

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

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 2423/DEL/2017 (A.Y 2010-11)

(THROUGH VIDEO CONFERENCING)

Dunnhumby IT Services India Pvt. Ltd. 4 th Floor, Paras Twin Tower, Tower-B Golf Course Road, Sector-54 Gurgaon AACCD6863H (APPELLANT)	Vs	DCIT Circle-10(1) New Delhi (RESPONDENT)
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I.T.A. No. 2815/DEL/2017 (A.Y 2010-11)

JCIT Special Range-3, New Delhi (APPELLANT)	Vs	Dunnhumby IT Services India Pvt. Ltd. 4 th Floor, Paras Twin Tower, S-22, Great Kailash, Part-1 AACCD6863H (RESPONDENT)
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Appellant by	Sh. Rajesh Sachdev, Adv & Mr. Manish Bawa, CA
Respondent by	Sh. Anurag Sharma, Sr. DR

Date of Hearing	22.02.2021
Date of Pronouncement	26.04.2021

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee and the Revenue against the order dated 17/11/2016 passed by the CIT(A)- 44, New Delhi for Assessment Year 2010-11.

2. The grounds of appeal are as under:-

I.T.A. No. 2423/DEL/2017 (Assessee's appeal)

In view of the facts of the case and relevant legal provisions under the Income-tax Act, 1961 ('the Act'), the taxpayer-appellant believes that the impugned order of the Commissioner of Income-tax (Appeals) - 44, New Delhi [Ld. CIT(A)] dated November 17, 2016 is not sustainable in the eyes of law since:

- 1. Ld. CIT(A) erred in misconstruing the functional and risk profile of the Appellant;*
- 2. Ld. CIT(A) erred in terms of approving the Transfer Pricing Officer's ('TPO') approach of summarily rejecting the comparables selected by the Appellant, selecting erroneous filters and functionally dissimilar companies while applying Transactional Net Margin Method;*
- 3. CIT(A) erred in arbitrarily rejecting the comparable company, viz. R Systems international Limited on the ground that audited data on quarterly basis from where profit-level indicator (PLI) can be re-casted on a financial year (running April 01, 2009 to March 31, 2010) basis had not been provided;*
- 4. Ld. CIT(A) erred in arbitrarily approving the TPO's approach of selecting the companies, viz. TCS E-Serve International Limited and TCS E-Serve Limited by misquoting assessee's functional profile;*
- 5. Ld. CIT(A) erred in upholding the TPO's approach of computing net cost plus margin ('NCPM') of selected companies and that of Appellant by incorrectly classifying gain/ loss from foreign exchange variation and provision for doubtful debts as a non-operating in nature;*
- 6. Ld. CIT(A) erred in not granting appropriate risk adjustments as warranted under Rule 10B of the Income-tax Rules, 1962 ('the Rules');*
- 7. Ld. CIT(A) erred in upholding the Ld. TPO's approach of considering third-party cost recoveries from associated enterprises ('AE') for the purpose of applying the mark-up;*
- 8. Ld. CIT(A) erred in upholding the Ld. TPO's approach of treating outstanding receivables from the AE as an unsecured loan and charging interest thereon.*

The above grounds of appeal are without prejudice and notwithstanding each other."

I.T.A. No. 2815/DEL/2017 (Revenue's appeal)

- “i) While directing to exclude M/s Accentia Technology Pvt. Ltd. from the comparables, the CIT (A) failed to appreciate that the extra ordinary event of amalgamation had not affected the profits of the company.*
- ii) While directing to exclude M/s Eclerx Services Ltd. from the comparables, the CIT (A) failed to appreciate that there is no difference between KPO and BPO for the purpose of computing ALP.*
- iii) While directing to exclude M/s I Gate Global Service Ltd. from the comparables, the CIT (A) failed to appreciate that engagement of the company in ITS and ITES does not affected the profits of the company.*
- iv) While directing the exclude M/s Infosys BPO Ltd. from the comparables, the CIT (A) failed to appreciate that the comparable cannot be excluded only because the company has substantial intangible in forms of goodwill and different risk factors.”*

3. The assessee company DH India is a subsidiary of Dunnhumby Ltd. UK. The assessee company is engaged in the business of providing data analytics and data solution development and applications services to its AE i.e. DH-UK. The assessee is operating at cost plus 20% mark up for the provision of services. During the year, the company was engaged in the business of providing information technology enabled services, Web enabled Services, data analytics business in which process outsourcing services and other services relating to back of its operations and business support services to its holding company, Dunnhumby Ltd., UK. During the year under consideration, the assessee company made an international taxation with the Associate Enterprises. A reference was made to Transfer Pricing Officer u/s 92CA(3) of the Act in respect of international transaction entered into by the assessee during the Financial Year 2009-10. The Transfer Pricing Officer passed order dated 23/01/2014 directing the Assessing Officer to made an addition of Rs. 5,34,52,006/-. During the relevant Assessment Year, following international transactions were entered by the assessee:

AE	Nature of International Transaction	Amount (In INR)	Method
Dunnhumby Ltd. U.K	Provision of data analytics Services	355532164	TNMM
	Reimbursement of expenses	37330267	
	Recovery of expenses	9416059	

The Assessing Officer passed assessment order dated 24/04/2014 thereby assessing total income at Rs. 7,74,13,770/- making the adjustment as suggested by the TPO amounting to Rs.5,34,52,006/-.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. In the present Assessment Year, the assessee as well as the Revenue are contesting certain comparable and other issues. Therefore, we are taking first assessee's appeal.

6. The Ld. AR submitted that the assessee company is a domestic company engaged in the business of providing routine back-office IT-enabled Services (ITES) to its parent entity in the United Kingdom, namely Dunnhumby Ltd. UK (Associated Enterprise/AE). The Ld. AR submitted that Ground No. 1 is general ground and hence not pressed. As regards to Ground No. 2 relating to erroneous exclusion of Microgenetics Systems Ltd., the Ld. AR submitted that the turnover threshold is inconsequential in selection of potential comparables qua entities engaged in providing BPO services. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of Chryscapital Investment Advisors (India) Pvt. Ltd. vs. DCIT (2015) 376 STR 183. As regards to Ground No. 3 relating to erroneous rejection of R-Systems International Ltd. from the list of comparables, the Ld. AR submitted that the decision of the Tribunal in

case of M/s Midland Credit Management India Pvt. Ltd. (ITA No. 3892 & 3765/Del/2017 order dated 14.09.2020, has identical issue involved and the Tribunal included the said comparable. As regards to Ground No. 4 relating to erroneous inclusion of TCS E-serve International Ltd. and TCS E-Serve Ltd. in the list of comparables, the Ld. AR relied upon the decision in case of M/s Midland Credit Management India Pvt. Ltd. (supra) and submitted that the Tribunal has directed to exclude the TCS entities. As regards to Ground No. 5 and 6, the Ld. AR submitted that the same are not pressed. As regards to Ground No. 7, the Ld. AR submitted that no economic rationale was adopted for charging mark-up on out of pocket expenses by the TPO. The Ld. AR submitted that it is common industry practice not to charge any mark-up on recovery of out of pocket expenses, such as, outstation travel, boarding/lodging, etc. Such expenses are incurred on need basis and do not add intrinsic value to services being delivered. An independent third party would not have paid any mark-up on such reimbursements. The Ld. AR relied upon the decision of the Tribunal in case of Cheil Communication India Pvt. Ltd. vs. DCIT (ITA No. 712/Del/2010). As regards to Ground No. 8 relating to working capital adjustment, the Ld. AR submitted that the same is jettisons a separate overlapping adjustment on account of outstanding receivables. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of PCIT vs. Kusum Health Care Ltd. (ITA No. 765/2016) wherein the SLP filed by the Department before the Hon'ble Apex Court was also dismissed in limine.

7. As regards to the Revenue's appeal, the Ld. AR submitted that the Revenue is challenging the exclusion of the following 4 companies from the list of comparables.

Ground ' Revenue's appeal	Company's name
Ground No. i)	Accentia Technology Pvt. Ltd.
Ground No. ii)	Eclerx Services Ltd.
Ground No. iii)	1 Gate Global Services
Ground No. iv)	Infosys BPO Ltd.

In addition to the CIT(A)'s findings, the Ld. AR relied upon the decision of the Tribunal in case of Midland Credit (supra) for exclusion of Accentia Technology Pvt. Ltd. and Infosys BPO Ltd. which are contested by the Revenue in Ground No. i) and (iv). As regard exclusion of Eclerx Services Ltd. and I Gate Global Services which are contested in Ground No. ii) and iii) of Revenue's appeal, the Ld. AR in addition to the CIT(A)'s findings, relied upon the jurisdictional Delhi High Court/ITAT decisions directing rejection of these companies from list of potential comparables in a case where the assessee is a captive-entity providing routine back-office ITES to group companies:

- i) Rampgreen Solutions Pvt. Ltd. Vs. CIT(A) (ITA No. 102/2015) (Delhi H.C.
- ii) Ameriprise India Pvt. Ltd. Vs. DCIT 1(1) (ITA No. 7014/Del/2014)(Delhi Tribunal)
- iii) Techbooks International Pvt. Ltd. Vs. DCIT (ITA No. 240/del/2015) (Delhi Tribunal)

8. The Ld. DR submitted that in its appeal the assessee has raised 8 Ground of appeals (GOA). GOA 1 to 7 relates to the TP adjustment in ITES segment and GOA 8 relates to the adjustment on account of delayed realization of receivables from AE. On the issue of adjustment in ITES segment, the Ld. DR submitted that a detail show-cause dt. 09.01.2014 was issued to the assessee. The filters applied by the assessee in its TP documentation and the comparables, selected by the assessee have been discussed in para 2.3 of SCN at P/3-5 of the TP order, Para-4 at P/5-6 of the TP order. The TPO, after considering the reply of the assessee, discussed the filters and the comparables in para 3.5 of the TP order. The CIT(A) has upheld the action of the TPO and his discussions are recorded at Page Nos. 12-14. The filters proposed by the TPO have been discussed at para 2.4 & 3 of the SCN at Page no. 5 of the TP order and the proposed comparables have been discussed in para 4.2 & 4.3 of the SCN at page no. 6-7 of the TP order. The TPO after considering the reply of the assessee have further discussed the use of current year data at para 3.7 at

page no. 12, filters & quantitative criteria at para-4 of the order at page no. 19-46. The Ld. DR submitted that the CIT(A) has upheld the action of the TPO and his discussions are recorded at page 14. As regards rejection of 'R Systems International Ltd', the discussions are recorded at page 64 of the TP order. This comparable has been rejected due to having different year ending and non-availability of audited data on quarterly basis. As discussed, neither contemporaneous data nor audited quarterly data was available which could enable the TPO to compute PLI. The CIT(A) has discussed this issue at page 14 of his order. The Ld. DR also pointed out the discussion on use of contemporaneous / current year data at page 22 of CIT(A) order. As regards selection of TCS e-Serve International Ltd and TCS e-Serve Ltd as comparables by the TPO, the discussions of the TPO are recorded at page no. 57-58 and page no. 58-61 of the TP Order. The Ld. DR further submitted that the CIT(A) has discussed these comparables at page no. 17-21 of his order and has upheld the inclusion of these two comparables by the TPO. On the issue of inclusion of these two comparables, the Ld. DR relied upon the decision of Tribunal, Delhi in following two cases:

(i) Xchanging Technology Services India Pvt. Ltd, AY 2010-11, ITA No.1222/Del/2015, order dt.08.09.2015. Relevant findings & decision of Hon'ble ITAT, Delhi is recorded in para-23 to 26 at P/28-33 of the order wherein both TCS e-Serve International Ltd and TCS e-Serve Ltd have been retained as comparables.

(ii) Smart Cube India Pvt. Ltd, AY 2010-11, ITA No. 1103/Del/2015, order V A dt.27.04.2018. Relevant findings & decision of Hon'ble ITAT, Delhi is recorded in para-8 &9 at P/20-24 of the order wherein both TCS e-Serve International Ltd and TCS e-Serve Ltd have been retained as comparables.

The Ld. DR also pointed out the discussion on comparable with super normal profit / abnormal profit in para 4.7 at page 34-39 of the order of TPO. For the purpose of comparability under TNMM, the Ld. DR relied upon following case laws:-

- ST Microelectronics Ltd, ITAT Del, 2011-TII-ITAT-DEL-TP
- CRM Services, ITAT Del, 2011-TII-86-ITAT-DEL-TP
- Deloitte Consulting India Pvt. Ltd., ITAT, Hyderabad, ITA No. 1082/Hyd/2010,

As regards treatment of gain/loss from foreign exchange fluctuations and provision for doubtful debts as non-operating, the same has been examined and discussed by the TPO in para 4.9, page no. 46-49 of the TP order. The Ld. DR further submitted that the CIT(A) has upheld the action of the TPO as discussed at page 23 of his order. The Ld. DR pointed out that the same are in line with provisions contained in clause (j) & clause (k) of Rule 10TA of I.T. Rules. Further, in the case of Avaya India Ltd., AY 2014-15, ITA No. 7290/Del/2018 , Tribunal, Delhi vide its order dt. 24.09.2019 [para 17.1 to 17.4, Page 25-27] has upheld the exclusion of foreign exchange gain/loss both in the case of the comparable companies and in the case of the tested party. Accordingly, the Ld. DR prayed that the order of the TPO and the CIT(A) may be sustained. On the issue of allowing risk adjustment, the CIT(A) examined the issue and has held that the same is not admissible as per discussions recorded at P/23 of his order. However, the CIT(A) has allowed working capital adjustment. As regards the issue of considering 3rd party cost recoveries from AE for applying mark-up, the discussions of the TPO are recorded in para 4.14 at page 75-81 of the TP order. The CIT(A) has upheld the action of the TPO as discussed at page 23. The CIT(A) has held that these recoveries from AE, being expenses of boarding/lodging expenses of the employees, are part & parcel of the business of the assessee and forms part of the total cost base. On the issue of adjustment on account of delayed realization of receivables from AE, the Ld. DR submitted that the TPO has noted on perusal of the Service Agreement dt. 27.02.2009 with the AE that a period of 30 days was allowed to the AE to make the payment of receivables to the assessee and accordingly any delay beyond the stipulated period was liable to be benchmarked. The Ld. DR pointed out the said Service Agreement and the relevant terms which are mentioned in clause 3.3 of the Agreement from the paper book. The TPO

issued a detail show-cause dt. 09.01.2014 & called for the requisite detail. However the assessee did not provide the desired details to the TPO. The TPO called for relevant information u/s 133(6) from CRISIL to logically arrive at the interest rate for benchmarking and also considered the bank rate as per RBI norms. The Ld. DR submitted that the TPO applied the interest rate of 14.88% to work out the adjustment for delayed realization of outstanding from AE considering various crucial factors such as the currency in which the loan has originated, the assessee is an Indian entity, the opportunity cost, the expected rate of return on investments made in India if the funds are realized in time. Since the assessee did not provide the detail of invoice-wise delayed realization of receivables from AE corresponding to the outstanding as on 01.04.2009, the TPO benchmarked in respect of the entire outstanding of Rs.2,36,28,467 for the year at the aforesaid interest rate. On assessee's appeal, the CIT(A) has upheld the action of the TPO and has given his findings holding the outstanding receivables as international transactions. The elaborate discussions of the CIT(A) are recorded at page 23-26 of his order. The CIT(A) has upheld the findings of the TPO/AO except modifying the interest rate. The CIT(A) has discussed the clause (c) to explanation (i) of Sec.92B and has held that the explanation is clarificatory in nature & the amendment has retrospective effect. The CIT(A) has concluded that outstanding trading receivables are at par with unsecured loans & correctly treated the same in the nature of unsecured loans. The CIT(A) has also held that benchmarking of transactions under TNMM takes into account the transactions upto the date of invoice whereas the profit corresponding to the loss of interest on such outstanding receivables is a subsequent phenomena and accordingly have to be benchmarked separately. However, the CIT(A) modified the rate of interest to LIBOR plus 300 bps in accordance with the currency of receipt of such outstanding receivables following the decision of Hon'ble Delhi HC in the case of Cotton Naturals India Pvt. Ltd., ITA No.233/2014. The Ld. DR also relied upon the following case-laws on the issue:

- (i) Techbooks International Pvt. Ltd., ITA No. 6102/Del/2016, order dt.

06.07.2020 of ITAT, Delhi. The Ld. DR submitted that this case squarely covers the issue involved in the case of the appellant viz. treatment of such outstanding receivables as loans, denial to aggregated benchmarking of principle transactions & outstanding receivables, plea of working capital adjustment. The case-law of Kusum Healthcare Pvt. Ltd has also been considered and the facts are distinguished in addition to other case-laws considered/discussed by the Tribunal.

(ii) Techbooks International Pvt. Ltd., ITA No. 240/Del/2015, order dt. 06.07.2015 of ITAT, Delhi.

(iii) Samsung India Electronics Pvt. Ltd, ITA No. 6813/Del/2012, order dt.07.01.2020 of ITAT, Delhi.

(iv) Cheil India Pvt. Ltd vs. DCIT, ITA No.1230/Del/2014, order dt.15.05.2014 of ITAT, Delhi.

9. We have heard both the parties and perused all the relevant material available on record. The Ld. AR at the time of hearing submitted that Ground No. 1 is General, hence not pressed as well as Ground No. 4 and 5 were also not pressed. Hence, Ground No. 1, 4 and 5 of the assessee's appeal are dismissed as not pressed. Now coming to Ground No. 2 of the assessee's appeal, it is pertinent to note that exclusion of Microgenetics Systems Ltd. by the TPO was done after applying the turnover-filter of Rs. 5 crores. The Ld. AR's submissions that there is no linkage between the turnover and profit margins though are not valid, but the TPO has also not given any concrete findings as to why this particular comparable was earlier selected and was only excluded following the turnover filter of Rs. 5 crores. This filter whether strictly followed by the TPO or not in other comparables is also not emerging from the order of the TPO. Thus, it will be appropriate to direct the TPO/AO for taking cognizance of this comparable after applying all the filters as well as the functional profile of the comparable into account and thereafter if all the parameters are proper, then select this comparable. Thus, Ground No. 2 of the assessee's appeal is partly allowed for statistical purpose. As regards to

Ground No. 3 of the Assessee's appeal relating to rejection of R-Systems International Ltd., from the perusal of the annual reports, it can be seen that audited financial data for the relevant previous year (April, 2009 to March, 2010) is available in the public domain relating to four quarters. Merely having different financial year cannot discard this comparable from the list of comparables. Thus, we direct the TPO/AO to consider this comparable after applying all the filters as well as the functional profile of the comparable into account and thereafter if all the parameters are proper, then select this comparable. Thus, Ground No. 3 of the assessee's appeal is partly allowed for statistical purpose. As regards to Ground No. 4 relating to inclusion of TCS E-serve International and TCS E-Serve Limited in the list of comparables, it can be seen that the functional profile of these comparables are different from that of the assessee company. Both these entities are involved in software testing, verification and validation of software which falls in the domain of "software development" services. Besides this separate segmental details pertaining to ITeS/BPO activities are also not available in their financial statements. Therefore, we direct the TPO/AO to exclude both these comparables i.e. TCS E-serve International and TCS E-Serve Limited from the final list of comparables. Hence, Ground No. 4 of the assessee's appeal is allowed. As regards to Ground No. 7 relating to third party cost recoveries from AE for the purpose of applying the mark-up, it can be seen that the third party expenses as claimed by the assessee are that of expenses on travel, boarding and lodging etc. of its employees during outstation visits. As per the terms of the service agreement with the overseas AE, such expenses are recovered by the assessee on a cost-to-cost basis, without charging any mark-up. The CIT(A) has rightly held that the assessee should have marked up these expenses by a profit-margin before making the recoveries as the said expenses are part and parcel of the business of the assessee and forms part of the total cost based. Besides this the decisions of Cheil Communication India Pvt. Ltd. (supra) is altogether on a different footing and the factual aspects are totally different from that of the assessee's case herein. In Cheil Communications, the issue was that of

remunerated by its associated enterprises on the basis of a fixed commission/charges based on expenses or cost incurred by the assessee for release of a particular advertisement as well as on advisory services. Thus, Ground No. 7 of the assessee's appeal is dismissed. As regards to Ground No. 8 of the assessee's appeal relating to working capital adjustments on account of outstanding receivables, the submission of the Ld. AR was that the assessee could not recover two invoices dated 31.03.2009 and 30.10.2009 within the stipulated credit period of 30 days and there was delay of 11 and 6 days respectively in collecting these invoices on an isolated basis. But the Ld. AR claims that the weighted average period of realization with respect to all invoices during the relevant year put together was only 20.52 days. This issue needs to be verified properly by the TPO/AO, therefore, we are remanding back this issue to the file of the TPO/AO for proper adjudication after taking cognizance of the actual delay in collection of invoices. Needless to say, the assessee be given proper hearing after following principles of natural justice. Thus, Ground No. 8 of the assessee's appeal is partly allowed for statistical purpose.

10. Now coming to the Revenue's appeal which contested the exclusion of four comparables that are, Accentia Technology Pvt. Ltd., Eclerx Services Ltd., I Gate Global Services and Infosys BPO Ltd. From the perusal of these companies profiles and the findings given by the CIT(A) is apt. As in case of Accentia Technology Pvt. Ltd. there was extraordinary event that of merger took place during the year. In case of Eclerx Services Ltd., the functional profile is altogether different than the assessee company. In case of I Gate Global Services separate segmental data relating to IT enabled Services and IT Services were not available. In case of Infosys BPO Ltd., it is a giant in the area of the software development, besides this it assumes all risk leading to higher profits as well as there was an extra ordinary economic event during the year as it acquired membership interest in Machenic Systems LLC. Thus, all these comparables were rightly excluded by the CIT(A). Hence, all four grounds

of Revenue's appeal are dismissed.

11. In result, appeal of the assessee is partly allowed for statistical purpose and appeal of the revenue is dismissed.

Order pronounced in the Open Court on this 26th Day of April, 2021

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER
Dated: 26/04/2021
*R. Naheed **

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

