

IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA Nos. 2095/Mum/2012
(Assessment Year: 2007-08)

ITO – (8)(2)(1) Room No. 212/216A, 2 nd Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	Vs.	M/s. Integreon Managed Solution (India) Pvt. Ltd. 402, Building No. 4, Infinity Park, Gen. A. K. Vaidya Marg, Malad(E), Mumbai-400 097
PAN/GIR No. AAACI 7431 A		
(Revenue)	:	(Assessee)

ITA Nos. 2307/Mum/2012
(Assessment Year: 2007-08)

And

ITA No. 586/Mum/2015
(Assessment Year : 2010-11)

M/s. Integreon Managed Solution (India) Pvt. Ltd. 402, Building No. 4, Infinity Park, Gen. A. K. Vaidya Marg, Malad(E), Mumbai-400 097	Vs.	ITO – (8)(2)(1) Room No. 212/216A, 2 nd Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AAACI 7431 A		
(Assessee)	:	(Revenue)

Assessee by	:	Shri Ketan Ved
Revenue by	:	Shri Minal Kamble

Date of Hearing	:	09.06.2023
Date of Pronouncement	:	07.09.2023

ORDER

Per Kavitha Rajagopal, J M:

ITA Nos. 2095/Mum/2012 and 2307/Mum/2012

These are cross appeals filed by the Revenue and the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2007-08.

2. The grounds raised by the assessee are as below:

1. **General**

1.1 On the facts and in the circumstances of the case and in law, the learned Transfer Pricing officer (Herein after referred as The Learned TPO' or TPO') and the learned Income-tax Officer (Herein after referred as The Learned AO' or 'AO') erred in comparing the appellant company's low end back office support functions (risk free service provider) with the entrepreneurial companies and the Hon'ble Commissioner of Income Tax – Appeals [Herein after referred as The Hon'ble CIT(A)' or 'CITA)'] further erred in:

1.2 Confirming the action of the learned AO /TPO and making an adjustment to the appellant company's total income based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').

2. **Ground 1: Hon'ble CIT(A) and the learned AO / TPO erred in understanding the appellant company's low end back office support services**

2.1 On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble CIT(A) further erred in understanding the low end back office support services (risk free service provider) provided by the appellant to its associated enterprise.

3. **Ground 2: Learned AO TPO erred in non-considering the fact that there is no shifting of profit outside India**

3.1 The learned AO TPO erred in ignoring the fact that IMS US undertakes all the entrepreneurial risks and has also incurred loss on a consolidated level for F.Y 2006-07 (December 31, 2006 and December 31, 2007). However the appellant company being a risk mitigated captive service provider is always compensated on a cost-plus model. Thereby, by no stretch of imagination, one can conclude that the profits have been shifted outside India on account of related party transactions.

4. **Ground 3: Hon 'ble CIT(A) erred in confirming the action of learned AO / TPO in rejecting the contemporaneous search carried out by the appellant company**

4.1 On the facts and in the circumstances of the case and in law, the learned AO / TPO erred and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned Assessing Officer ('A.O.' for short) /TPO in disregarding the benchmarking analysis and comparable companies selected by the appellant company 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 Income-tax Rules, 1962 ('the Rules') and the various submissions made by the appellant company.

5. **Ground 4: Hon'ble CITA) erred in confirming the action of learned AO / TPO in carrying out the fresh search**

5.1 On the facts and in the circumstances of the case and in law, the learned A /TPO erred and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned AO /TPO in conducting a fresh benchmarking analysis using non contemporaneous data and substituting the appellant company's analysis with fresh benchmarking analysis on his own conjectures and surmises. Thus, the appellant prays that the fresh benchmarking analysis conducted by the learned AO /TPO is liable to be quashed or alternatively ignored.

5.2 On the facts and in the circumstances of the case and in law, the learned AO /TPO erred and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned Assessing Officer ('A.O.' for short) /TPO in rejecting the reasons provided by the appellant for the rejection of comparable companies selected by the learned AO /TPO.

