

2. The grievances of the assessee read as under:

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

1. The assessment order passed in pursuance to the directions issued by the Honorable Dispute Resolution Panel ("Hon'ble DRP") is a vitiated order as the Hon'ble DRP erred both on facts and in law in confirming the transfer pricing addition made by the Learned ("Ld.") Assessing Officer ("AO") / Transfer Pricing Officer ("TPO").

2. The Ld. AO / TPO/ Hon'ble DRP erred both in facts and on law in enhancing the income of the Appellant by Rs. 1,56,84,389/- in the Information Technology enabled services ("ITeS") segment by disregarding the economic analysis (including filters used therein) conducted by the Appellant and undertaking a fresh economic analysis (with modified filters) and holding that the said international transactions do not satisfy the arm's length principle envisaged under the Act.

3. The Ld. AO / TPO / Hon'ble DRP erred both in law and on facts by including certain companies which are not comparable to the Appellant in terms of functions performed, risk assumed and asset employed, namely M/s Accentia Technologies Limited, M/s TCS E-Serve International Limited, M/s e4e Healthcare Business Services Private Limited, M/s TCS E-serve Limited and M/s Infosys BPO Limited.

4. The Ld. AO / TPO / Hon'ble DRP erred both in law and on facts in not including M/s Axis IT&T as comparable even when it passes the filters adopted by the Ld. AO / TPO.

5. The Ld. AO / TPO / Hon'ble DRP erred in not allowing for working capital and risk adjustment undertaken by the Appellant.

6. That Ld. AO/TPO erred in not correcting the margins of certain comparables in the final order despite the directions of the Hon'ble DRP.

7. That the Ld. AO grossly erred in initiating penalty proceedings u/s 271 (1) (c) of the Act mechanically without recording any satisfaction for its initiation."

3. The representatives of both the sides were heard at length, the case records carefully perused. Relevant documentary evidences and judicial decisions brought on record duly considered wherever necessary.

4. Briefly stated, the facts of the case are that the assessee is a 99.99% subsidiary of BAIN & Company INC. USA and is primarily engaged in providing Information Technology Enables back-office services, such as, industry, company and financial analysis to Bain USA's global case teams through business information research. The

assessee primarily provides back-office support to Bain USAs global consulting operations through customized remote research and information support services. The assessee also provides contract software development services to Bain USA.

5. The functions performed during the year under consideration are as under:

"Due to the nature of services rendered by it, BCC essentially employs research associates who provide the following range of routine back-office support services to Bain USA:

Company snapshot,

Company details - product segments, distribution channel,

SWOT analysis etc.,

Competitor information and benchmarking,

Industry details,

Statistical support,

Research support and

Financial analysis.

The research associates work with consultants from Bain USA to understand the scope, time frame and deliverables expected under each research request. The consultants could send in a request in a prescribed requisition form providing the details of the work required and the time frame within which the deliverable is expected. BCC tracks the work load of each employee and accordingly staffs the

research associates on each assignment. Once assigned on a project, the research associate coordinates with its consultant colleagues to determine the most appropriate, cost-effective, and timely research mechanism. The research associates also keeps on getting follow-up work with respect to. the work earlier done for consultant.

In order to execute all these research requests, BCC utilizes a wide array of external global databases purchased by and housed at Bain USA. In addition, BCC also extensively relies on web and other publications and may collect the requisite information on its own through proprietary tools developed by Bain USA.

In addition to providing the afore-described IT enabled back-office services BCC also has several other support teams which function in the following manner:

Customer Insights Group (CIG): From time to time, overseas Bain group entities require some research to be carried out specific to the Indian market, either by way of online surveys, telephonic interviews or face to face interviews. CIG supports Bain group entities in such endeavors by acting as a contact point / interface between them and independent market research vendors operating in India.

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Essentially, *CIG* contacts market research vendors in India and coordinates with them for collating the data requested for by the group entities. It also supports group entities in drafting questionnaires to make the data collation process more effective and focused. Once the data is received from the market research vendors, *CIG* forwards the same to respective group entities after structuring it into a meaningful format. If required, *CIG* assists group entities in carrying out various statistical analyses (using tools such as *SPS* and *Latent gold* etc.) on the data for a detailed understanding of the same. For example, if a group entity wants to know what kind of instruments it should float in the Indian market, *CIG* would provide relevant data in the format such as segmentation of customer groups on the basis of their purchasing preferences, age groups that invest more, the kind of instruments invested in by a particular age group etc.

