases, it is emphatically held by higher forums that Cosmic Global Ltd. is not a good comparable.

8. Per contra, Id. DR submitted that the order of Ld. TPO is self-explanatory on this aspect having regard to the functional profit of this entity, by no stretch of imagination could it be said that this is not a good comparable.

9. In so far as this entity is concerned, the functional profile of the assessee stated above is concerned, and we need to compare the profile of Cosmic Global Ltd. In respect of the same assessment year, i.e., 2009-10, profile of this company is concerned by the Judicial Forums. It is not in dispute that this Cosmic Global Ltd. is into the transcription and translation services besides other services. Further, a perusal of the annual report of Cosmic, available in Schedule 13 i.e. Notes Forming part of Financial Accounts ending March 31, 2009 contains the revenue recognition as under :

“1.2 Revenue recognition:

In respect of Medical Transcription Services, and Translation Services the Company follows the practice of raising monthly invoices job-wise on the clients based on the number of lines and number of words respectively, etc., as accepted by them and in respect of Accounts BPO services the invoices are raised after acceptance by the clients on mutually agreed basis.

This year the company has raised the bill on all the jobs accepted and hence the application of proportionate completion method according to AS-9 has not arisen.

Export/Consultancy Services are billed at mutually discussed rates wherever the terms have not been reduced to writing.

Revenue from Operations includes Revenue earned through Translation Services Rs.6,99,35,756.45, through Medical Transcription Rs.9,90,737 and through Accounts BPO services Rs.27,76,090.”

10. Aforesaid revenue recognition shows that Cosmic has three segments viz. medical transcription Rs.0.09 crore, translation services Rs.6.99 crores and Accounts BPO segment Rs.0.27 crores. However, complete segmental data is not available. Furthermore, Cosmic is having abnormal growth of sales i.e. 106% as is evident from profit & loss account, available in the annual report.

11. It is noticed by the Tribunal in the case of NCS Pearson India Pvt. Ltd in ITA No. 2556/Del/2014 for assessment year 2009-10 that this company has outsourced its activities and the outsourcing expenses constitute 57% of the total expenses and that the entire outsourcing is confined to translation charges paid of Rs.3 crores and in view of such activities, of outsourcing and having a different business model apart from having the abnormal growth of sale at 106%, this Cosmic Global is not a good comparable with the assessee which is confined to ITES alone.

12. Further, in the case of UTStarcom Inc. vs. DDIT in ITA No. 1829/Del/2014 for the assessment year 2009-10, the profile of this Cosmic Global Ltd. is considered by the Tribunal and after examining the financials of Cosmic Global Ltd., the Tribunal observed that the activities of outsourcing the translation services and payment of Rs.3 crores for such purpose, which constituted significant portion of its services, makes this company not a good comparable. In this process, the Tribunal placed reliance on the decision of the Tribunal in Macquarie Global Services (P) Ltd. vs. DCIT for A.Y. 2009-10 to reach such a conclusion.

13. In PCIT vs. Exchange Technology Services India Ltd. in ITA No. 813/2015, Hon'ble jurisdictional High Court considered this Cosmic Global Ltd. vis a vis, the entity dealing with ITES and held that outsourcing of major activities by this company renders it not a good comparable to the entity like assessee in this case, who has been in the business in houses. It is, therefore, clear that Cosmic Global is an entity which has been deriving a significant portion of its receipts from outsourcing the translation work and making payment of about Rs. 3 crores and as has been held by the higher judicial forums stated supra, this Cosmic Global Ltd. is not a good comparable and needs to be excluded. Considering all these aspect, we are of the opinion that this is not a good comparable with the assessee and, therefore, direct the Id. AO/TPO to exclude this company from final list of comparables.