6 Ground 5: Hon'ble CIT(A) erred in confirming the action of learned AO TPO in comparing the appellant company's low end back office support functions (risk free service provider) with the entrepreneurial comparable companies

6.1 The learned AO/ TPO and the Hon'ble CIT(A) failed to appreciate the business model of the appellant company (risk free service provider) and as a consequence erroneously compared the appellant company's margins with the following high end entrepreneurial companies:

Sr. No.	Name of the Company
1	Caliber Point Business Solutions Limited (Seg)
2	Eclerx Services Limited
3	HCL Comnet Systems (Seg)
4	Informed Technologies India Limited
5	Mold-Tek Technologies Limited (Seg)

6.2 The learned AO / TPO and the Hon'ble CIT(A) erred in ignoring the fact that more than 85 per cent employees of the appellant company's were graduates and below. Thus, by no stretch the appellant company is engaged in providing high end services.

7 Ground 6: Hon'ble CIT(A) erred in confirming the action of learned AO TPO in disregarding the multiple year data

7.1 On the facts and in the circumstances of the case and in law, the learned AO /TPO erred and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned Assessing Officer ('A.O.' for short) /TPO in rejecting the contention of the appellant to compute the margin of the alleged comparable companies based on multiple year financial data.

3. The additional grounds of appeal raised by the assessee dated 18.02.2014 are as follows:

1:0 Re.: Validity of Order:
ADDITIONAL GROUNDS OF APPEAL

1:1 The Assessing Officer has erred in passing the impugned order under section 143(3) r.w.s. 144C(3) of the Income-tax Act, 1961 ("the Act") without complying with the mandatory provisions of section 144C of the Act.

1:2 The appellant submits that the Assessing Officer has erred in issuing a Notice of Demand dated 06 December 2010 u/s. 156 of the Act and a Notice dated 06 December 2010 u/s. 274 r.w.s. 271 (1) (c) of the Act alongwith the Order dated 06 December 2010

1:3 The Appellant submits that the impugned Order dated 22 February 2011 passed u/s.143(3) r.w.s. 144C(3) of the Act be struck down as void ab-initio and bad in law

2:0 Re.: General:

2:1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

4. The brief facts are that the assessee company was incorporated in India dated 06.09.2000 as a wholly owned subsidiary of Integreon Managed Solutions Inc., USA and is an offshore delivery centre for IMS US which provides documentation and presentation services in the area of computer graphics, layout, design and web development. The assessee submits that these services are developed with the help of various software applications, and are primarily delivered in electronic form. The assessee company provides low end back office support services to IMS US and IMS UK provides high value, complex BPO value to its customers. The assessee company filed its return of income dated 29.10.2007 declaring total income at Rs.1,50,067/- and the same was processed u/s. 143(1) of the Act. The assessee's case was selected for scrutiny and notice u/s. 143(2) and 142(1) was duly issued and served on the assessee. The A.O. observed that the assessee has entered into international transactions as reported by the assessee in its Form 3CEB which are as below:

S. No.	Name of the Associated Enterprises	Description of the transactions	Amount (in Rs.)	
			Paid	Received
	Integreon Managed Solutions Inc., USA	Reimbursement for capital purchases	321,615	-
		Provision of documentation and presentation services	-	35,14,02,015
		Employee Incentive	-	441394

5. The Assessing Officer ('A.O.' for short) made a reference to the Transfer Pricing Officer ('TPO' for short) u/s. 92CA(1) who vide order dated 27.10.2010 passed u/s. 92CA(3) of the Act proposed an adjustment of Rs.4,56,50,117/-. The A.O. then passed the draft assessment order dated 06.12.2010 u/s. 143(3) r.w.s. 144C of the Act after duly considering the submission of the assessee and made an adjustment of Rs.4,56,50,117/-.

The assessee made a submission to the A.O. that it had opted to exercise its option to appeal to the Id. CIT(A) against the impugned addition and not processed before the learned Dispute Resolution Panel ('Id. DRP' for short). Therefore, final assessment order was passed on 22.02.2011.

6. The assessee was in appeal before the Id. CIT(A).

7. The Id. CIT(A) has partly allowed the appeal filed by the assessee for which both the Revenue and the assessee are in appeal before us, challenging the impugned order of the Id. CIT(A).

8. The assessee has raised the additional ground, wherein the assessment order passed u/s. 143(3) r.w.s. 144C(3) of the Act challenged on the ground that the A.O. has failed to comply with the mandatory provision of section 144C of the Act by issuing a notice of demand dated 06.12.2010 u/s. 156 of the Act and a notice dated 06.12.2012 u/s. 274 r.w.s. 271(1)(c) of the Act along with the draft assessment order dated 06.12.2010. As the legal issue raised by way of additional ground goes to the root of the case, after hearing parties we hereby admit this ground as per the proposition laid down by the Hon'ble Apex Court in the case of *National Thermal Power Co. Ltd. vs. CIT* [1998] 229 ITR 383 (SC). We are inclined to decide the additional ground as the same would determine whether the assessment order passed by the A.O. was valid or void-ab-initio before getting into the merits of the case.

9. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that the demand notice dated 06.12.2010 issued u/s. 156 of the Act and the

notice u/s. 274 r.w.s. 271(1)(c) of the Act issued along with the draft assessment order violates the mandatory provisions of section 144C of the Act. The ld. AR for the assessee further stated that the A.O. did not have jurisdiction to raise a demand and levy penalty even before passing of the final assessment order. The ld. AR relied on the decision of the Tribunal in the case of *Marriott International Licensing Company BVV vs. DCIT (IT)* (in ITA No.1621/Mum/2021 vide order dated 03.02.2023) and *Aker Powergas P. Ltd. vs. Dy. CIT* (in ITA No. 7211/Mum/2017 vide order dated 23.06.2022).

10. Per contra, the learned Departmental Representative ('ld.DR' for short) for the Revenue contended that the said action of the A.O. has not caused any prejudice to the assessee where the same amounted to only a draft demand notice and not a final demand notice. The ld. DR relied on the orders of the lower authorities.

11. We have heard the rival submissions and perused the materials available on record. The additional ground no. 1 raised by the assessee challenging the validity of the order is taken up for adjudication by us before getting into the merits of the case for the reason that the said legal ground goes to the very root of the case wherein the validity of the assessment order is challenged as void-ab-initio. It is observed that the assessee was engaged in providing IT enabled and support services in the nature of documentation and presentation services, business support services and legal support services to its AEs. The assessee had bench marked its international transaction by applying transactional net margin method (TNMM) which method was also adopted by the ld. TPO for determining the ALP. The ld. A.O./TPO determined the total income by making transfer pricing adjustment of Rs.4,56,50,117/- by rejecting the comparable companies considered by the

assessee and had considered the other comparable companies for bench marking the said transaction for determining the ALP. The assessee had challenged the selection of comparable companies made by the TPO namely Eclerx Services Ltd. and Mold Tek Technologies Ltd. which according to the assessee has been decided in favour of the assessee by various decisions of the Tribunal and the Hon'ble High Courts. The Revenue, on the other hand, had challenged the order of the Id. CIT(A) in rejecting some of the comparables selected by the Id. TPO. On this background, the assessee vide submission dated 18.02.2014 had raised the additional ground challenging the validity of the order. On perusal of the records, it is evident that the Id. A.O. while passing the draft assessment order dated 06.12.2010 had issued a notice of demand u/s. 156 and the penalty notice u/s. 274 r.w.s. 271(1)(c) of the Act. The Id. AR for the assessee has relied on the following decisions which are cited hereunder for the proposition that the draft assessment order issued along with the demand notice and penalty notice has been held to be without jurisdiction and, hence, null and void:

- a. *Decision of the Mumbai Bench of the Tribunal in the case of Jazzy Creations Pvt. Ltd. v/s. ITO reported in [2017] 83 taxmann.com 244;*
- b. *Decision of the Delhi Bench of the Tribunal in the case of Olympus Medical Systems India Pvt. Ltd. v/s. DCIT [ITA No. 8892/Del/2019];*
- c. *Decision of the Delhi Bench of the Tribunal in the case of Perfetti Van Melle India Pvt. Ltd. v/s. ACIT [ITA No. 9116/Del/2019];*
- d. *Decision of the Delhi Bench of the Tribunal in the case of Suretex Prophylactics (India) Ltd. v/s. ACIT [IT(TP)A No. 430/Bang/2016];*
- e. *Decision of the Pune Bench of the Tribunal in the case of Atlas Copco India Ltd. v/s. DCIT [ITA No. 649/Pun/2013 and 1726/Pun/2014 alongwith CO Nos. 34 & 35/Pun/2019];*
- f. *Decision of the Pune Bench of the Tribunal in the case of DCIT v/s. Rehau Polymer Pvt. Ltd. reported in [2017] 85 taxmann.com 23;*
- g. *Decision of the Pune Bench of the Tribunal in the case of Suktas India Pvt. Ltd. vs.ACIT reported in [2017] 77 taxmann.com 19;*

h. *Decision of the Delhi Bench of the Tribunal in the case of Mavenir India Pvt. Ltd vs. DCIT [ITA no. 203/Del/20101];*

i. *Decision of the Pune Bench of the Tribunal in the case of Skoda Auto India Pvt Ltd v/s. ACIT [ITA No. 2344/ Pun/2012]*

12. The Revenue, on the other hand, has not controverted the said fact and has merely defended that there was no prejudice caused to the assessee in issuing the demand notice and the penalty notice along with the draft assessment order.

13. On a bare reading of the provision of section 144C of the Act, it is evident that the A.O. has to first forward a draft assessment order to the eligible assessee in case where he proposes to make any variation to the assessed income of the assessee for which the assessee shall within 30 days of the receipt of the draft order either file his acceptances or objection for the variation proposed to the A.O. The A.O. thereafter should complete the assessment on the basis of the draft order, after the A.O. receives the acceptance of the assessee or when no objections are received within a specified period from the assessee. As per the provisions of the Act, the draft assessment order in no way culminates to arriving at the demand and also the levy of penalty. It can be inferred from the act of the A.O. in issuing the demand notice along with the draft assessment order that the demand got crystalised on passing of the draft assessment order thereby converting the draft assessment order to be the final assessment order passed by the A.O. The intention of the legislature is clear where it has proposed a draft assessment order for the purpose to show cause the assessee whether he accepts or objects to the proposed addition. The assessee has placed reliance on the decision of the Tribunal in the case of *Aker Powergas P. Ltd.* (supra), wherein the Tribunal by placing reliance on the decision of the Pune Bench of the Tribunal in the case of *Atlas Copco India Ltd. v/s. DCIT* [ITA No. 649/ Pun/2013 and

1726/ Pun/ 2014 alongwith CO Nos. 34 & 35/ Pun/2019] has held that on identical facts, the assessment order was held to be null and void. The ld. AR had also relied on a plethora of cases wherein the said proposition has been reiterated by various benches of the Tribunal and also in the case of Hon'ble Madras High Court in the case of *Vijay Television (P.) Ltd. vs. DRP* [2014] 369 ITR 113 (Mad.) where the Hon'ble High Court held that the omission on the part of the A.O. to follow the mandatory procedures is not a curable defect nor was it a procedural irregularity. We would also like to place reliance on the decision of the Hon'ble Jurisdictional High Court in the case of *Pr. CIT vs. Lion Bridge Technologies Private Limited* [2019] 260 Taxman 273 (Bom), wherein it was held that failure to follow the mandatory procedures will render the assessment order null and void.

14. By respectfully following the above said decisions, we hereby hold the assessment order to be null and void. As the assessment order has been held to be invalid, we do not find it necessary to adjudicate the other grounds raised by the assessee and the Revenue.

15. In the result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

ITA No. 586/Mum/2015

16. This appeal has been filed by the assessee challenging the order of the A.O. pursuant to the direction of the ld. DRP relevant to A.Y. 2010-11. The assessee has raised the following grounds of appeal:

1.0 Adjustment/addition of Rs. 5,56,38,789/- on account of provision of back office support services to Associated Enterprises (AEs'')

1.1 The Assessing Officer / the Transfer Pricing Officer / the Dispute Resolution Panel has erred in making an upward adjustment of Rs. 5,56,38,789 to the total income of the Appellant by holding that the international transactions relating to the back office support services provided by the Appellant to its AEs is not at an arm's length.

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

1.3 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the Assessing Officer / the Transfer Pricing Officer/ the Dispute Resolution Panel has erred in characterizing the low end back-office services which are in the nature of business process outsourcing' as high-end knowledge process outsourcing".

1.4 The Appellant submits that the Assessing Officer be directed to delete the upward adjustment of Rs. 5,56,38,789/- made by him to the Appellant's total income and to re-compute its total income and tax liability thereon accordingly.

2.0 General

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

17. The brief facts are that the assessee filed its return of income dated 14.10.2010, declaring total income at Rs.2,03,428/-. The assessee's case was selected for scrutiny. The A.O. made reference to the TPO u/s. 92CA(1) of the Act for the following international transaction entered into by the assessee with its AE:

Sr. No.	Description of the transactions	Value (Rs.) AY 2010-11	AY 2009-10	Method used
1	Provision of Documentation and Presentation services	60,64,54,221	57,00,82,975	TNMM
2	Reimbursement	-	18,403	CUP

18. The operating profit and operating cost accounts of the assessee has been worked out as following :

Profit and loss account	Year ended 31 st March	As per P and L
Income	60,90,10,934	60,90,10,934
Other Operating Income	2,89,839	2,89,839
Bank Interest		2,03,428
Less: Operating expenditure		
Personnel costs	30,75,19,489	30,75,19,489
Administrative and other expenses	15,12,35,554	15,12,35,554

<i>Foreign Exchange Loss</i>		2,43,65,712
<i>Loss on sale of fixed assets</i>		6,427
<i>Interest</i>		2871957
<i>depreciation</i>	5,44,95,352	5,44,95,352
<i>Total operating cost ('TC')</i>	51,32,50,378	54,04,94,491
<i>Operating Profit ('OP')</i>	9,60,50,378	6,90,09,710
<i>OP/TC</i>	18.71%	

19. The assessee's OP/TC margin was determined at 18.71%. It is observed that the lower authorities had relied on the order of the A.O. in treating the assessee as KPO during the assessment for A.Ys. 2008-09 and 2009-10, by rejecting the contention of the assessee that it was providing ITES services. The filters applied by the assessee and TPO are as follows:

<i>Filters adopted by the assessee</i>	<i>Filters adopted by the Transfer Pricing Officer ('TPO' for short)</i>
<i>Operating income/sales > 50%</i>	<i>Operating income/sales > 75%</i>
<i>Research and Development /sales < 3%</i>	
<i>Net fixed assets/sales < 200%</i>	<i>Net fixed assets/sales < 200% (However, this has to be seen case by case)</i>
<i>Average sales > 1crore</i>	<i>Income from IT enabled services > Rs.1 crores</i>
<i>Positive net worth</i>	<i>Companies incurring persistent losses for last 3 years</i>
<i>Advertisement marketing and distribution expenses /sales<3%</i>	
<i>RPT/Total revenue < 10%</i>	<i>RPT/Total revenue < 25%</i>
	<i>Export sales/total sales > 75%</i>
<i>Multiple year data</i>	<i>Single year data</i>
	<i>Income from ITes/operating revenue > 75%</i>

