

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
' D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER]

आयकर अपील सं./I.T.A.No. 2031/Mds/2011
निर्धारण वर्ष /Assessment year : 2007-2008.

M/s. MPS Technologies Ltd,
(since merged with MPS Ltd)
27, G.N. Chetty Road,
T. Nagar,
Chennai 600 017.

Vs. The Assistant Commissioner
of Income Tax,
Company Circle IV(3)
Chennai.

[PAN AAECM 0205A]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. Vikram Vijayaraghavan, Adv.
प्रत्यर्थी की ओर से /Respondent by : Shri. Pathclavath Peereja, CIT

सुनवाई की तारीख/Date of Hearing : 08-02-2017
घोषणा की तारीख /Date of Pronouncement : 14-02-2017

आदेश / ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

This is an appeal filed by the assessee against an assessment order dated 11.10.2011 of Assistant Commissioner of Income Tax, Company Circle IV(3), Chennai pursuant to directions issued by the Dispute Resolution Panel (in short the "Id. DPR") u/s.144C of the Income Tax Act, 1961 (herein after referred to as

'the Act'). It has altogether raised three grounds of which ground No.1 is general in nature needing no specific adjudication. Ld. Counsel at the outset submitted that he was not pressing ground No.3 which is regarding restriction of depreciation on site licence. Accordingly ground No. 3 is dismissed as not pressed.

2. Ground No.2, relates to Transfer Pricing. Within this ground there are large number of sub grounds starting from 2.1 to 2.7. Even within these sub grounds, there are further divisions. Ld. Authorised Representative submitted that he was pressing only grounds No.2.4 and 2.6.2, to ground No.2.6.5 among various grounds relating to Transfer Pricing. Accordingly all other grounds relating to Transfer Pricing are dismissed as not pressed.

3. Initiating his arguments in connection with ground 2.6.2, Id. Authorised Representative submitted that assessee was a low end provider of IT enabled service. As per Id. Authorised Representative, assessee as well as Id. TPO had followed TNMM method for bench marking the international transactions of the assessee with its Associated Enterprise. As per Id. Authorised Representative, Id. TPO had finally arrived at ten comparables company for bench marking purposes. Among these ten companies there were four company named Eclerx Services Ltd, Infosys BPO Ltd, Maple ESolutions Ltd and

Mphasis Ltd. AS per the Id. Authorised Representative he was seeking exclusion of these four companies from the list of comparables. With regard to M/s. Eclerx Services Ltd submission of the Id. Authorised Representative was that it was into high end knowledge process outsourcing and not comparable to what assessee was doing. As per Id. Authorised Representative assessee was maintaining ScholarlyStats Platform and providing back office services to its customers named Macmillan India Ltd. Continuing his submission, Id. Authorised Representative submitted that services of the assessee were in the nature of subscriber fulfillment of clients engaged in publishing periodicals. Such services offered, as per the Id. Authorised Representative included processing subscriptions, maintaining and updating the database of subscribers and other related services. As per Id. Authorised Representative it was purely a back office processing and was in the nature of low end ITe/BPO services. ScholarlyStats services as per Id. Authorised Representative only meant collection and collation of usage report from various platforms and making such reports available to the customers on the portal. In so far as content development platform was concerned as per the Id. Authorised Representative there was no high end process work done by the assessee. As per Id. Authorised Representative, assessee being only a low level BPO, could not be compared with Eclerx Services Ltd. For

this reliance was placed on the judgment of Hon'ble Delhi High Court in the case of *Ramp Green Solutions P. Ltd vs. CIT 377 ITR 533*.

4. Viz-a-viz Infosys BPO Limited, Id. Authorised Representative submitted that it had a turnover of ₹650 crores. As per Id. Authorised Representative assessee's turnover was only ₹33.5 crores. Relying on the judgment of Hon'ble Bombay High Court in the case of *CIT vs. M/s. Pentair Water India Pvt. Ltd, (2016) 381 ITR 216* and that of Hon'ble Delhi High Court in the case of *CIT vs. Agnity India Technologies Pvt. Ltd (2013) 93 DTR 375*, Id. Authorised Representative submitted that Infosys BPO Ltd had to be excluded from the list of comparables.