14. Next grievance of the assessee is in respect of the capacity underutilization adjustment, in respect of which Id. TPO at page No. 31 at paragraph No. 16 made an observation that the claim of adjustment of low capacity utilization for the ideal capacity, in the TP study, the

assessee has not made any such adjustment and if the claim was correct, it would have made in the TP study itself and not to meet the goal of ALP. But with reference to TP study document at page No. 29, it is demonstrated before us that there was a reference to the capacity underutilization adjustment which missed the attention of the Id. TPO. On examination of para 5.3 and 5.4 of the TP study, we are convinced that this missing of the details relating to the capacity underutilization adjustment resulted in the observation of Ld. TPO that the TP study of the assessee has not made any such adjustment. Further, the order of the Id. CIT(A) is silent on this aspect. Ld. DR submitted that the observations of the Id. TPO in para No. 16 that certain details and data in support of the claim of assessee are required and the assessee may be directed to produce such details before the Assessing Officer/TPO. While recording the same, we remand the issue to the file of Id. A.O./TPO for considering the capacity underutilization adjustment in the light of the TP study and by requiring the details, if any, from the assessee.

15. In respect of Eclerx Services Ltd., exclusion of which is challenged by the Revenue, according to the Revenue, this is a good comparable and reliance is placed on the report of Ld. TPO, whereas according to the assessee, this entity is functionally dissimilar, inasmuch as it is a KPO, engaged in financial services; that it is engaged in data analytics and data process solutions; that it provides very high-end services; that it is recognised as expert in chosen market financial services and retail and manufacturing; that the year of acquisitions is extra-ordinary events; and that it has abnormal margins earned due to extra-ordinary circumstances.

16. Apart from this, it is brought to our notice that in the assessment year 2010-11 in assessee's own case, this comparable is considered by the Tribunal in ITA No. 1467/Del/2015 and was rejected with the following observations :

"12. The next comparable by the assessee is that eClarx Services submitting that it is a knowledge process outsourcing (KPO) unit and therefore cannot be compared with the ITES service provider like assessee. The assessee has relied on the decision of Hon'ble Delhi High Court of Ramgreen Solutions Pvt. Ltd Vs. CIT.

13. The Id DR submitted that the assessee is also a knowledge process outsourcing unit as it employs 616 personnel. He referred to page No. 6 of the order of the Id Transfer Pricing Officer for this. He submitted that assessee's case falls into all three horizontal segments of ITES industries such as call centre and technical support, payment supply chain and analytics. He therefore, stated that eClarx is the right comparable

14. We have carefully considered the rival contentions and perused the annual report of the comparable for AY 2010-11 at page No. 734 to 83.7 of the paper book. The functions of the company are described at page No. 23 of its annual report under management discussion and analysis. It provides that eClerx supports its clients through its two business units- Capital markets and sales and marketing support. Across both these units, the company supports and improves processes that are core of its customers day to day business operations. The company continues to focus on engagements where it can tap the largest percentage of client spend by leveraging its domain expertise and by bringing together consulting, project management and solution based service delivery. In the capital markets division, the company today provides end-to-end financial transaction support services such as trade booking, trade confirmation, asset servicing cash settlements, client servicing risk management and reference data integrity across all asset classes, and its services span both sell side (the large banks) and buy side (the funds and assets managers) Furthermore, the company provides strategic and process consulting services helping clients devise solutions to improve efficiency, reduce risk and meet regulatory and market demands. Similarly in the sales and marketing support division, the company today supports clients in all elements of product and services marketing and sales with a focus on online support to include

content development and management, search engine management, web operations, pricing and customer analytics, product database management and catalog audits. The company is also pursuing a strategy of creating a portfolio of platform attached services, by creating a suite of services that are complementary to industry standard it platforms. A glance at the functional profile of this company divulges that it is basically a Knowledge Process Outsourcing (KPO) company providing data analytics and data process solutions to global clients. This company provides end to end support through trade life cycle including trade confirmations and settlements etc. It also provides sales and marketing support services to leading global manufacturing, retail, travel and leisure companies through its pricing and profitability services. Further this company has also developed it tool and process automation. From the above discussed nature of business carried on by e- Clerx Services Ltd., it is patent that the same being a KPO company, is quite different from the assessee, providing only IT enabled services to its AE, which fall in the realm of BPO services. Apart from that, it is further observed that this company has significant intangibles which it uses in rendering KPO services, against which the assessee does not have any intangibles. The Hon'ble jurisdictional High Court in Rampgreen Solutions (P.) Ltd. v. CIT [2015] 234 Taxman 573/60 taxmann.com 355 (Delhi), has held that e-Clerx Services Ltd., being engaged in KPO, cannot be treated as comparable of an assessee engaged in rendering BPO services. In view of the direct judgment of the Hon'ble jurisdictional High Court on the point, we direct to eliminate e-Clerx from the list of comparables. As such, e-Clerx Services Ltd. cannot be considered as comparable."