20. It is observed that the A.O./TPO had rejected the comparables selected by the assessee and had accepted only one comparable namely e4e Health Care Business Services Pvt. Ltd. and had rejected the other comparables for the reason that the current year data was not used, comparables selected by the assessee did not stand scrutiny of FAR analysis, the comparables was in the nature of performing different kinds of services and the selection of the companies was made with significant controlled transactions or

related transactions. The TPO rejected the objections of the assessee and included the following comparables :

<i>Sr. No.</i>	<i>Comparables</i>	<i>Margins</i>
1	<i>Acropetal Technologies Ltd. (Seg)</i>	<i>9.84%</i>
2	<i>Eclerx Services Limited</i>	<i>55.94%</i>
3	<i>Accentia Technologies Ltd.</i>	<i>43.07%</i>
4	<i>Cosmic Global Limited</i>	<i>16.59%</i>
5	<i>Nittany Outsourcing Services Pvt. Ltd.</i>	<i>19.52%</i>
	<i>Average</i>	<i>28.99%</i>

21. The Id. TPO vide order dated 30.11.2013 passed u/s. 92CA(3) of the Act made an upward adjustment to the arms length price by Rs.7,98,64,207/- in relation to the international transaction entered into by the assessee company with its AE. The Id. A.O. then passed a draft assessment order dated 28.01.2014 u/s. 144C(1) of the Act where the proposed addition of Rs.7,98,64,207/- was made on account of adjustment in arms length price of the international transaction. The assessee filed its objection before the Hon'ble DRP who vide direction dated 07.10.2014 u/s. 144C(5) of the Act was passed after disposing off the objections raised by the assessee, wherein the adjustment made by the A.O. was confirmed. The A.O. then passed the final assessment order dated 28.11.2014 in pursuance to the direction of the Id. DRP by making a transfer pricing adjustments of Rs.5,56,38,7819/- after following the direction of the DRP and recalculations made by the Id. TPO.

22. The assessee is in appeal before us, challenging the impugned order made by the A.O.

23. The Id. AR for the assessee contended that the international transaction entered into by the assessee to its AE related to the back office support services and the same

were determined at arms length price. The ld. AR for the assessee further stated that the lower authorities have wrongly interpreted the low end back office services which are in the nature of BPO to be high end knowledge process out sourcing. The ld. AR relied on the assessee's case for A.Y. 2011-12, wherein it was held that Exclerx Services Ltd. selected as comparable by the TPO was functionally different from that of the assessee company thereby directing the TPO to exclude the said comparable while bench marking the international transaction of the assessee for determination of the ALP. The ld. AR relied on the decision of the Tribunal in ITA No. 1074/Mum/2016 along with the other decisions.

24. The ld. DR contended that the transfer pricing report of the assessee infers that the assessee provides services in the nature of KPO and that the assessee has failed to adopt proper filters including the validity export filter of >75% for the reason that the assessee's turnover was mainly from its export to its AEs abroad. The ld. DR further stated that the TPO has rightly rejected some of the comparables selected by the assessee and has included four comparables from the assessee's own accept/reject matrix. The ld. DR relied on the orders of the lower authorities.

25. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee has objected to the inclusion of the comparable namely Eclerx Services Ltd. selected by the TPO for the reason that the said comparable company was a KPO. The lower authorities have rejected the contention of the assessee for the reason that the co-ordinate bench in the case of *Agilent Technologies (International) Private Limited v. ITO* TS 165 IT 2013 (Del) has held that the said