(*Knowledge Management Group (KMG)*): *KMG* is essentially involved in internal knowledge management and sharing through pipeline tracking within the *Bain Group*. It tracks and collates a repository of information about the various clients handled by different worldwide *Bain group entities* and the diverse assignments handled by them. This information is put together in the form of presentations by *KMG* which are then loaded onto the *Bain intranet*, for access and use by all *Bain group entities*.

KMG also helps practice leaders in preparing annual plans, material for regional meetings, global partner meetings etc.

Editorial Group (EG)

Bain USA has a global editorial team which periodically writes articles on Bain Group, its views / insights on global market / industry / sector specific developments etc., with the objective of increasing Bain Group's brand awareness worldwide. The articles written by the global editorial team of Bain USA serve as core manuscripts for EG at SCC for repurposing and syndicating in the Indian market.

In return for these services, SCC is remunerated by Bain USA on a cost plus an arm's length mark-up basis."

6. Assets employed are as under:

"5.1.2 Any business requires assets (tangible or intangible) without which it cannot carry out its activities. Intangibles play a significant role in the functioning of a business and are accordingly more important. An understanding of the assets employed and owned by BCC provides an insight into the resources deployed by BCC and their contribution to the business processes / economic activities of BCC.

5.1.2.1 Tangibles owned by BCC

BCC utilizes tangible assets such as its office premises, computers / computer peripherals, office equipment, communication facilities, etc. for the purpose of its business

The routine tangibles owned by BCC are shown in the Table 2 below:

Tables 2 : Assets owned by BCC

<i>Type of fixed Assets</i>	<i>Gross block as on March 31.2010</i>
<i>Lease of improvements</i>	<i>3,69,90,331</i>
<i>Furniture and fixture</i>	<i>2,33,20,209</i>
<i>Office equipments</i>	<i>75,11,763</i>
<i>Phone Equipments</i>	<i>83,91,889</i>
<i>Computers</i>	<i><u>2,06,58,189</u></i>
<i>Total</i>	<i><u>9,68,72,371</u></i>

5.1.2.2. Intangibles

BCC does not own any non-routine intangibles and does not undertake any research and development on its account that leads to the development of non-routine intangibles. BCC uses the trademarks, processes, know-how, technical data, software, operating quality standards etc. developed owned by Bain USA. Accordingly, BCC does not own any non-routine intangibles."

7. Risk Profile of the assessee is as under:

Product / Service liability risk: Risks associated with product / service failures including non-performance to generally accepted or regulatory standards. This could result in product recalls and possible injuries to end-users.

Bain USA enters into contracts with end customers and hence bears all the risk associated with service quality. BCC does not bear any risk of poor quality of service. All the liabilities for non-performance are contractually borne by Bain USA. BCC is however required to perform its services in accordance with generally accepted industry practices/quality norms.

Research & Development ("R&D") risk: Represents risk that R&D activities performed by an enterprise may not be successful.

BCC does not undertake any research and development activity on its own account that leads to the creation of any non routine intangibles and hence is not exposed to any R&D risk.

Over the years, Bain USA has developed all the intangibles which are being utilized by BCC and hence Bain USA bears all the R&D risk.

Credit Risk: This is the risk arising from nonpayment of dues by customers.

BCC does not have material exposure to this risk as it renders services to its own group entities.

Bain USA is responsible for ensuring recovery from end customers, and accordingly bears this risk entirely.

Foreign Exchange Risk: This risk relates to the potential impact on profits that may arise because of changes in foreign exchange rates.

BCC is compensated for rendering services to Bain USA in US Dollars. Accordingly, it bears the risk of foreign exchange fluctuations depending on the movement of the US Dollar vis-a-vis the Indian rupee. However, since BCC operates on a cost plus basis, it is insulated from the foreign exchange risk due to the pricing policy.