17. It is not the case of the Revenue that there is any change in facts and circumstances of the case to render this view taken by the Tribunal in the case of assessee as perverse. When the facts remain same, we find it difficult to take a different view for this assessment year, in as much as the functional profile of the assessee company stands unchanged while respectfully following the view taken by the Co-ordinate Bench, we hold that Eclerx Services Ltd. is not a good comparable and the Id. CIT(A) rightly directed its deletion.

18. Now, coming to the Genesys International Corporation Ltd, (GIS) the assessee has submitted that Genesys is mainly engaged in the area of Geographical Information System Services and the company provides high end GIS services A" which include the generation, processing, management and maintenance of data for GIS and other information management systems and all other services necessary for successful geospatial data implementation. The GIS services performed by Genesys is functionally different from the functions performed by the Appellant under IT enabled services segment. In this regard, the assessee had submitted as under :

" Genesys International Corporation Ltd. ("Genesys"): Should be rejected

The Ld. TPO has considered Genesys as an ITBS/BPO comparable. The Appellant does not agree to the selection of Genesys as a comparable and the content.ion(s) of the Appellant in this regard, are detailed below

Appellant's contentions:

4.3.5.] Functionally different: Engaged in geographical information services, engineering services and software product development services

The Appellant would like to bring to your goodselfs notice that Genesys is not functionally comparable to the Appellant. It is engaged, in providing geographical information services comprising of photogrammetry, remote sensing, cartography, data conversion and other computer based related activities. The business model of Genesys is different from that of the Appellant.

Geographical Information Services (GIS):

Your goodself s attention is drawn to the following extract of the annual report for FY 2008-09 (Page 39) which evidences the fact

that the business model of Genesys is different from that of the Appellant and hence should be rejected:....

Further, as mentioned on page xvi and xvii of the Annual Report of Genesys, the company is engaged in following range of activities

- > GIS consulting: Offers consultancy services for needs assessment, system requirement, analysis and design, geospatial data services and application development;*
- > 3D Mapping: Large scale .3D content building;*
- > Navigation Maps: created data, base for maps navigation and running an "offshore production centre" for data updates and enhancements;*
- > Lidar: Includes ground point classification, building and power line classification vectorization and vegetation classification;*
- > Photogrammetry remote sensing services: offers complete range of photogrammetric services for municipal mapping, utilities mapping, road and highway planning, cadastral mapping etc.;*

Utility services: offers end to end services including consulting to build enterprise-wide GIS to enhance lifecycle management of both the physical network and customers' work processes, Network Data Building & Maintenance, Mapping & Survey, Integration Services, Network Planning, Land-base Conflation to utility companies;

Image Processing: satellite data processing for geospatial domain;

Surveying: surveying through 'Electronic Total Station' (ETS), Differential Global Positioning System' (DGPS)&other contemporary surveying techniques for mapping in addition to management large human resource for collection of 'Point of Interest' (POI) attributes;

Business geographies and logistics: decision support, system, that can be customized, to suit the requirements of the end-user;

Cadastral Mapping;

City Space: provides unique geo data content for most urban areas of India, and

Telecommunication

Engineering Services:

Further, Genesys is engaged in offering LIDAR (Light Detection and ranging) engineering services including Mobile Mapping survey in India and has the country's largest fleet of mobile mapping units including sizeable number of High Definition (LiDAR) scanning systems. It offers the following engineering services: (Source: http://www.igenesys.com/LiDAR_Engineering.html)

- *Survey and Mapping*
- *Comprehensive 2D / 3D Topographic feature maps*
- *Contour Maps (at user defined intervals)*

3D data sets (DSM, DEM, DTM)

Engineering drawings – cross/Long sections

3D Animation/Fly through”

19. Ld. CIT(A) analysed the functional profile of the assessee as well as Genesys International Corporation Ltd in the light of decision of Hyderabad Tribunal in the case of Parexel International (India) Private Limited to reach a conclusion that this company is functionally different in as much as it is providing data management and data processing services which are in the nature of low end services and in view of functional dissimilarity, Genesys International Corporation Ltd cannot be a good comparable with the company like assessee. Further, this Genesys International Corporation Ltd is considered in the case of Mercer

Consulting (India) vs. DCIT in ITA No. 966/Del/2014 for assessment year 2009-10.

20. The Tribunal considered the issue in the light of CBDT Circular SO 890 (E) dated 26.9.2000 in para 14.3 of the order as under :

“Ld. TPO on page 48 of his order has examined CBDT Circular SO 890(E) dated 26.09.2000 which provides a detailed list of products or services that can be covered under the ITES for the purposes of Section 10A and 10B of the Act. In this Circular, the Information Technology Enabled Products/Services have been divided into fifteen categories, starting with Bank Office operations, Call centres etc. and ending with Website services. From the very description of such services, it is palpable that even though these fall under the overall ITES category, but some of them are quite different from each other. To cite, service at Sl.No. (vi) of this Circular is 'Geographic Information System services and at Sl. No. (vii) is 'Human Resources Services.' No doubt, all these fifteen categories of products/services have been included under the major head of 'Information Technology Enabled Services' (ITES), but most of them are quite distinguishable from others. In our considered opinion, the fifteen broad categories set out in this Circular cannot per se be claimed as similar to each other. A cursory look at these products/services transpires that some of them are functionally quite different from each other. Further the level of investment required for providing such services is also not consistent. In our considered opinion, the mere fact that two services are placed under this category do not become automatically comparable. If a case providing one category of services under ITES is claimed as comparable with another in the category of service under ITES as per this circular, then it must be shown ex facie that it is broadly similar. Adverting to the facts of the instant case, we find that the services rendered by Genesys fall under clause (vi) with the heading 'Geographical Information Systems Services', whereas those rendered by the assessee fall partly under clause (vii) with the heading 'Human Resources Services' and partly under clause (xi) with the heading 'Payroll'. On juxtaposition examination of these two sets of services, we find

that there is a vast difference which make one quite distinct from the other. In view of such functional incomparability between the assessee and Genesys, we hold that this company cannot be treated as comparable. We, therefore, direct to exclude this case from the list of comparables.”

21. After considering the functional profile of this Genesys International Corporation Ltd, the Tribunal observed that Geo Special services provided by this Genesys International Corporation Ltd relate to the relative position of things on the earth's surface. These basically include 3D mapping, Navigation maps, image processing, Cadastral mapping etc. And do not match with the services provided by the entity like assessee which are into ITES services. Further, for the assessment year 2009-10, Hon'ble Punjab & Haryana High Court considered this company in the case of CIT vs. M/s. Mercer Consulting for A.Y. 2009-10 to reach a conclusion that Genesys International Corporation Ltd. provides a full range of geospatial services to its clients. Geospatial services relate to the relative position of things on the earth's surface. This includes 3D mapping, navigation maps, image processing and cadastral mapping etc. And such services are entirely different from ITES. On a careful consideration of the functional profile of the assessee as noted supra vis a vis the services provided by Genesys International Corporation Ltd, we have no hesitation to hold that it is not a good comparable to the assessee and rightly excluded by the Id. CIT(A). We decline to interfere with the exclusion of Eclerx Services Ltd. and Genesys International Corporation Ltd and to that extent, Revenue's case is rejected.

22. Lastly coming to the working capital adjustment, Id. CIT(A) gave a very detailed reasoning vide paragraph No. 5.5 of his order. For the sake of completeness, we extract such observations hereunder :

“5.5 As regards working capital adjustment, the appellant has submitted as under:

“From an economic perspective, the Appellant would like to submit that, in terms of business and risk comparability, a significant aspect for all entities is the requirement of working capital. There are three critical elements in the working capital policy of a firm: (a) lags between the time products are sold and payments on these sales are received, which create accounts receivable, (b) lags between the time inputs are purchased and payments on these purchases become due, which create accounts payable and (c) lags in the physical process of production and sale, which create inventories. By allowing customers/ creditors to defer payment for a certain period, any company foregoes the right to receive its revenues immediately and to earn, additional income by re-investing these revenues over the deferral period. All companies have their own limits for deferring such payments and these limits determine that working capital cycles. Such cycles would have a direct impact on the revenue and cost of any entity. Accordingly for a due economic analysis, it becomes important to make an adjustment for different working capital positions so as to eliminate the impact of such factors from an arm’s length comparison.

In view of the above it is humbly submitted that adequate adjustment needs to be made for differences in working capital position of the Appellant vis-a-vis comparable companies.

In this regard, the Appellant would like to place reliance on the following case laws:

..Further, in case of Qualcomm India Pvt. Ltd. Vs. ACIT (ITA No.

5239/Del/2010), it was held :

Quote

“.....In the present case the Assessee is engaged in the business of software development and providing marketing services, hence there is no dispute that appropriate adjustment to account for difference in working capital employed by the Assessee vis. a vis. the comparable

companies for software development services is required to be considered. Similarly making of suitable adjustments to (account for differences in the risk profile of the Assessee vis. a vis. the comparable companies for software development services is also required to be considered”

Unquote

Further. n was held in Capgemim India Private Limited case (ITA No 786 1 Mum/ 201 I):

Quote

“..In our view, working capital adjustments are required, to be made because these do impact the profitability of the company,,,,working capital cannot be denied to the Assessee only on ground that the Assessee had not made any claim in the TRP study if it is possible to make such adjustment. In our view, working capital adjustment will improve the comparability. ”

Unquote [Emphasis supplied]

Thus, the approach of adopted by the Appellant wherein, it made working capital adjustments to account for the differences in working capital positions of the comparable companies vis-a-vis the Appellant had a valid sanction of the law.....

The Appellant, wishes to submit that the Appellant has demonstrated that the difference in working capital is resulting in a difference in the margins earned by the Appellant and the comparables.

As mentioned above the Appellant relied on the available guidance from, the OECD's guidelines 2010 and performed working capital adjustments to the comparable companies as per the formula provided in OECD. ”

I have examined the issue of working capital adjustment. For the purposes of proper comparability differences in the prices charged by the appellant and the comparables arising on account of different levels of working capital are required to be eliminated. The OECD guidelines also support, this view, In a competitive environment the price should include an element to reflect the different payment and receipt terms and compensate for the timing effect. Guidelines further say that making a working capital adjustment is an attempt to adjust for the difference in time value of money between the tested party and potential comparables with an assumption that the difference should be

reflected in profits. Though guidelines say that as a matter of routine such adjustment should not be made but also state that the same should be resorted to if it improves the comparability. The provisions contained in Rule 1QB(3) also mandate adjustments wherever there are material differences in the situations of comparables and the taxpayer, The different benches of the ITATs have upheld such adjustment [Vedaris Technology ITAT (Del); Sony India 1114ITD448(Del)], Mentor Graphics, E Gain communication 2008-TIOL-282-ITAT-Pune, Global Vantage 2010-TOP-24 ITAT-DEL, TNT India P Ltd 2011-TII-39-ITAT-BANG-TP etc. Accordingly, the AO/TPO is therefore directed to grant working capital adjustment based on the OECD formula and by taking the PLR as adopted by the State Bank of India in FY 2008-09 for working capital loans”

23. In view of the considered observations of the Id. CIT(A), we are of the considered opinion that no interference is required and while upholding the same, we reject the challenge of the Revenue on this aspect.

24. For the above reasons, the appeal of the assessee is allowed in part for statistical purposes and appeal of the Revenue is dismissed.

Order pronounced in the open court on this the 02nd day of February, 2021 immediately after the conclusion of the hearing over virtual mode.

Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 02/02/2021
'aks'