comparable was similar to that of the assessee and, hence, was rightly included as a comparable by the TPO. The assessee contended that the annual report of Eclerx Services Ltd. showed substantial work in the nature of outsourcing to various parties and that the business model of Eclerx Services Ltd. is different from that of the assessee and, hence, should not be taken as a comparable for bench marking the international transaction of the assessee. The assessee further stated that Eclerx Services Ltd. was also into financial services along with the sales and marketing services and has not given separate segmental information. The assessee has relied on the decision of *B C Management Services P. Ltd. vs. DCIT* [2017] 83 taxmann.com 346 (Del-Trib), which was upheld by the Hon'ble Delhi High Court and had also relied on the decision of the Delhi Tribunal in the case of *Agilent Technologies (International) Private Limited* (Supra) wherein it was held that the comparables with different business model and no segmental business available, was to be rejected. The ld. AR had placed reliance on the decision of the co-ordinate bench in assessee's case for A.Y. 2011-12, wherein Eclerx Services Ltd. has been held to be not a comparable for the reason that it was functionally different from that of the assessee company.

26. The assessee contended that if Eclerx Services Ltd. was rejected as comparable then the assessee's margin would be at arms length. The relevant extract of the said decision is cited hereunder for ease of ready reference:

16. We have heard the rival submissions. We find in the facts of the instant case and in the light of the arguments advanced by both the sides, we feel there is no need to address the preliminary issue as to whether the assessee is a BPO or KPO. We find that the ld.AR was very fair in stating that once the comparable Eclerx is excluded from the list of comparables chosen by the ld.TPO, then its margin would be through, warranting no adjustment to ALP in respect of international transaction carried out by it. Hence, we proceed to address that particular

comparable alone in this order. We find that the ld.AR placed reliance on the following decisions to support his contentions:-

- (i) Delhi Tribunal decision in the case of BC Management Services (P) Ltd. v. DCIT [(2017) 83 taxmann.com 346 (Delhi-Trib.) for assessment years 2011-2012 and 2012-2013 - dated 25.05.2017.
 - (ii) Hon'ble Delhi High Court decision in the case of Pr.CIT v. B.C.Management Services (P.) Ltd. reported in [(2018) 89 taxmann.com 68 (Delhi)] dated 28.11.2017.
 - (iii) Delhi Tribunal decision in the case of Agilent Technologies (International) Private Limited v. ITO for assessment years 2010-2011 to 2012-2013 dated 12.02.2018.
 - (iv) Hon'ble jurisdictional High Court decision in the case of Pr.CIT v. Aptara Technology (P.) Ltd. reported in [(2018) 92 taxmann.com 240 (Bombay) dated 26.03.2018.
 - (v) Hon'ble jurisdictional High Court in the case of Pr.CIT v. PTC Software (I) Pvt. Ltd. Income Tax Appeal No.598 of 2016 dated 16.04.2018.
 - (vi) Hon'ble jurisdictional High Court decision in the case of Pr.CIT v. DNY Mellon International Operations (India) (P.) Ltd. reported in [(2018) 93 taxmann.com 363 (Bombay) dated 23.04.2018.
- M/s.Integreon Managed Solutions (India) Pvt.Ltd.

17. We find that the Hon'ble jurisdictional High Court in the case of Pr.CIT v. Aptara Technology (P.) Ltd. reported in [(2018) the question raised before the Hon'ble High Court was as under:-

"Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in excluding Accentia Technologies Ltd. and Coral Hubs Ltd. as comparable, ignoring the said companies are engaged in the business of providing IT enabled services?"

18. The Hon'ble High Court in the context of exclusion of one of the comparables, M/s.Coral Hubs Ltd. had observed as under:-

"(a) The impugned order of the Tribunal has excluded M/s. Coral Hub Ltd. from the list of comparable after rendering a finding of fact that activities undertaken by Coral Hub Ltd. are not comparable to that engaged by the Respondent-Assessee. It was found as a fact by the Tribunal that M/s. Coral Hub Ltd. is engaged in ITES particularly selling and purchasing of products and goods whereas the Respondent-Assessee is engaged in e-learning and content development activity. Besides, the Tribunal has recorded finding of fact that business model adopted by M/s . Coral Hub Ltd. was different in-as-much as it outsources its work to sub- vendors as against the Respondent-Assessee carrying out its activities in-house. (Underlining provided by us)

(b) The grievance of the Revenue is that both the Coral Hub Ltd. as well as the Respondent-Assessee are in the field of Information Technology Enabled Services. Therefore, by virtue of above fact, they become comparable.

(c) It is obvious that merely because the tested party and the comparable provide ITES, they do not become comparable. The content of the services rendered by virtue of IT is to be examined before holding it to be comparable. Besides, the two are not comparable as the business model in both are different i.e. outsourcing in one and in-house in the other. We further note that M/s.Integreon Managed Solutions (India) Pvt.Ltd.

the impugned order of the Tribunal places reliance upon the decision of the Tribunal dated 30.10.2013 of its co-ordinate bench in the case of PTC Software India (P.) Ltd. which also excluded M/s. Coral Hub Ltd. (formerly known as 'Vishal Information Technologies Ltd.'). Mr. Suresh Kumar the learned counsel for the Revenue very fairly states that being aggrieved by the above order an appeal was filed to this Court being Income Tax Appeal No.732 of 2014 (CIT v. PTC Software). This appeal was dismissed upholding the finding of the fact of the Tribunal that M/s. Coral Hub (formerly known as 'Vishal Information Technologies Ltd.') was a company not only engaged in IT enabled

services but also in providing agency services by way of outsourcing to third party vendors. In this case also, the impugned order of the Tribunal has come to a finding of the fact that the services rendered by the Respondent to its AE is different from the activities/services provided by M/s. Coral Hub Ltd. Therefore, they would not be comparable only on the ground that both of them broadly fall under the category ITES providers. (Underlining provided by us)

(d) The finding reached by the Tribunal is one of finding of fact which is not shown to be perverse. Thus, there is no reason to interfere with the finding of fact recorded by the Tribunal.

III. Conclusion: In the above view, the question as proposed does not give rise to substantial question of law. Thus, not entertained.

19. *We find that the ld.DR also placed certain co-ordinate Bench decisions of the Tribunal for assessment years 2007-2008 and 2008-2009. We hold that the issue is now settled by the Hon'ble jurisdictional High Court (supra), wherein the outsourcing activity in one company which is done predominantly cannot be treated as a comparable with the company which is engaged in carrying out its activity in-house. These facts were duly brought as a specific objection by the assessee before the ld.TPO as well as ld.DRP as detailed elsewhere hereinabove in this order by way of written M/s.Integreon Managed Solutions (India) Pvt.Ltd. submissions. Hence, it cannot be said that the assessee had made this objection for the first time before this Tribunal. We also find that the objections made by the assessee with regard to this comparable namely Eclerx Solutions Limited had not been disputed by the ld.TPO or by the ld.DRP by pointing out certain factual differences in the objections of the assessee, more particularly, with regard to the predominant activity carried on by the said comparable.*

20. *In view of the aforesaid factual observations and respectfully following the judicial pronouncements relied upon hereinabove, we hold that Eclerx Solutions Limited should not be treated as a comparable as it is functionally different and we direct the ld.TPO to exclude the same from the list of comparables while benchmarking the international transactions for determination of Arm's Length Price, for this assessment year.*

27. On perusal of the above said decision, it is evident that the Tribunal has held Eclerx Services Ltd. is not held to be a comparable for the reason that it is functionally different from that of the assessee.

28. From the above submission, it is observed that the issue before us is identical to that of A.Y. 2011-12 and by respectfully following the above decision we direct the ld. TPO to exclude Eclerx Services Ltd. from the list of comparables while benchmarking the international transaction of the assessee for the year under consideration. Therefore, we allow the grounds raised by the assessee.

30. As stated by the ld. AR that from comparability if *Eclerx Services* is excluded, the other grounds become academic. Hence, the other grounds are dismissed as mere academic in nature.

31. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 07.09.2023

Sd/-

Sd/-

(Prashant Maharishi)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 07.09.2023

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai