

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'I-2' NEW DELHI  
BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER  
AND  
SMT SUCHITRA KAMBLE, JUDICIAL MEMBER  
I.T.A .No.-1181/Del/2015  
(ASSESSMENT YEAR-2010-11)**

Mercer India Ltd. (Now known as Mercer Consulting (India) Pvt. Ltd.) 6 <sup>th</sup> Floor, Building No. 14, DLF Cyber city, Sector-24 & 25 Gurgaon AAACC8145M <b>(APPELLANT)</b>	vs	DCIT Circle-2 Gurgaon  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh.Deepak Chopra, Adv &amp; Sh. Piyush Singh, Adv</b>
<b>Respondent by</b>	<b>Sh. Anand Kedia, CIT, DR</b>

<b>Date of Hearing</b>	<b>18.01.2016</b>
<b>Date of Pronouncement</b>	<b>15.02.2016</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the assessee against the Assessment Order dated 22/01/2015 for A.Y. 2010-2011 passed under Section 144C of the Income Tax Act, 1961.

2. The grounds of appeal are as follows:-

- “1. *The final assessment order dated 22 January 2015 passed by the Deputy Commissioner of Income Tax, Circle 2, Gurgaon (Learned A.O) pursuant to the directions of the Hon’ble Dispute Resolution Panel (‘DRP’) dated 27<sup>th</sup> November 2014, draft assessment order passed by Ld. A.O dated 17<sup>th</sup> February 2014 and the order dated 16<sup>th</sup> January*

2014 passed by the additional Commissioner of Income Tax, Transfer Pricing Officer-1 (3), New Delhi ('Learned TPO'), is bad in law and void-ab-initio.

2. That on facts and circumstances and in law, the Learned A.O has erred in passing the assessment order under the provisions of Section 143(3) of the Income-tax Act, 1961('Act'), in the name of erstwhile Mercer India Pvt. Ltd, which has now been merged with Mercer Consulting (India) Pvt. Ltd and therefore, the assessment made in the name of erstwhile Mercer India Pvt. Ltd is non est and not tenable under law.
3. That on facts and in law, the Learned A.O has erred in computing the total income of the Appellant at INR 137,589,744/- as against the returned income of INR 64,673/- by making an upward adjustment of INR 137,575,071/- with respect to transfer pricing ("TP").

**TRANSFER PRICING GROUNDS**

4. That on facts and circumstances and in law, the DRP/TPO/Assessing Officer have erred in rejecting the economic analysis undertaken by the appellant by conducting a fresh economic analysis for international transaction pertaining to provision of IT enabled services ("impugned transaction").
5. That on facts of the case and in law, the DRP and TPO/Assessing Officer have erred by failing to make appropriate adjustments to account for differences in working capital employed by the Appellant vis-à-vis comparable companies.
6. That on facts and circumstances and in law, the DRP/TPO/Assessing Officer have erred in rejecting certain companies and adding certain companies to the final set of alleged comparable companies on an ad-hoc basis, thereby resorting to cherry picking of comparable companies for benchmarking the impugned transaction.
7. That on facts of the case and in law, the DRP ignored the principle of natural justice by not a giving a finding on the additional evidence filed by the Appellant with respect to a comparable company namely Omega Healthcare Ltd. and Microland Ltd.
8. That on facts of the case and in law, the DRP/TPO/Assessing Officer have erred in selecting companies in the final set of alleged comparables which are functionally different as compared to the Appellant for the impugned transaction.
9. That on facts of the case and in law, the DRP/TPO/A.O have erred in law and in facts by selecting certain companies which are earning super normal profits as comparable to the Appellant.
10. That on facts of the case and in law, the DRP ignored the principle of natural justice by not a giving a finding with respect to foreign exchange gains/losses and provision of doubtful debts as operating income/expenditure while computing the operating margin of comparable companies.

11. *That on facts of the case and in law, the A.O/ TPO has computed the operating margin of the comparable companies using safe harbor rules without understanding that:*
- *Appellant has not applied for being assessed under safe harbor provisions.*
  - *Safe harbor provisions do not reflect arm's length nature of margins.*
  - *Safe harbor rules cannot be applied retrospectively and are only applicable for assessment year ("A.Y") 2013-14 and A. Y 2014-15 on specific application by a taxpayer.*
12. *That on facts of the case and in law, the DRP/TPO/A.O have erred in conducting a fresh economic analysis by using arbitrary filters for identifying companies comparable to the Appellant. The arbitrary filters applied by the TPO and confirmed by the DRP/A.O inter-alia include the following:-*
- *To reject companies having turnover less than INR 5 Crores;*
  - *To reject companies having different accounting year than that of the Appellant;*
  - *To reject companies having peculiar economic circumstances which are not in line with the industry trend and companies which showed diminishing revenue trend; and*
  - *To reject companies having export revenue less than 75 percent of the operating revenue.*
13. *That on facts of the case and in law, the DRP/TPO/A.O have failed to make appropriate adjustments to account for varying risk profiles of the Appellant vis-à-vis the alleged comparables for impugned transaction and in the process inter-alia neglected the Indian Transfer Pricing regulations, international guidelines on transfer pricing and judicial precedence in this regard.*
14. *That on facts of the case and in law, the DRP/TPO/A.O have erred in using single year data for financial year ("F.Y") 2009-10 of alleged comparable companies without considering the fact that the same was not available to the Appellant at the time of complying with the transfer pricing documentation requirements and disregarding the Appellant's claim for use of multiple year date for computing the arm's length price.*
15. *That on facts of the case and in law, the DRP/TPO/A.O have erred by not considering that the adjustment to the arm's length price, if any, should be*

*limited to the lower end of the 5 percent range as the Appellant has the right to exercise this option under the second proviso to Section 92C(2) of the Act.*

16. *That on facts of the case and in law, the DRP/A.O has erred in confirming that A.O/TPO has discharged his statutory onus by establishing that the conditions specified in clause (a) to (d) of Section 92C (3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price.*
17. *That on facts of the case and in law, the A.O has grossly erred in initiating penalty proceedings u/s271(1)(c) of the Act in relation to transfer pricing adjustment.*
18. *That on facts of the case and in law, the A.O has grossly erred in charging interest u/s234B, 234C, 234D and Section 244A of the Act.”*

2. Ground No. 1 and 2 are general in nature and therefore not pressed by the assessee. Hence Ground No. 1 and 2 are dismissed. Ground No. 3 is related to the entire action of the A.O which is specifically mentioned in Ground No. 4 to 12.

3. The brief facts are as under:-

3.1. Mercer India Pvt. Ltd. (MIPL) has been incorporated under the provisions of the Companies Act, 1956 as a wholly owned subsidiary of Mercer Mauritius Limited, Mauritius. MIPL is engaged in rendering IT enabled services to various associated enterprises (“AEs”). MIPL has entered into a service agreement with its AEs wherein it renders IT enabled services to its AEs and is remunerated at a cost plus 20 percent mark-up basis. The assessee has given the eight comparables which are as follows:

- i. Accentia Technologies Ltd.
- ii. Aditya Biral Minacs Worldwide Ltd.
- iii. CG-VAK Software & Exports Limited [Segmental]

- iv. Cepha Imaging Pvt. Ltd.
- v. Cosmic Global Ltd.
- vi. Informed Technologies India Ltd.
- vii. Infosys B P O Ltd.
- viii. R System International Ltd.

3.2 The TPO has given final comparables and their margin calculations as follows:

Sr. No.	Company Name	OP/OC
1	Accentia Tech.	42.52%
2	Cosmic Global	18.28%
3	e4e Healthcare	31.03%
4	Fortune Infotech Limited	22.80%
5	igate Global Solutions Limited	24.54%
6	Infosys B P O Ltd.	31.44%
7	T C S E-Serve International Ltd.	54.03%
8	T C S E-Serve Ltd.	63.42%
9	Jindal Intellicom Limited	13.62%
	<b>AVERAGE</b>	<b>33.52%</b>

Thus the TPO rejected economic analysis done by the assessee, selected his set of comparables and worked out margin of 33.52%, thereby proposing an adjustment of Rs. 139,799,922/-.

4. The Assessing Officer in his Assessment Order dated 7.02.2014 incorporated this addition. The assessee filed its objections before the Dispute Resolution Panel- III, New Delhi. The DRP-III vide its order dated 27.11.2014 rejected the contention of the assessee except this but contention that there are

some computational errors in the margin computed by the TPO. The order of the DRP-III New Delhi was forwarded to the TPO-II(2), New Delhi to verify the computation errors and to adopt the correct figure. An order giving effect to the direction of DRP-III has been received from the TPO, in which the TPO revised the Transfer Pricing Adjustment at Rs. 13,75,25,071/- from Rs. 13,97,99,922/- in the original order. The assessee got relief of Rs. 22,74,851/- and addition of Rs. 13,75,25,071/- was made vide order dated 22.01.2015.

5. The Ld. AR submitted that the comparables which have to be excluded by the TPO are as follows:-

	<b>Company Name</b>	<b>OP/OC</b>
6	<i>Accentia Tech.</i>	42.52%
7	<i>Infosys B P O Ltd.</i>	31.44%
8	<i>T C S E-Serve International Ltd.</i>	54.03%
9	<i>T C S E-Serve Ltd.</i>	63.42%

6. The Ld. AR submitted that DRP has not at all considered the contentions of the assessee relating to the objection of these comparables included by the TPO while working out the transfer pricing adjustments. There is no finding to that effect given by the DRP. Therefore, the Ld. AR prayed that the same may be remitted back to the TPO for fresh consideration.

7. The Ld. AR further contended and relied upon the case of Techbooks International Pvt. Ltd. [ITA No. 240/DEL/2015 passed by Delhi ITAT (pg. 1-51 of case law paper book)] and Bechtal India Pvt. Ltd. [Delhi ITAT (pg. 1-51 of case

law paper book)] for this contention that the comparables related to TCS E-Serve International Ltd. has been excluded therein. The Ld. AR further submitted that the same should be excluded in assessee's case as well. The Ld. AR submitted that as regards to the case of TCS-E-Serve Ltd the finding given in Techbook International Ltd. is distinguishable to the extent that the TCS-E-Serve Ltd. was not providing technical services. In fact the portfolio of the TCS-E-International and TCS-E- Serve Ltd. both are one and the same. The assessee company is only into the business of ITES Services and not that of providing Software Services, therefore the abovementioned four comparables has to be excluded.

8. The Ld. AR further submitted that the following comparables which have been excluded by TPO & DRP should be included while working out the transfer pricing adjustments for the reasons stated as under:-

<i>1.</i>	<i>Name of the Company</i>	<i>Rejection by the Ld. TPO</i>	<i>Assessee's comments</i>	<i>DRP's View</i>
<i>1</i>	<i>R Systems International Ltd.</i>	<i>Different Financial Year</i>	<i>Use of "contemporaneous" data" does not necessarily mean selection of companies having financial year from April to March -Inappropriateness of different accounting year ending filter -Financials over a 12-month period, thereby establishing comparability -in light of Hon'ble ITAT judgment in case of Mckinsey</i>	<i>DRP has upheld the filter used by TPO, hence it is rejected as comparable.</i>
<i>3.</i>	<i>CG-V AK Software &amp; Exports Ltd.</i>	<i>Falls turnover filter of Rs. 5 crore</i>	<i>-Inappropriateness of turnover filter -Company's turnover more than Rs.5 crore on entity wide basis which</i>	<i>DRP has upheld the filter used by TPO, hence it is rejected as</i>

			<i>passes the turnover filter applied by the Ld. TPO.</i>	<i>comparable.</i>
4.	<i>Microgenetics Systems Ltd.</i>	<i>Falls turnover filter of Rs. 5 crore</i>	<i>-Inappropriateness of turnover filter</i>	<i>DRP has upheld the filter used by TPO, hence it is rejected as comparable.</i>

The Ld. AR submitted that these are the comparables for which the TPO has used 5 crore turnover filter as well as functional aspect of those companies in respect of R. Systems International Ltd. and CG. V AK Software & Exports Ltd. The same was accepted in assessee's own case for A. Y 2009-10. However, the DRP has not at all given any finding while excluding these companies as comparables. It was further submitted that these comparables have to be looked into and thus the matter needs to be remitted back to the TPO for inclusion of the comparable. It was further submitted that in respect of Axis IT & T Limited, the TPO has applied 75% of export filter and the assessee stated that in assessee's case also deemed export should have been taken into consideration and this comparable should have been included. The Ld. AR relied upon the assessee's own case for A.Y. 2009-10 wherein the ITAT Delhi Bench included the R. Systems International Ltd. as comparables. The Ld. AR also relied upon the case of Techbooks International Pvt. Ltd. [ITA No. 240/DEL/2015 passed by Delhi] wherein all these comparables were included.

9. The Ld. AR submitted that there is no functional dissimilarity provided by the TPO or DRP while excluding these comparables. These comparables passes all the filters applied by the TPO and DRP. The contentions of the Ld. AR are given herein under:

Sr. No.	Name of Company	Appellant's Remarks
1	R Systems International Limited (Segmental)	1. No functional dissimilarity provided by TPO or DRP

		<p>2. It passes all the filters applied by the TPO and DRP except different year-end filter.</p> <p>3. Different year-end not a valid filter if company is otherwise functionally comparable to the appellant and results can be extrapolated with credible accuracy.</p> <p>4. Audited segmental quarterly results are available.</p>
2	Informed Technologies Limited	<p>1. No functional dissimilarity provided by TPO or DRP</p> <p>2. It passes all the filters applied by the TPO and DRP except turnover filter of INR 5 crores</p> <p>3. Accepted as comparable by the TPO in AY 2009-10</p> <p>4. Turnover filter is not a valid filter if company is otherwise functionally comparable to the appellant.</p>
3	C G VAK Software & Exports Limited (Segmental)	<p>1. No functional dissimilarity provided by TPO or DRP</p> <p>2. It passes all the filters applied by the TPO and DRP except turnover filter of INR 5 crores</p> <p>3. Turnover filter is not a valid filter if company is otherwise functionally comparable to the appellant.</p> <p>4. Turnover at entity level is INR 6.33 crores</p>
4	Microgenetics Systems Limited	<p>1. No functional dissimilarity provided by TPO or DRP</p> <p>2. It passes all the filters applied by the TPO and DRP except turnover filter of INR 5 crores</p>

		3. Turnover filter is not a valid filter if company is otherwise functionally comparable to the appellant.
5	Axis-IT & T Limited	1. No functional dissimilarity provided by TPO or DRP 2. It passes all the filters applied by the TPO and DRP except turnover filter of 75 percent. 3. Turnover filter is not a valid filter if company is otherwise functionally comparable to the appellant.

10. As regards to the issue raised in Ground No. 5, the Ld. AR submitted that the D.R.P, T.P.O/A.O while calculating the working capital adjustment have not appreciated the facts in right perspective vis-à-vis comparable companies, therefore, this issue also needs to be set aside.

11. As relates to Ground No. 7, the Ld. AR submitted that for the comparable company namely Omega Health Care Ltd. and Micro Line Ltd., the assessee has filed additional evidences before the DRP but the same were totally ignored by the DRP and requested to remand back the said issue to the TPO.

12. In his rival submissions, the Ld. DR submitted that the DRP should have looked into comprehensiveness of the exclusion and inclusion of the comparables in relation to IT & ITES service provider companies. The Ld. DR submitted that the deem export cannot be put on the same footing of export, therefore, DRP as well as TPO has rightly rejected IT & ITES service provider companies as comparables.

13. We have perused all the records and heard both the parties. From the orders of the TPO as well as DRP it can be seen that the issues under consideration have not been discussed in detail with the proper reasoning and

finding, particularly the exclusion and inclusion of the comparables submitted by the assessee company. Therefore, the issue relating to comparables which have to be excluded or included is remitted back to the TPO. The judgment of the I.T.A.T in the case of Techbooks International P. Ltd. has given the proper reasoning as regard to what are the criteria for exclusion and inclusion of the various companies as comparables. As regards to additional evidences submitted before us relating to Omega Health Care Ltd. and Microgenetics Systems Ltd. which go to the root of the matter, we direct the T.P.O/A.O to consider the same while deciding the issue relating to the working of the Transfer Pricing adjustment and working capital adjustment. In the present case, the order of the DRP is non-speaking on the issue relating to working capital adjustments, therefore, the said issue is also remitted back to the DRP/A.O to be decided afresh, in accordance with law after providing due and reasonable opportunity of being heard to the assessee.

14. In the result, the appeal is partly allowed for statistical purposes.

**The order is pronounced in the open court on 15th of February 2016.**

**Sd/-  
( N. K. SAINI)  
ACCOUNTANT MEMBER**

**Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 15/02/2016

*\*R. Naheed\**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

		Date	
1.	Draft dictated on	18/01/2016	PS
2.	Draft placed before author	18/01/2016	PS
3.	Draft proposed & placed before the second member	.2016	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	15.02.2016	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	15.02.2016	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		