Bain USA makes payment to BCC in its own currency, i.e. US Dollars. However, since BCC is compensated on a cost plus basis, the ultimate risk due to fluctuations in exchange rates is borne by Bain USA.

Manpower Risk: Any enterprise which is largely dependent, for its success, upon quality personnel with superior technical knowledge is faced with this risk. Competitive market forces expose such an enterprise to the risk of losing its trained personnel.

Since BCC maintains a skilled workforce, it is exposed to this risk.

Bain USA does not bear any risk associated with the manpower of BCC, other than its own personnel deputed at BCC. It however bears manpower risk in relation to manpower employed and maintained by it.

Price Risk: This risk arises as a result of price pressures in the market resulting in price undercutting and thereby adversely impacting profitability.

BCC does not have any exposure to this risk as its compensation from Bain USA is pre-agreed on a cost-plus basis. Therefore, it is hedged from any risk arising as a result of price pressures in the market.

Bain USA bears price risk as it operates in a competitive environment, and has direct dealings with outside third parties. Bain USA is accordingly responsible for pricing decisions and the impact on profitability of such decisions is also borne by it.

Capacity Utilisation Risk: This risk arises on account of under-utilisation of manufacturing/service facility/personnel

BCC is not exposed to this risk as it is remunerated by Bain USA, for the services rendered by it, on the basis of a full cost plus mark up and hence is assured of the recovery of costs of any underutilized/unutilized service.

Bain USA is faced with this risk as it compensates BCC on a cost plus basis irrespective of the extent of services rendered by BCC.

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Risk category and Description

Exposure to Bain USA

Rework Risk: This is the risk of having to perform non-billable rework.

Exposure to BCC

BCC may perform rework relating to the enabled back office services provided by it. However, BCC is not exposed to this risk as it is remunerated by Bain USA on a cost plus basis, and the costs incurred by it, in performing the rework would form part of its cost base.

Bain USA is exposed to this risk as it would remunerate BCC for the rework costs, as these costs would get included in BCC's cost base.

Cost Variance Risk: This risk arises on account of variations between actual costs and budgeted costs.

BCC is not exposed to this risk as it is remunerated by Bain USA on an actual cost plus basis, irrespective of the variance between the actual and budgeted costs of BCC.

Bain USA is exposed to this risk as it compensates BCC on an actual cost plus basis irrespective of the extent to which BCC's actual costs vary from its budgeted costs.

8. In so far as the functional profile of the assessee is concerned, there is no dispute between the assessee and the Assessing Officer. Considering the FAR analysis, the TPO considered the following 11 comparables in his final analysis:

<i>Sl. No.</i>	<i>Comparable</i>	<i>OP/OC (Without</i>
1	<i>Accentia Tech. Ltd</i>	43.07%
2	<i>Cosmic Global Ltd.</i>	18.28%
3	<i>e-4-e Healthcare Business Services Pvt. Ltd.</i>	31.03%
4	<i>Fortune Infotech Limited</i>	22.8%
5	<i>I gate Global Solutions Limited</i>	24.54%
6	<i>Satyam BPO Limited</i>	-10.60%
7	<i>TCSE - Serve International Ltd</i>	54.03%
8	<i>TCSE- Serve Ltd.</i>	63.42%
9	<i>Infosys BPO Ltd. -</i>	31.46%
10	<i>Microland Ltd.</i>	0.79%
11	<i>Jindal intellicom Ltd.</i>	14.94%
AVERAGE		26,705%

9. The Arm's Length Price of the international transaction was computed as under:

<i>Operational Cost</i>	<i>18,59,64,508/-</i>
<i>Arm's Length Price at a Margin of 126.705%</i>	<i>23,56,26,330</i>
<i>Price Received</i>	<i>21,91,70,188</i>
<i>Proposed Adjustment u/s 92CA</i>	<i>1,64,56,142/-</i>

10. Proposed adjustment was Rs. 1,64,56,142/-.

11. On the basis of proposed TP adjustment, the Assessing Officer completed assessment vide order dated 27.01.2015 at an assessed income of Rs. 1,67,41,499/-.

12. Before us, the ld. counsel for the assessee vehemently argued for exclusion of:

- a) TCS E-Serve Limited
- b) TCS E-Serve International Limited
- c) Accentia Tech Ltd

13. It is the say of the ld. counsel for the assessee that if two comparables i.e TCS E-Serve Limited and TCS E-Serve International Limited are excluded, then the assessee's margin will be within arm's length range and then adjudication of other comparables will become purely academic.

14. Arguing for exclusion of two TCS E-Serve comparables, the ld. counsel for the assessee vehemently stated that TCS E-Serve is functionally incomparable as it has incomparable scale of operation, payment of brand equity and presence of intangibles and volatile profit margins. The ld. counsel for the assessee further pointed out that the

TPO has included this merely on erroneous basis that it is an ITES company and that the assessee has not shown any impact of payment to TATA Brand equity on profitability and ownership of intangibles for its exclusion. Strong reliance was placed on the decision of the Hon'ble High Court of Delhi in the case of Avaya India Pvt Ltd ITA No. 532/2019.

15. The ld. DR defending the comparables selected by the TPO placed reliance on the decision of this Tribunal in the case of Techbooks International [P] Ltd 147 taxmann.com 561 and pointed out that the coordinate bench has, on identical set of facts declined to exclude TCS E Serve Ltd from the final set of comparables.

16. We have given thoughtful consideration to the rival contentions. Reliance on the decision of the co-ordinate bench by the ld. DR appears to be misplaced as the said decision was given for A.Y 2011-12 whereas the impugned A.Y is 2010-11. In our considered opinion, the financials of each A.Y are different and therefore, the figure of one year cannot be considered for comparing the figure of another A.Y.

17. On the contrary, the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Avaya India Pvt Ltd [supra] pertains to A.Y 2010-11 and is, therefore, very much relevant. The relevant findings read as under:

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

28. The Director's report of TCS E-Serve Limited bears out the contention of the Assessee that both entities have been leveraging TCSs scale and large client base to increase their business in a significant way. The submission that the two comparables offer an illustration of "an identical transaction being conducted in an

uncontrolled manner" overlooks the effect of the Tata brand on the performance of the impugned comparables. The question was not merely whether the margins earned by the Tata group in providing captive service to the Citi entities were at arm's length. The question was whether they offered a reliable basis to re-calibrate the PLI of the Assessee whose scale of operations was of a much lower order than the two impugned comparables. The mere fact that the transactions were identical was not, in terms of the law explained in the above decisions, either a sole or a reliable yardstick to determine the apposite choice of comparables.

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

18. The co-ordinate bench in the case of Agilent Technologies [International] Pvt Ltd in ITA No. 1620/DEL/2015 had an occasion to consider a similar grievance on similar FAR and held as under:

"10. We have heard the rival submissions and also perused the relevant findings given in the impugned order for exclusion of TCS E-Serve Ltd. As discussed above, the assessee is a captive service provider which is providing back office support like, internal transaction processing including processing for sales, accounting and

vendor payables; and IT support and network management like providing knowledge management for engineer designs and network management for the wireless network solution of Agilent US. The TCS E- Serve is too engaged in providing IT services primarily to City Group entities globally. Apart from that, TCS E- Serve provides technical services involving software testing, verification and validation of software at the time of implementation and data management activities which ostensibly cannot be held to be purely back office support services. There is no segmental bifurcation between the transaction processing and technical services. Further TCS E- Serve is a subsidiary of TCS Ltd., which is one of the foremost and eminent company of Tata group, which inherently has an element of huge brand value associate with it, which tends to influence the pricing policy and thereby directly impacting the margins earned by the company. Apart from the size of the company, huge turnover do reflect that the assets deployed by the TCS E- Serve is far more than the assessee. In the case of BC management Service Pvt. Ltd. (supra), this Tribunal has excluded TCS E-Serve with the similar ITeS companies after observing and holding as under:-

"18. We have heard the rival submissions, perused the relevant finding giving in the impugned orders as well as the material placed on record. One of the main points of distinction which is quite ostensible is that the TCS E-Serve' is a subsidiary of Tata Consultancy Services Limited', which is one of the leading and giant company in the world and has an inherent element of very high brand value associated with it. Such a high brand value definitely has an impact on the pricing policy,

niche market, contractual terms, etc. and thereby affecting the profit margins. Annual report of this company reflects that huge payments have been made by TCS E-Serve to TCS Limited' for the use of the brand as a "royalty". This fact itself shows the effect of brand value in the pricing mechanism. On a further analysis it is seen that the employee cost base is more than 64 times than the assessee and even the turnover is also more than 67 times as compared to the assessee. This only goes to suggest that assets employed by TCS E-Serve" along with huge intangibles in the form of brand value definitely has a huge effect in PLI and vitiates the comparability under FAR analysis with a company like assessee which is a captive service provider without much intangibles and risks. Another important thing which has been pointed out by learned counsel is that, the operation of TCS E-Serve broadly comprise of transaction processing and technical services including software testing, verification and validation for which no segmental bifurcation is available. In absence of such vital information of the margins of such varied segments it becomes quite difficult to put such company in the comparability basket so as to bench mark the correct profit margin. All the aforesaid factors have been held so in various decisions of this Tribunal in several cases as relied upon by the Ld. Counsel, including the decision of Amriprise India Private Limited (supra). Thus, in our opinion TCS E-Serve' cannot be held to be a good comparable for the purpose of bench marking the assessee's PLI and accordingly, we direct

the Id. AP/TPO to exclude TCS E-Serve from the comparability list."

11. Apart from that in other decisions relied upon by the learned counsel, including that Hon'ble Delhi High Court in [Actis Global Service Pvt. Ltd. vs. Pr. CIT](#) in ITA. 94/2017, we find that on similar point of distinction, TCS E-Serve has held to be incomparable. Thus, we hold that TCS E-Serve cannot be held to be comparable with that of the assessee for bench marking the profit margin."

19. Again, the Hon'ble High Court of Delhi in the case of Inductis [India] Pvt Ltd ITA No. 144/DEL/2019 has held as under:

The last issue urged is with respect to the issue of comparables. The first comparable excluded by ITA T's order i.e. *Accentia Technologies Ltd* was excluded on the basis that the company was functionally dissimilar and that the segmental data for the assessment year with regard to the comparable segment was not available. The second comparable directed to be excluded i.e. *TCS E-Serve Ltd.*, was on the ground that the concern provided high end online software solutions unlike the assessee which provided internet based medical health related services. The real services therefore, were entirely dissimilar. We are of the opinion that this aspect not a question of law, rather a factual one and does not call for an interference".

20. Facts relating to the exclusion of TCS E Serve International Ltd are identical to that of TCS E Serve. In light of the judicial decisions discussed hereinabove, we are of the considered view that the assessee company is typically engaged in running software solutions which are in the nature of IT services and, thus, are not comparable to a back-office service provider.

21. In light of the decision of the Hon'ble Jurisdictional High Court of Delhi [supra], we direct the Assessing Officer/TPO to exclude TCS E Serve and TCS E Serve International from the final set of comparables.

22. Another comparable which was argued for exclusion is Accentia Tech Ltd. The main reason for exclusion of this company is that this company in its financial accounts has stated that the current year's figures are not comparable to the previous year's figure due to the merger of subsidiary company.

23. Accentia is not comparable to the assessee due to the fact that Assent Infoserve Pvt Ltd amalgamated into Accentia during A.Y 2010-11 itself in light of extra ordinary event during the subject A.Y., it leads to distorted profits of the company and thus, the same cannot be comparable.

24. Accentia has been excluded on this very ground by the co-ordinate bench in the case of Agilent Technologies International Pvt Ltd 1620/DEL/2015. For similar reasons, it was excluded in the case of Ameriprise India Pvt Ltd ITA No. 7014/DE?2014, which has been upheld by the Hon'ble High Court in ITA no. 461/2016.

25. Considering the facts of the case in light of judicial decisions discussed hereinabove, the Assessing Officer/TPO is directed to exclude Accentia from the final set of comparables.

26. As per the statement of the counsel, inclusion/exclusion of other comparables would be academic and hence not considered.

27. In the result the appeal of the assessee in ITA No. 1614/DEL/2015 is allowed.

The order is pronounced in the open court on 13.10.2023.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 13th OCTOBER, 2023.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	