

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

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.1524/Del./2017
(ASSESSMENT YEAR : 2012-13)**

M/s. CPA Global Support Services India vs. ACIT, Circle 6 (2),
Private Limited, New Delhi.
1/3, 2nd Floor, Sir Gangaram Hospital Marg,
Old Rajinder Nagar,
New Delhi – 110 060.

(PAN : AABCI1509C)

(APPELLANT)

(RESPONDENT)

**ASSESSEE BY : Shri Manomeet Dalal, Advocate
Shri Vishu Goel, AR**

REVENUE BY : Shri Surender Pal, CIT DR

**Date of Hearing : 22.12.2020
Date of Order : 03.02.2021**

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. CPA Global Support Services India Pvt. Ltd.
(hereinafter referred to as 'the taxpayer') by filing the present
appeal sought to set aside the impugned order dated 13.01.2017
passed by the Assessing Officer (AO) in consonance with the
orders passed by the Id. DRP/TPO under section 143 (3) read with

section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2012-13 on the grounds inter alia that :-

“1. That on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ("DRP")/ Learned Assessing Officer ("AO")/ Learned Transfer Pricing Officer ("TPO") erred in making addition to the returned income of the appellant by INR 13,30,04,676/- by re-computing the arm's length price ("ALP") of international transactions under section 92 of the Income-Tax Act, 1961 ("the Act").

2. That on the facts and in the circumstances of the case and in law, the reference made by the AO suffers from jurisdictional error as the AO did not record any reasons in the draft assessment order based on which he reached the conclusion that it was "necessary and expedient" to refer the matter to the TPO for computation of the arm's length price, as is required under section 92CA(1) of the Act.

3. That on facts and in the circumstances of the case and in law, the DRP/AO/TPO erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case.

4. That on the facts and in the circumstances of the case and in law, DRP/AO/TPO erred in holding the functions performed by the Appellant to be in the nature of knowledge process outsourcing ("KPO") company without appreciating the facts on record and thereby accepting certain companies which were performing high end and different services as compared to the Appellant.

5. That on the facts and in the circumstances of the case and in law, DRP/AO/TPO erred in re-computing the arm's length price of the international transactions with its associated enterprises by rejecting the quantitative filters selected by the Appellant and instead applying his additional/modified quantitative filters which lacked valid and sufficient reasoning.

6. That on the facts and in the circumstances of the case and in law, DRP/AO/TPO erred in rejecting the comparable companies selected by the Appellant without providing cogent reasons and accepting companies which are functionally not comparable to the Appellant in terms of functions, assets and risk profile.

7. That on the facts and in the circumstances of the case and in law, DRP/AO/TPO erred in disregarding the multiple year data selected by the Appellant in the TP documentation and in selecting the current year (i.e. financial year 2011-12) data for comparability despite the fact that at the time of comparison done by the Appellant, the complete data for financial year 2011-12 was not available within the public domain.

8. That DRP/AO/TPO erred on the facts and in the circumstances of the case and in law in not considering the foreign

exchange gains and bank charges as operating items while computing the operating margins of the Appellant as well as of the comparable companies.

9. That DRP/AO/TPO erred on the facts and in the circumstances of the case and in law in making arithmetical errors while computing the margins of comparable companies.

10. That DRP/AO/TPO erred on the facts and in the circumstances of the case and in law in ignoring the business/commercial' reality that since the Appellant is remunerated on an arm's length cost plus basis, i.e. it is compensated for all its operating costs plus a pre-agreed mark-up based on a benchmarking analysis, the Appellant undertakes minimal business risks as against comparable companies that are full-fledged risk taking entrepreneurs, and by not allowing a risk adjustment to the appellant on account of this fact.

11. That DRP/AO/TPO erred on the facts and in the circumstances of the case and in law by not giving benefit of MAT credit to the Appellant in computation of income.

12. That DRP/AO/TPO erred on the facts and in the circumstances of the case and in law, in initiating penalty proceedings under section 274 read with 271 of the Act.”

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. CPA Global Support Services India Pvt. Ltd., the taxpayer, incorporated in September 2003 is into rendering Information Technology Enabled Services (ITES) related to IP administration / renewal and data management services to its group companies including renewal support services, proof reading support, customer support services etc.. The taxpayer functions as a captive off-shore centre in India and supports its Associated Enterprises (AEs) in servicing customer contracts. During the year under assessment, the taxpayer entered into international transactions with is AEs :

S. No.	Type of International Transaction	Method Selected		Total value of transaction (Rs.)
		MAM	PLI	
1	Provision of IT Enabled Services	TNMM	OP/OC	871,922,767
2	Reimbursement of Expense to AEs	TNMM	OP/OC	12,304,322
3	Payment of interest on ECB	CUP	NA	1,002,818
4	Reimbursement of Expenses from AEs	CUP	NA	40,439,829

4. The taxpayer in order to benchmark its main international transaction qua business processing services/ITES applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI) and computed the tested party margin at 17.20%, selected 10 comparables with average OP/OC at 11.01% and treated its international transaction at arm's length. However, ld. TPO accepted TNMM as the MAM with OP/OC as PLI but rejected 4 comparables chosen by the taxpayer and introduced 5 new comparables by applying various filters detailed in paras 5 & 6 of its order. Ld. TPO finally selected 12 comparables with average OP/OC at 29.70%. Ld. TPO also computed the margin of the taxpayer after considering foreign exchange as non-operating at 12.53% and proposed the ALP adjustment at Rs.13,30,04,676/-.

5. The taxpayer carried the matter before the Id. DRP by way of filing the objections which have been disposed off. Consequently, the Assessing Officer (AO) framed the assessment at Rs.28,85,81,220/- u/s 143(3) read with section 144C of the Act. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1

7. Ground No.1 is general in nature, hence does not require any specific adjudication.

FOUNDATIONS NO.1, 2, 3, 4, 5, 6, 7, 9 & 10

8. Undisputedly, Id. TPO/DRP have accepted the TNMM with OP/OC as the PLI as the MAM for benchmarking the international transactions undertaken by the taxpayer with its AEs qua providing ITES services. It is also not in dispute that various filters introduced by the TPO has also been accepted by the taxpayer for benchmarking the international transactions. Id. TPO/DRP after

disposing off various objections raised by the taxpayer finally selected comparables as under :-

Sl. No.	Company Long Name	Adjusted OP/OC
1.	Accentia Technologies Ltd.	13.21%
2.	Eclerx Services Ltd.	62.04%
3.	Informed Technologies India Ltd.	22.78%
4.	Jindal Intellicom Ltd.	3.54%
5.	T C S E-Serve Ltd.	66.21%
6.	Excel Inforways Ltd. (Seg)(IT/BVPO)	42.89%
7.	R Systems International Ltd.(Seg./BPO)	2.31%
8.	Infosys BPO Limited	39.04%
9.	Acropetal Technologies Ltd. (segment)	19.91%
10.	B N R Udyog Limited	50.72%
11.	e4e Healthcare Business Services Pvt.Ltd.	23.52%
12.	Microgenetics Systems Ltd.	10.19%
Average		29.70%

9. Ld. TPO also computed the margin of taxpayer at 12.53% as against 17.20% computed by the taxpayer by considering foreign exchange as non-operating as under :-

Particulars	IT Enabled Services
Operating revenues	871,922,767
Operating costs	774,809,131
Operating profit	97,113,636
OP/OC	12.53%

10. Since the method of benchmarking the international transactions is not in dispute, ld. AR for the taxpayer in order to compress the controversy at hand contended that the taxpayer is aggrieved with inclusion of 4 comparables out of 5 introduced by the TPO and is also aggrieved in considering foreign exchange

fluctuation of bank charges as non-operating by the TPO while computing operating margin of the taxpayer.

11. First of all, we would discuss the suitability of four comparables viz. Eclerx Services Limited, TCS E-Serve Limited, Excel Infoways Limited & BNR Udyog Limited vis-à-vis the taxpayer sought to be excluded by the taxpayer to benchmark the intentional transactions one by one.

ECLERX SERVICES LIMITED (ECLERX)

12. The taxpayer sought exclusion of Eclerx on the grounds inter alia that it is functionally dissimilar; that it is also outsourcing substantial amounts of work to outsider and that Eclerx has unreliable data.

13. However, on the other hand, ld. DR for the Revenue drew our attention towards findings given by the ld. DRP at page 22 of its order and thereby relied upon the DRP findings.

14. When we examine financials of the Eclerx at page 766 of the paper book, its profile is as under :-

“Who we Are

Incorporated in 2000, eClerx services Limited (eClerx) is a Knowledge Process Outsourcing Company providing Data Analytics and Customized Process Solutions to global enterprise clients. eClerx supports core and complex activities for its clients using proprietary processes and a scalable offshore delivery model.

In May 2012, we acquired Agilyst Inc, a niche operational and analytics company focused on the U.S. media and telecom industry. In July 2007 we had acquired Igentica Group which introduced the Company to a client base of global corporation in travel and hospitality industry and strengthened the Company's presence in Western Europe.

eClerx equity shares are listed on the Bombay Stock Exchange and the National Stock Exchange of India. As on March 31, 2012 the market capitalization of the Company was Rs. 21,338 million.

What We Do

The Company supports critical processes for more than 50 clients that include global leaders in Financial Services, Manufacturing, Retail, Media, Travel and Hospitality. About 97% of our revenues come from Fortune 500 or Financial Times 500 clients.”

15. Functional profile of Eclerx shows that it is a Knowledge Process Outsourcing (KPO) company and is providing domain specific reengineering expertise in partnership with financial services firms to increase control and execute ongoing functions. It is also providing consulting, business analysis and solution testing services which provides a broad suite of services that allows its clients to operate on day-to-day basis including trade processing, reference data, accounting & finance and expense management activities. Similarly, under sales and marketing services segment, as has been described at page 767 of the annual report paper book, Eclerx provides web content management & merchandising execution, web analytics, social media moderation and analytics, search engine analytics & support, CRM platform support, lead

generation, supply chain and channel analytics, price & catalogue competitive intelligence etc.

16. Coordinate Bench of the Tribunal in case of Ameriprise India Pvt. Ltd. in ITA No.2010/Del/2014 held that Eclerx is having significant intangibles to provide KPO services whereas the taxpayer on the other hand is a captive ITES service provider on cost plus mark-up model with minimal risk. Operative part of the order of the coordinate Bench of the Tribunal is as under :-

“14.2. After considering the rival submissions and perusing the relevant material on record, we find that it is a Knowledge Process Outsourcing (KPO) company providing data analytics and data process solutions to global clients. This company provides end to end support through trade life cycle including trade confirmations and settlements etc. It also provides sales and marketing support services to leading global manufacturing, retail, travel and leisure companies through its pricing and profitability services. From the above narration of the nature of business carried on by e-Clerx Services Ltd., it is manifest that the same being a KPO company, is quite different from the assessee, providing only IT enabled services to its AE. Apart from that, it is further observed that this company has significant intangibles which it uses in rendering KPO services, against which the assessee does not have any intangibles. As such, e-Clerx Services Ltd. cannot be considered as comparable. The same is directed to be eliminated.”

17. In other words, the taxpayer is a BPO/ITES service provider which cannot be compared with KPO.

18. Furthermore, when we peruse financials of Eclerx at page 835 of the paper book, it shows that Eclerx is outsourcing its substantial amount of work to outsiders under the head ‘contract

for services' to the tune of Rs.66,08,10,000/- in addition to payment of salary to the tune of Rs.158,38,70,000/- which is 41% of the total activity carried out by the company. So, for availing ITES services from the outsiders, it is outsourcing its work and as such, cannot be compared with the taxpayer which is working as a captive ITES service provider on cost plus mark-up model with minimal risk.

19. Ld. AR for the taxpayer also contended that financial data of Eclerx in the public domain is not reliable one because turnover appearing in consolidated financial statements is not merely a sum of turnover of Eclerx (as per standalone financials) and its subsidiaries. Rather it includes the turnover of subsidiary companies and drew our attention to pages 821, 849 and 872 of the paper book which is tabulated as under :-

Name of the company	Rupees in Millions	Reference
Standalone Financials		
Turover – eClerx Services Limited	4,724.66	Page 821
Consolidated Financial Statements		
Turnover of eClerx Services Ltd. along with its subsidiaries	4,728.85	Page 849
Revenue of subsidiaries included under Consolidated Financial Statements		
- eClerx Limited	245.79	Page 872
- eClerx LLC	355.48	
- eClerx Investments Ltd.	-	
- Igentica Travel Solutions Ltd.	-	
- eClerx Private Limited	63.47	
Total Subsidiaries Turnover	664.75	

20. So, the financials of Eclerx available in the public domain, referred to above, are not reliable rather include turnover of its subsidiary companies.

21. Eclerx has been found to be not suitable comparable vis-à-vis captive service provider by the **coordinate Bench of the Tribunal in Ariba India Pvt. Ltd. vs. DCIT ITA No.5201/Del/2012.**

22. So, in view of what has been discussed above, we are of the considered view that Eclerx is not a suitable comparable vis-à-vis the taxpayer, hence ordered to be excluded.

TCS E-SERVE LIMITED (TCS E-SERVE)

23. The taxpayer sought exclusion of TCS E-Serve on grounds of functional dissimilarity; providing services predominantly to Citi Group; having high turnover and presence and payment for band; segmental information not available; having abnormal profitability trend and relied upon the decision of **Hon'ble Delhi High Court in Avaya India Pvt. Ltd. vs. ACIT in ITA 532/2019, decisions of coordinate Bench of the Tribunal in case of Ariba India Pvt. Ltd. vs. DCIT ITA No.876/Del/2015, and Baxter India Pvt. Ltd. in ITA No.6185/Del/2016.**

24. However, on the other hand, Id. DR for the Revenue drew our attention towards findings given by the Id. DRP at pages 22 & 23 of its order and thereby relied upon the DRP findings.

25. When we examine functional profile of TCS E-Serve at page 903 of the paper book which shows that TCS E-Serve is into providing services from various processing facilities which includes processing, collections, customer care payments in relation to services offered to Citi Group, software testing, verification and validation of software. Furthermore, it is predominantly providing services to Citi Group, as is evident from Notes to Accounts to annual report for Financial Year 2010-11 and described at pages 1090 to 1092 of the paper book. From pages 1093 to 1102 of the paper book, it is proved that TCS E-Serve also acquired BPO arm of Citi Group with a \$ 2.5 billion contract for a period of 9.5 years and as such, Citi Group became a related party during FY 2009-10.

26. Furthermore, when we examine the turnover of TCS E-Serve, it is 180 times of the taxpayer and is duly supported by Tata Consultancy Services (TCS)/Tata group having large scale and large client base. TCS E-Serve also contributed brand equity to the tune of Rs.3.67 crores to Tata Sons Ltd. by using its brand name 'Tata' which makes it incomparable vis-à-vis the taxpayer.

27. Hon'ble Delhi High Court in case of **Avaya India Pvt. Ltd. in ITA 532/2019 order dated 24.07.2019** excluded TCS E-Serve as a comparable for the purpose of determining the ALP of international transactions involving the assessee and its AE on account of huge turnover and non-availability of segmental revenues by returning following findings :-

"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 opposite 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.”*

28. Furthermore, Id. AR for the taxpayer drew our attention towards the abnormal profitability trend of TCS E-Serve since 2004-05 to 2012-13 in tabulated form which is extracted for ready reference as under :-

	Pre – Acquisition Period				Post – Acquisition Period				
TCS E-Serve Ltd.	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
Sales	4659	5965	7936	9400	12176	13594	14424	15784	17916
Operating Profit	593	772	1642	1835	3510	5114	5889	6145	7288
OP/OC%	14.59%	14.87%	26.10%	24.27%	40.50%	60.39%	69.02%	63.75%	68.57%
Average OP/OC Margins	19.96%				60.45%				

29. So, the post acquisition period shows huge profitability trend in the TCS E-Serve which was average OP/OC margin of 19.96% in FY 2004-05 to 2007-08 and shoot up to 60.45% in post acquisition period of FY 2008-09 to 2012-13 which is also a factor to be reckoned with for TP analysis.

30. So, keeping in view the functional dissimilarity, related party transactions, high turnover and payment for brand fee to Tata and abnormal profitability trend discussed in the preceding paras, we are of the considered view that TCS E-Serve is not a suitable comparable vis-à-vis the taxpayer who is a BPO/ITES service provider, hence ordered to be excluded.

EXCEL INFOWAYS LTD. (EXCEL)

31. The taxpayer sought exclusion of Excel on the grounds inter alia that it fails employee cost filter applied by the Id. TPO; it faced extra ordinary circumstances due to steep reduction in the profit; segmental financials are not available. However, Id. DR for the Revenue relied upon the findings returned by the Id. DRP.

32. Perusal of para 5 of the TP order shows that TPO has himself applied a filter to reject the companies having employee cost less than 25% of the sales.

33. When we examine financials of Excel, available at page 1015 of the paper book, it shows that employee cost/net sales is 13.50% explained in the table below :

Employee cost (amount in 000)	Net Sales (amount in 000)	Employee cost/ Net Sales
INR 20,215.30	INR 154,921.03	13.05%

34. Furthermore, when we examine financials of Excel no doubt it is engaged in IT & BPO but segmental details of the same are not available as is evident from page 1029 of the paper book. When we examine page 1029 & 1025 of the paper book Excel is shown to have incurred significant cost on account of certain material related to infra activities amounting to Rs.7,48,53,000/- which has been shown under the P&L account as purchase of stock but its

segmental data is not available. Perusal of annual report at page 1190 of the paper book shows that Excel has started infrastructure activities during FY 2011-12, as is evident from Item No.6 under the head “commencement of new activities”, extracted as under :-

“In view of the global recession in Information Technology (IT) and Business Processing Outsourcing (BPO), the Board of Directors of the Company consider it prudent to close down the related services in future and to diversify the business into new areas of construction, development of property and real estate etc. as mentioned in sub clauses (73), (84) and (85) of clause (C) of Part III of the Memorandum of Association of the Company, at the appropriate time and depending on the availability of resources and opportunity.”

35. Excel has been rejected by the Tribunal in taxpayer’s own case of earlier years. So, in these circumstances, we are of the considered view that Excel is not a suitable comparable vis-à-vis the taxpayer as it fails employee cost/net sales ratio filter applied by the TPO and segmental financials are not available, which is into new infrastructure activities, real estate, etc.. So, we order to exclude Excel from the final set of comparables.

BNR UDYOG LTD. (BNR)

36. The taxpayer sought exclusion of BNR on the ground that it fails related party transactions of 25% applied by the TPO. The TPO has himself applied filter to reject companies where related party transactions exceeds 25% of the sales and that this company is earning super abnormal profit and is also functionally dissimilar.

37. However, on the other hand, Id. DR for the Revenue drew our attention towards findings given by the Id. DRP in para 19 of its order and thereby relied upon the DRP findings.

38. Perusal of financials of BNR, available at pages 744 & 745 of the paper book, shows that related party transactions/net sales of this company is 49.60% explained in tabulated form as under :-

RPT (in INR)	Net Sales (amount in 000)	RPT/ Net Sales
1,70,35,029	3,43,43,644	49.60%

39. Furthermore, this company has earned super normal profit having extra ordinary growth in its revenue. Following table explained the super normal profit/growth as under :-

Particulars	Revenue		Related Transactions	Parties
Turnover	90,94,848	3,43,43,644	3,42,60,146	1,70,35,029
Growth (%)		277.62%		
PBT	3,26,196	98,19,993		
Growth (%)		2910.46%		

40. Furthermore, when we examine functional profile of BNR at page 723 of the paper book shows that it is engaged in medical transcription and medical coding which is different from the taxpayer who is a routine ITES service provider working on cost plus mark-up business model. So, we are of the considered view that since BNR fails RPT filter of 25% applied by the TPO himself, having super normal growth, having functional dissimilarity

vis-à-vis taxpayer is not a suitable comparable, hence ordered to be excluded.

GROUND NO.8

41. Ld. DRP/TPO/AO erred in treating foreign exchange loss as a non-operating item. Undisputedly, the taxpayer invoices its AEs for its services in US Dollars and bears foreign exchange risk qua movement in the exchange rate between US Dollar and INR. When the taxpayer derives its income from overseas AEs and the remuneration of support services provided to its AE is a major source of income. Ld. TPO/DRP have erred in applying the Safe Harbour Rule which is not applicable for AY 2012-13, the year under consideration being effective from 18.09.2013 having been made applicable prospectively.

42. So, when foreign exchange loss is to form part of the total base of the taxpayer for the purpose of charging a mark up to its AEs as it derives income from its overseas AEs and it being a cost plus entity, the taxpayer earns foreign exchange loss incurred if any, foreign exchange fluctuation is operating in nature in order to compute margins, hence ld. DRP/TPO/AO has erred in treating foreign exchange loss as non-operating item. So, we direct to treat foreign exchange loss as operating in nature, hence ground no.8 is determined in favour of the taxpayer.

GROUND NO.11

43. Ground No.11 is dismissed having not been pressed during the course of arguments.

GROUND NO.12

44. Ground No.12 being consequential in nature needs no specific findings.

45. Resultantly, the appeal filed by the taxpayer is partly allowed.

Order pronounced in open court on this 3rd day of February, 2021.

**Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 3rd day of February, 2021
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.DRP
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**