5. Arguing for the exclusion of M/s. Maple Esolutions Ltd, Id. Authorised Representative submitted that directors of the said company was involved in a fraud. As per Id. Authorised Representative, directors of the said company were Rastogi Brothers who were arrested by FBI and UK authorities for various fraudulent deals. As per Id. Authorised Representative in the case of *ITO vs. CRM Services India (P) Ltd (ITA No.4068/Del/2009, dated 30.06.2011 for assessment year 2004-2005)* comparability of the above company was dealt with by the Delhi Bench of this Tribunal at para 17.5 of its order. As per Id. Authorised Representative Bench had observed that considering the question mark on the reputation of the owners of the

said company, it was unsafe to take it as a comparable. Id. Authorised Representative submitted that the above decision was considered by the Hyderabad Bench of the Tribunal in the case of *Capital IQ Information Systems (India) P. Ltd vs. DCIT (2013) 25 ITR(Trib) 185*, which was also for the very same assessment year. As per Id. Authorised Representative the Hyderabad Bench had held that Maple Esolutions Ltd was not a proper comparable at para 19 of its order after considering the decision of the Delhi Bench in the case of *CRM Services India (P) Ltd (supra)*.

6. Arguing for exclusion of Mphasis Ltd, Id. Authorised Representative submitted that the said company had a turnover of ₹1,103 Crores and was a industrial giant. According to him for the very same reason for which he was seeking exclusion of Infosys BPO Ltd, Mphasis Ltd also would go out of the list of comparables.

7. Per contra, Id. Departmental Representative strongly supporting the orders of the lower authorities submitted that assessee was not into low end knowledge process outsourcing. As per Id. Departmental Representative, the director's report of the assessee clearly pointed out the high end nature of its services. Thus according to him, Ecelrx Services Ltd could not be excluded from the list of comparables. Coming to Maple Esolutions Ltd, Id. Departmental

Representative submitted that assessee had not raised any ground regarding fraudulent transactions of its directors while seeking exclusion of this company from the list of comparables before any of the lower authorities. As per Id. Departmental Representative even before the Tribunal there was no specific ground in this regard. In so far as Mphasis Ltd was concerned, Id. Departmental Representative submitted that here also assessee had not pleaded exclusion of the said company before any of the lower authorities citing its mammoth nature. As per Id. Departmental Representative no such ground has been raised by the assessee before this Tribunal also. Thus according to him, assessee was raising fresh grounds before this Tribunal which were not taken before lower authorities. In any case, as per Id. Departmental Representative higher growth rate or extreme high profit margin could not be a reason for exclusion. For this, reliance was placed on the decision of Bangalore Bench of the Tribunal in the case of *DCIT vs. Akamal Technologies India (P) Ltd, (2016) 68 taxmann.com 371*.

8. We have considered the rival contentions and perused the orders of the authorities below. What we notice is that assessee has filed a comparability analysis as the first page of its paper book volume 2. In this chart, assessee has sought exclusion of Ecelrx Services Ltd, ICRA Online Ltd, Infosys BPO Ltd, Maple Esolutions Ltd,

Mphasis Ltd and Triton Corp. Ltd. However, arguments has been advanced by the Id. Authorised Representative only with regard to Ecelrx Services Ltd, Infosys BPO Ltd, Maple Esolutions Ltd and Mphasis Ltd. In other words, no arguments were advanced for exclusion of ICRA Online Ltd and Triton Corp. Ltd. Therefore, we are confining ourself to comparability of Ecelrx Services Ltd, Infosys BPO Ltd, Maple Esolutions Ltd and Mphasis Ltd argued by the Id. Authorised Representative.

9. In so far as Ecelrx Services Ltd is concerned, contention of the Id. Authorised Representative is that the said company was a high end knowledge process outsourcing provides and not comparable to the assessee which was doing low end knowledge processing. No doubt in the case of *Ramp Green Solutions P. Ltd (supra)* it has been held by the Hon'ble Delhi High Court that a BPO and a KPO were not comparable since BPO did not necessary involve advanced skill and knowledge whereas KPO employed advance skill and knowledge for providing its services. Their lordship had approved the decision of Hyderabad Bench of this Tribunal in the case of *Capital IQ Information Systems (India) P. Ltd (supra)*. There can be no quarrel on this. However question before us, is whether assessee was doing low end BPO or high end BPO. In the second annual report of the company for

the year ending 31st December, 2006 progress of the company has been summarized as under by its directors.

"Year 2006 saw an impressive growth in terms of number of clients and volume of sales. The company's sales turnover during the year registered a substantial growth from Rs. 956 lacs to Rs. 3,325 lacs, while the number of clients went up to 90 at the close of the financial year. ScholarlyStats launched during last year continued to show strong performance with some of the world's biggest and most famous academic libraries and institutions signing up. The year ended with the "Best library Product" of the year award for ScholarlyStats at the annual International Information Industry Awards. Fulfillment and PublisherStats products continued to show growth. The company also showcased "BookStore", its latest product offering at the annual Frankfurt Bookfair.

Business Outlook

Long term outlook for business remains positive in view of the good response for all the product offerings of the company. The company's latest product offering- BookStore is also showing a lot of promise and interest from the publishers. The company has already bagged a contract from Boersenverein-German Book Publisher's Association to build and develop their online book platform for their members. ScholarlyStats continues to receive buoyant response from the library market and is growing rapidly. The outlook for other product offerings of the company is also positive.

The company plans to take benefits of global outsourcing opportunity offered in the Information Industry space by maintaining its focus on high value added product offerings aimed at Publishing & library market in particular. Besides, strong support from the parent company continues to offer good growth potential".

Under the same caption the directors report for year ending 31st December, 2007 states as under:-

"Your Directors are pleased to report that the Company showed a substantially improved performance for the year. The total income increased to Rs.3919.57 lacs as against Rs.3325.44 lacs thus logging a growth of 17.30%.

The net profit after tax was Rs.1025.98 lacs as against a loss of Rs.223.53 lacs last year. The improved profitability has helped to wipe off the accumulated losses aggregating to Rs.753.58 lacs resulting in a net accumulated profit to the tune of Rs.272.39 lacs. The net EPS recorded for the year was ₹23.87 as against a negative EPS of ₹5.59 in the last year. The Company will continue to maintain the ScholarlyStats Platform and will also provide back office services to existing ScholarlyStats customers thereby ensuring a steady revenue stream in future as well.

Further, a new on line Content Delivery Platform was launched during the year. Also, the first full scale eBook site using the ground breaking Bookstore platform was launched during the year. Bookstore services are being made available to major US publishing clients.

The Company also showcased its German book platform Librekal at the Frankfurt Book Fair during the year which invited an encouraging response though the deal with Boerseverein did not go through as expected earlier. The Board of Directors has decided that it is in the interests of the company and the group as a whole to transfer the fulfillment services of the Company to the parent company Macmillan India Ltd. This would help integrate the operations of the company and render better service to its customers. This transfer is being effected as on March 31, 2008 on a slump sale basis”.

Business outlook of the company was also captured in the said annual report which is reproduced hereunder:-

“Long term outlook for business remains positive in view of the good response for all the product offerings of the company. However the year 2008 is expected to be a challenging year in terms of product offerings as well as the market conditions in view of falling dollar and a prolonged sales cycle for BookStore.

The company plans to take benefits of global outsourcing opportunity offered in the Information

Industry space by maintaining its focus on high value added product offerings aimed at Publishing & library market in particular. Besides, strong support from the parent company continues to offer good growth potential”.

10. A reading of the above, in our opinion goes against assessee's contention that it was a low-end BPO provider. Business outlook specifically states that assessee was seeking to maintain its focus on high value added product offerings. That ScholarlyStats software was launched by the assessee in the calendar year ending 31st December, 2006 is clear from its annual report. What is meant by ScholarlyStats is specifically mentioned by the assessee in its written submission before us which is reproduced hereunder:-

“ScholarlyStats services means collection and collation of usage report from platforms, preparation of ScholarlyStats reports and making such reports available to the customer on the portal”.

In our opinion, it is clear from the above that assessee was not doing low end BPO. It was providing knowledge and skill based process outsourcing services. Hence, assessee was only a KPO and not a BPO. This was also a view taken by the lower authorities. Thus, Ecelrx Services Ltd which was also doing high end KPO service was a proper comparable to that of assessee. We do not find any reason to exclude the said company from the list of comparables.

11. Coming to the case of Infosys BPO Ltd, in the case of *Agnity India Technologies Pvt. Ltd (supra)* Hon'ble Delhi High Court had clearly held that Infosys BPO Ltd had to be excluded from the list of comparables since it was a giant company. Same view was taken by Hon'ble Bombay High Court in the case of *M/s. Pentair Water India Pvt. Ltd (supra)* where comparability of Infosys BPO Ltd was an issue. Therefore assessee's contention that Infosys BPO Ltd had a brand value which had driven its high turnover is acceptable. We direct exclusion of Infosys BPO Ltd from the list of comparables.

12. Coming to M/s. Maple Esolutions Ltd, reliance has been placed by the assessee on the decision of Delhi Bench of the Tribunal in the case of *CRM Services India Private Ltd (supra)* which was in turn relied by the Hyderabad Bench of the Tribunal in the case of *Capital IQ Information Systems (India) Pvt. Ltd (supra)*. No doubt it was observed by the Delhi Bench in the case of CRM Services India Private Ltd (supra) that Rastogi Brothers were directors of Maple E Solutions and Triton Corporation and were involved in fraudulent deals in earlier years. However what we find is that assessee had not raised any ground in this regard before Id. DRP. There is no specific ground taken before us also. Now the question is whether assessee can seek exclusion of Maple Esolutions Ltd based on a different reason. By virtue of decision of Special Bench in the case of *Dy. CIT vs. Quark*

Systems P. Ltd (2010) 42 DTR 414, we are of the opinion that assessee cannot be stopped from raising a fresh plea on these lines. Considering the facts and circumstances, we are of the opinion that the issue whether Maple Esolutions Ltd can be included as a good comparable requires a fresh look by the lower authorities. So, we set aside the orders of the lower authorities on this comparable and remit it back to the Id. Assessing Officer/TPO for consideration afresh in accordance with law.

13. Coming to Mphasis Ltd claim of the assessee is that it had very high turnover and was not a comparable to the assessee which was having turnover of ₹33.5 Crores. Here also assessee had not raised a specific ground before lower authorities or before us citing the mammoth nature of Mphasis Ltd as a reason for seeking its exclusion. We are of the opinion that this can also be looked by the Id. Assessing Officer/TPO. Assessee cannot be estopped from raising such issue for the first time before us by the virtue of the decision of Special Bench in the case of Quark Systems P. Ltd (supra). Accordingly, we remit the question of comparability of Mphasis Ltd also back to the Id. Assessing Officer/TPO for consideration afresh in accordance with law.

14. However, contention of the assessee that companies having higher growth rate or extreme high profit margin should be excluded

cannot be accepted, since Bangalore Bench of the Tribunal in the case of *Akamal Technologies India (P) Ltd (supra)* has clearly held that such a filter cannot be applied while selecting comparable.

15. In the result, ground 2.6.2 to 2.6.5 of the assessee are treated as partly allowed for statistical purpose.

16. This leaves us with ground No.2.4 which assails rejection of adjustment done by the assessee, while working out its operating profit to operating costs ratio, for what the assessee terms as huge marketing and accounting management cost.

17. Ld. Authorised Representative submitted that assessee had worked out its operating profit to operating costs ratio at 25.46%. As per Ld. Authorised Representative the operating expenditure was computed by the assessee considering the ratio of operating expenses to sales of the comparable companies selected by it. As per the Ld. Authorised Representative, Ld. TPO on the other hand had taken the PLI of the assessee at (-) 1.01%. Contention of the Ld. Authorised Representative was that assessee was in its initial year of operation and had to incur huge marketing and accounting management cost. As per Ld. Authorised Representative assessee was in its start up phase. None of the comparable selected by the assessee had incurred

marketing and accounting management cost comparable to that of assessee. Hence as per Id. Authorised Representative such adjustment was required. According to him, general management and administrative cost incurred by the assessee for the relevant previous year was ₹16.42 Crores and this had gone down to ₹10.45 Crores by the financial year ending 31st March, 2009. As per Id. Authorised Representative assessee had set up team of employees in overseas jurisdiction to markets its service. Hence it had to incur huge marketing expenditure. According to him an adjustment for startup expenditure was required to be given and lower authorities had failed to consider this. According to him, assessee had made an adjustment of its own operating cost to offset this. As per the Id. Authorised Representative this was an acceptable method but not accepted by the lower authorities.

18. Per contra, Id. Departmental Representative strongly supported the orders of the authorities below.

19. We have considered the rival contentions and perused the orders of the authorities below. Computation of the operating profit on operating cost done by the assessee is reproduced hereunder:-

<i>Particulars</i>	<i>Amount(Rs)</i>
<i>Sales as per audited financial statements</i>	<i>334,272,627</i>
<i>Operating expenses</i>	<i>196,920,005</i>
<i>(Considered on the basis of the operating expenses/sales ratio of 58.91% based on the comparable companies)</i>	
<i>Employee cost as per audited financial statements</i>	<i>52,233,747</i>
<i>Total Cost</i>	<i>249,153,752</i>
<i>Operating Profit</i>	<i>85,118,875</i>
<i>Operating profit/cost</i>	<i>25.46%</i>

It is not disputed that Id. Assessing Officer had considered operative profit to operative cost margin of the assessee at (-)1.01% based on the published results of the company. The published profit and loss account of the company gives its result as under:-

MPS Technologies Limited
Profit and Loss Account for the year ended 31st March, 2007

	<i>Schedule Ref</i>	<i>Year ended 31.03.2007 (₹)</i>
<i>INCOME:-</i>		
<i>1. Sale of Services</i>		<i>334,272,627</i>
<i>2. Other Income</i>	<i>9</i>	<i>588,477</i>
		<hr/> <i>334,861,104</i> <hr/>
<i>EXPENDITURE:-</i>		
<i>1. Staff Costs</i>		<i>57,715,606</i>
<i>2. General and Administration Expenses</i>	<i>8</i>	<i>261,029,975</i>
<i>3. Depreciation</i>	<i>8</i>	<i>18,944,960</i>
		<hr/> <i>337,690,541</i> <hr/>
<i>Less: Amount capitalized towards software development costs</i>		
<i>Loss Before Tax</i>		<hr/> <i>337,690,541</i> <hr/>
		<i>(2,829,437)</i>

Obviously, assessee had reported an operating loss. The general and administrative expenditure claimed by the assessee appears at schedule 8 which is reproduced hereunder:-

General and Administration Expenses

<i>(a) Technical and professional services</i>	<i>124,678,234</i>
<i>(b) Product support charges</i>	<i>96,876,217</i>
<i>(c) Agency commissions charges</i>	<i>7,794,600</i>
<i>(d) Rent and hire charges</i>	<i>6,694,526</i>
<i>(e) Repairs and maintenance:</i>	
<i>Office Building</i>	<i>2,701,859</i>
<i>Computers</i>	<i>2,118,824</i>
<i>Equipment</i>	<i>2,684</i>
 <i>(f) Electricity expenses</i>	 <i>958,888</i>
<i>(g) Computer consumables</i>	<i>258,467</i>
<i>(h) Communication expenses</i>	<i>3,111,342</i>
<i>(i) Travelling and conveyance</i>	<i>10,948,728</i>
<i>(j) Rates and taxes</i>	<i>192,500</i>
<i>(k) Legal and Professional charges</i>	<i>1,595,257</i>
<i>(l) Insurance</i>	<i>147,982</i>
<i>(m) Foreign exchange fluctuation</i>	<i>-</i>
<i>(o) Other expenses</i>	<i>2,949,867</i>
	<i>261,029,975</i>
 <i>Total Operating and other expenses</i>	 <i>318,745,581</i>

Assessee itself had termed its expenditure as total operating and other expenditure. It therefore cannot say that part of the expenditure alone should be taken out for a separate treatment, when bench marking is based on TNMM Method. TNMM method itself is used so as

to even out the difference in nature and quantum of expenditure and small dissimilarities in functional profile. Hence attempt made by the assessee to rework its operating cost based on a separate comparability analysis is not warranted under TNMM Method. We are therefore of the opinion that lower authorities were justified in computing operating cost to operating profit based on the published accounts of the assessee. We do not see any reason to interfere with the orders of the lower authorities in this regard. Ground No.2.4 of the assessee stands dismissed.

20. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced on Tuesday, the 14th day of February, 2017, at Chennai.

Sd/-

(एन.आर.एस. गणेशन))

(N.R.S. GANESAN)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: 14th February, 2017

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |