IN THE INCOME-TAX APPELLATE TRIBUNAL "J" BENCH MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.1898/Mum/2015 (Assessment Year 2010-11)

Swiss Re Services India Private Ltd., Unit 701-702, Peninsula Corporate Park, Tower A, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013. **PAN: AAHCS5626E**	Vs.	DCIT Circle-2(3)(2) Room No. 552, Aayakar Bhavan, M.K. Marg, Mumbai-400020.
Appellant		Respondent

ITA No.389/Mum/2016 (Assessment Year 2011-12)

Swiss Re Services India Private Ltd., Unit 701-702, Peninsula Corporate Park, Tower A, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013. **PAN: AAHCS5626E**	Vs.	DCIT Circle-2(3)(2) Room No. 552, Aayakar Bhavan, M.K. Marg, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri Kamal Sahni, Shri Abhishek Tilak & Miss Mehar Chandni (ARs)

Respondent by : Shri Uodhalraj Singh (Sr.DR)

Date of Hearing : 27.11.2019

Date of Pronouncement : 06.01.2020

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. These two appeal by assessee are directed against two separate assessment order under section 143(3) rws 144C (13) dated 21.01.2015 & 26.11.2016, passed in pursuance of direction of Dispute Resolution Panel-II (DRP), Mumbai & DRP-IV for assessment year 2010-11 & 2011-12 respectively. In

both the appeals, the assessee has raised certain common grounds of appeal, therefore, both the appeal were clubbed, heard and are decided by a common order. For appreciation of facts, the appeal for A.Y. 2010-11 is treated as lead case.

2. Brief facts of the case are that the assessee is a wholly owned subsidiary of Swiss Reinsurance Company Ltd., Zurich (SRZ) Switzerland and is engaged in providing consultancy/ information technology enabled services (ITeS) to its foreign Associate Enterprises (AE). The assessee-company filed its return of income for Assessment Year 2010-11 on 29.03.2011 declaring total income at Rs. 7,87,57,222/-. Along with the return of income, the assessee furnished report under Form 3CEB, reporting international transaction with its AE. The assessee reported following international transaction in its Form 3CEB:

Sr. No.	Nature of Transaction	Amount (Rs.)	Method
1	Provision of support services.	35,51,49,879	TNMM
2	Reimbursement of Expenses	1,14,11,154	TNMM
3	Import of Fixed Asset	180,886	TNMM

3. For bench marking of provision of support services, the assessee selected Transaction Net Margin Method (TNMM) as most appropriate method. The profit level indicator (PLI) selected was operating profit/ total cost (OP/TC). The assessee has shown its margin at 14.86% for transaction of provision of support services. The assessee selected 9 company as comparable and

computed the margin on the basis of single year average margin in the following manner:

Sr.No.	Name of the comparable Company	Single Year margins (in percent)
1.	Aditya Birla Minacs Worlwide Limited	3.85
2.	Caliber Point Business Solutions	21.16
3.	Crossdomain Solutions Pvt. Ltd.	NA
4.	Datamatics Financial Services Ltd.	-4.06
5	ICRA Techno analytics Pvt. Ltd.	24.90
6.	Informed Technologies India Ltd.	24.20
7	Infosys BPO Ltd.	31.63
8	Nittany Outsourcing Services Pvt. Ltd.	21.26
9.	R Systems International Ltd.	7.55
	Arithmetic Mean	**16.31**

4. The margin on comparable based on average of was 16.31% and the assessee's margin for international transaction was 14.85%. Thus, the assessee claimed its transaction at the Arms Length. The Assessing Officer made a reference to Transfer Pricing officer (TPO) under section 92CA for computation of Arms Length Price (ALP).

5. During the proceeding, the TPO noted that the assessee has not considered other income as operating item although they are on non-operating nature as seen in the entries in the Profit & Loss A/c, which include interest on deposit, rental income, profit of sale of its assets, reversal of provision of

doubtful debt, liabilities no longer required/written back and others and accordingly TPO computed assessee's PLI at 8.61% by excluding other income.

6. On benchmarking the TPO accepted six comparable and further added three additional comparable. The TPO after including three additional comparable worked out Arithmetic mean of Profit Level Indicator (PLI) of 29.55% against the margin of comparable company and arrived at margin of assessee's PLI at 8.61% by excluding "other income" in the following manner:

Sr.No.	**Name of Company**	**OP/OC**
1	Caliber Point Business Solutions Ltd.	21.16%
2	Crossdomain Solutions Pvt. Ltd.	NA
3	I C R A Techno Analytics Ltd. *	24.90%
4	Informed Technologies India Ltd.	24.20%
5	Infosys BPO Ltd.	31.63%
6	E4e Healthcare (Formerly known as Nittany Outsourcing Services Pvt. Ltd.)	21.26%
7	Accentia Technologies Ltd.	43.62%
8	Acropetal Technologies Ltd.	27.52%
9	E-Clerx Services Ltd.	42.14%
	Arithmetic Mean	**29.55%**

7. On the basis of margin of final set of comparable margin of 29.55%, the assessee's margin at 8.6%, accordingly, the TPO proposed the adjustment of Rs. 6,84,85,849/- in the following manner:

Particulars	**Amount**
Total Operating cost in relation to provision of support services	32,70,05,579
Arm/s Length Revenue as Per Comparables @ 29.55%	42,36,35,579
Value of international transaction (B)	35,51,49,879
105% of international transaction	37,29,07,373
95% of international transaction	33,73,92,385

8. The TPO noted that ALP falls outside the tolerance range of +/- 5% of transaction value, accordingly, amount of (Rs. 42,36,35,725/- minus Rs. 35,51,49,879/-) an adjustment of Rs. 6,84,85,849/- was proposed in the international transaction with regard to provisions of support services. The Assessing Officer on receipt of report of TPO, made upward adjustment/addition of Rs. Rs. 6,84,85,849/- in the draft assessment order passed under section 143(3) r.w.s. 144C(1) dated 17.02.2014. The copy of the draft assessment was served on the assessee.
9. The assessee filed its objections before DRP-IV, Mumbai. The DRP after considering the objection of assessee directed to include certain item excluded by TPO on the ground that such item of “other income” are operating in nature. However, in case there are similar item in any of these comparable finally considered, the TPO was directed to exclude such income from operating income of the comparable to maintain the consistency. On receipt of direction of DRP, the Assessing Officer passed the final assessment order by making adjustment of ALP of Rs. 6,84,85,849/-. Further, aggrieved by the additions made in pursuance of

direction of DRP, in final assessment order under section 143(3) rws 144C (13) dated 21.01.2015, the assessee has filed present appeal before the Tribunal.

10. The assessee has raised following grounds of appeal:

Ground 1 - Transfer Pricing Adjustment of Rs. 6,84,85,849 relating to provision of support services

1.1 On the facts and in the circumstances of the case, the learned Transfer Pricing Officer ('TPO') and the learned Assessing Officer ('AO') under the directions of the Hon'ble Dispute Resolution Panel ('DRP') erred on facts and in law in making an addition of Rs. 6,84,85,849 to the international transaction of the Appellant based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').

1.2 The learned AOITPO under the directions of the Hon'ble DRP erred on facts and in law in disregarding the various submissions made by the Appellant without providing any cogent reasons thereof and rejected comparable companies selected by the Appellant without appreciating the fact that such selection was based on contemporaneous data and the transfer pricing study report prepared and maintained as per Section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('the Rules').

1.3 The learned AO / TPO under the directions of the Hon'ble DRP erred on facts and in law in considering additional companies for determining the arm's length price of the international transactions, without taking into consideration the differences in the functions performed, assets employed and risks undertaken between the Appellant and the companies considered by the TPO as comparable and without finding any material deficiencies in the benchmarking analysis undertaken by the Appellant. The ld. TPO/AO/DRP have erred in erroneously selecting comparable company and adding certain companies to the final set of comparable companies on the following basis.

1.3.1 The learned TPO/AO/DRP has erred in including Accentia Technologies Ltd ('Accentia') on the ground that Accentia is engaged in ITES, even though Accentia is not functionally comparable of the Appellant and has undergone extraordinary event during the year under consideration and hence should be rejected.

1.3.2 The Learned TPO/AO/DRP has erred in including Acropetal Technologies Ltd. on the factually incorrect ground that it operates in two segments namely engineering design and ITES and the ITES segmental results were considered to be comparable to the assessee. However, it is evident from the Annual Report of the company that its segments are Engineering Design., IT (& not ITeS) and Health Care Services. Moreover, the TPO and DRP erred in not considering that Acropetal is engaged in development of software products and hence not comparable to the Appellant.

1.3.3 The learned TPO/AO/DRP erred in upholding the selection of Eclerx Services Ltd. ('Eclerx'), on the ground that Eclerx operates in the domain of ITES even though Eclerx is not functionally comparable and subcontracts/outsources its work, thereby operating in a different business model and hence is not comparable to the Appellant.

1.4 The learned AO I TPO under the directions of the Hon'ble DRP erred on facts and in law in incorrectly computing the margin of the Appellant by excluding income in the nature of operating income from margin computation.

1.5 The learned AO I TPO under the directions of the Hon'ble DRP erred on facts and in law in erroneously stating that the Appellant has considered interest on deposits, rental income and profit on sale of fixed assets as operating income inspite of the fact that these expenses were never considered by the Appellant in its margin computation.

1.6 The learned AO I TPO under the directions of the Hon'ble DRP erred on facts and in law in adopting an inconsistent approach for computation of margins of the Appellant and comparable considering other income as non-operating income in case of the Appellant and same as operating income in case of comparable companies.

1.7 The learned AO I TPO under the directions of the Hon'ble DRP erred on facts and In law in not providing adequate opportunity to the Appellant to verify its margin computed by the learned TPO.

1.8 The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in requiring financial data of only the current year (i.e. FY 2009-10) of the comparable companies to be used for benchmarking the Appellant's international transaction of provision of support services.

1.9 The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in not allowing appropriate adjustments to the comparable companies as was compulsorily required to be done in accordance with the provisions of Rule 10B(l)(e)(iii) of the Rules, to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned AO/TPO.

The Appellant prays that the learned AO/TPO be directed to consider the international transaction of the Appellant as arm's length and accordingly the transfer pricing adjustment of Rs. 68,485,849 should be deleted.

Ground 2 - Penalty Proceedings under Section 271(1)(c) of the Act

2.1 On the facts and in the circumstances of the case, the learned AO has erred in law in proposing to initiate penalty proceedings under Section 271(1)(c) of the Act.

The Appellant prays that the penalty proceedings be dropped in the matter.

Ground 3 - Short credit for advance taxes paid and taxes deducted at source

3.1 The learned AO erred on facts and in law in granting short credit for advance taxes of Rs. 19,950,000 as against Rs. 25,336,000 claimed by the Appellant in the return of income.

3.2 The learned AO erred on facts and in law in granting short credit for tax deducted at source ('TDS') of Rs. 104,760 against Rs. 821,509 claimed by the Appellant in the return of income.

The Appellant prays that the learned AO be directed to grant the credit of Rs. 25,336,000 for advance taxes and Rs. 821,509 for TDS as claimed by the Appellant in the return of income.

Ground 4 - Consequential reliefs

4.1 The learned AO under the directions of the Hon 'ble DRP erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material in deciding the case. Further, they also failed to consider the contrary material and evidence adduced by the Appellant. Accordingly, the Appellant prays that the AO be directed to grant all consequential reliefs arising out of reliefs from this appeal.

4.2 The learned AO has erred in levying interest under Section 234B of the Act of Rs. 17,462,176. Accordingly, the Appellant prays that the AO be directed to grant consequential relief in computing interest under Section 234B of the Act in accordance with the law.

4.3 The learned AO has erred in levying interest under Section 234C of the Act of Rs. 806,573 on the assessed income. Accordingly, the Appellant prays that the AO be directed to grant consequential relief in computing interest under Section 234C of the Act in accordance with the law.

The Appellant craves leave to add to, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law.

Ground No.5: Additional Grounds of Appeal filed with the ITAT by the Appellant vide submission dated 5 November 2015.

On the facts and in the circumstances of the case, and in law, Infosys BPO Ltd. ought not to be retained in the set of comparable to determine the arm's length price of international transaction entered into by the assessee.

11. We have heard the submission of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the revenue and perused the material available on record. We have noted that the assessee has raised additional ground of appeal vide application dated 05.11.2015. In the additional ground of appeal, the assessee has raised ground for exclusion of Infosys BPO Ltd. from final set of comparable in determining Arm's Length Price of international transaction entered by assessee. In the application for admission of additional ground, the assessee has pleaded that no additional facts are required to be brought on record for adjudication. Facts relating to adjudication of additional ground of appeal are emanating from the order of lower authorities. To support the application, the assessee

has relied upon the decision of Hon'ble Supreme Court in National Thermal Power Corporation Ltd. vs. CIT [229 ITR 383 (SC)] and Hon'ble Bombay High Court in CIT vs. Pruthvi Brokers & Shareholders [349 ITR 336(Bom)]. The ld. AR made his submission as per the averments in the application for admission of additional ground.

12. The ld. DR for the revenue, on the other hand not seriously opposed the additional ground of appeal raised by assessee. Considering the facts of the case, we find that no additional facts are required to be brought on record for adjudication of additional ground of appeal, all facts relating to adjudication of additional grounds are emanating from the orders of lower authorities. Accordingly, the additional grounds of appeal raised by assessee are admitted for adjudication.

13. Now, turning to the merits of various grounds of appeal. The ld. AR of the assessee submits that in case from final set of comparable, the comparable no. 5, 7, 8 & 9 i.e. Infosys BPO, Accentia Technologies, Acropetal Technologies and E-Clerx Services Ltd. are excluded and Datamatics Financial Services Ltd. are included, the assessee's margin would be within permissible range. The ld. AR further submits that **E-Clerx and Accentia Technologies** was excluded in the assessee's own case for A.Y. 2009-10 in ITA No. 1465/Mum/2014 dated 31.08.2018 on the test of functionality. Further, Acropetal Technology and Infosys BPO are also not functionally comparable with the assessee.

14. **For exclusion of Infosys BPO,** the ld. AR of the assessee submits that the retention of Infosys BPO as a comparable which was inadvertently included as a comparable by the assessee itself in its Transfer Pricing Study. There is no estoppel in the law to exclude the comparable, if the same is not comparable with the assessee on functional comparability. It is submitted that Infosys BPO is a giant company with different risk profile and nature of services, has brand value and owns IPs unlike the assessee who broadly provides back office support service and hence not comparable to the assessee. The ld. AR of the assessee submits that Tribunal in case of Stream International Services (P.) Ltd. vs. ADIT (141 ITD 492 Bom-Trib), excluded this comparable by taking view that Infosys BPO is a market leader and a giant company with a different risk profile and nature of service, has brand value and hence not comparable to the assessee due to huge difference in the size and scale of the company. The TPO in A.Y. 2009-10 himself rejected this comparable on account of Multiple Functional Segments with huge allocated items. In support of his submission, the ld. AR relied upon the decision of Tribunal in Stream International Services (P.) Ltd. vs. ADIT, Hon'ble Bombay High Court in CIT vs. Pentair Water India (P.) Ltd. (381 ITR 216) and Hon'ble Delhi High Court in PCIT vs. Sanvih Info Group Pvt. Ltd. (ITA No. 420 of 2019 dated 16.05.2019).

15. **For exclusion of Acropetal Technologies Limited**, the ld. AR of the assessee submits that the ld. TPO has considered Acropetal as a comparable

considering all of its three segments including the IT Segment. Moreover, the perversity in the TPO order is such that the TPO has referred to Page no.24 of the Annual Report of the comparable and has mentioned that Acropetal has only two segments, namely, Engineering Design and ITeS segment. The ld. AR further submits that the segments given at page 24 of this comparable company are the segments for AY 2009-10. Moreover, the TPO has wrongly mentioned the IT segment of Acropetal as ITeS segment which is factually incorrect. The ld. AR further submits that there are three segments reported by this comparable, namely, Engineering Design Service, Information Technology Services ('IT Segment') and Healthcare in Acropetal Technologies for the concerned year- AY 2009-10. For the concerned year three segments are provided at Page 23 of the Annual Report of this comparable. The ld. AR of the assessee submits that IT segment of Acropetal cannot be compared to the assessee company, which is undisputedly an ITeS company. The activities undertaken by Acropetal are not comparable to the functions of the assessee and this comparable is liable to be excluded. The reliable segmental data is not available. The ld. AR of the assessee submits that Hon'ble Delhi High Court in PCIT vs. Sexo India Private Ltd. (ITA No. 682 of 2016 dated 28.09.2016) held that in case of TNMM, reliable segmental details of all three elements, i.e. cost, sales and assets employed are required. Mere allowability of segmental sale is not sufficient.

16. **The For inclusion of Datamatics Financial Services Limited.,** the ld. AR of the assessee submits that the TPO has rejected Datamatics on the ground that it is a "persistent loss making" company. The ld. AR of the assessee submit that it is a well settled law that a company cannot be considered as a persistent loss making company if it has incurred a loss in one or two financial years consecutively. This filter was also applied by the assessee while eliminating companies to arrive at a set of comparable in the TP study. It was submitted that Datamatics has enjoyed net profits (Profits before Tax) in FY 2007-08 to FY 2010-11. Moreover, if NCP Margins of Datamatics is considered, it can be observed that the NCP margin loss is only in the present years. In support of his submission, the ld. AR submits that Hon'ble Bombay High Court in Goldman Sachs (India) Securities Pvt. Ltd. vs. CIT in ITA No. 2222/2013, wherein it was held that a company which had losses in two consecutive year was held not to be a persistent loss making company and was accepted as a comparable. The ld. AR further submits that TPO himself accepted Datamatics as a comparable in A.Y. 2009-10, accordingly by following the aforesaid decision of jurisdictional High Court, in the light of the fact that Datamatics to be included as a comparable and cannot be rejected, merely because it has incurred losses. The ld. AR also relied upon the decision of Tribunal TPG Capital India (P.) Ltd. vs. DCIT (ITA No. 7594/Mum/2014).

17. On the other hand, the ld. DR for the revenue supported the order of Assessing Officer/TPO/DRP. The ld. DR further submits that TPO while determining the ALP of the international transaction referred for computation of ALP has given detailed analysis on inclusion of Infosys BPO Ltd., Accentia Technology, Acropetal & eClerx being functionally comparable with the assessee. Further, Datamatics Financial Services was excluded on functional dissimilarities. The DRP also examined the exclusion and inclusion of various comparable. The ld. DR further submits that in the event of exclusion or inclusion of any comparable, the matter may be restored to the file of AO/TPO for computation of ALP afresh.

18. We have considered the rival submission of the parties and have gone through the orders of lower authorities. We have also deliberated on various case law relied by ld. AR of the assessee. We have noted that the assessee while benchmarking the ALP with regard to international transaction of assessee, the assessee selected 9 comparables, the TPO accepted only 4 comparable, the TPO included 5 additional comparable in the final set of comparable.

19. Before us, the ld. AR of the assessee disputed the inclusion of 4 comparable only, i.e. Infosys BPO Ltd., Accentia Technology Ltd., Acropetal Technology Ltd. and eClerx. Similarly, the ld. AR also argued on inclusion of Datamatics Financial Services Ltd. in final set of comparable. We have noted in AY 200910 TPO included Accentia Technology and eClerx in

final set of comparable, the inclusion was affirmed by DRP, however, on appeal before the Tribunal both the comparable were excluded order dated 31.08.2018, vide ITA No. 1465/Mum/2014 and 1493/Mum/2014 with the following direction:

> "7. We have heard both the counsel and perused the records. The ld. Counsel of the assessee submitted that the assessee disputes the following selection of comparables in this case:
>
> a) Coral Hubs Ltd. also known as Vishal Information Technologies Ltd.
> **b) Eclerx Services Ltd.**
> **c) Accentia Technologies Ltd.**
> d) Cosmic Global Ltd.
>
> 8. ……………..
> ……………..
>
> Accordingly, we proceed to adjudicate the issue as under:
>
> a) …………….
>
> b) **<u>Eclerx Services Ltd.:</u>**
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> In respect of this comparable, the assessee has submitted that this is engaged in data analytic KPO service specializing in the field of financial services and retail and manufacturing. The assessee has submitted that as Eclerx is a KPO whereas the assessee has been classified as an IT Enabled service provider by the TPO, Eclerx cannot be taken as a comparable case. The assesses in this regard explained that while under BPO services, the main activities involve data entry, data processing and other routine services, in the case of KPO the services are more research oriented involving higher skill set levels. Though even under KPO services there may be some amount of BPO activity, KPO services are essentially characterized by performance of research, domain based analysis and domain based expertise. In a KPO service, depth of knowledge and experience and judgement factor plays an important role while in the case of BPO, it is concerned more with size, volume and efficiency. Highlighting these aspects the assessee has submitted Eclerx should not be considered as comparable to the assessee.

The DRP in this regard has rejected the assessee's contention by observing as under:

> While examining the functional analysis performed by the assessee in its study report, it has already been pointed out that the assessee's activity is more in the nature of analytics and not in the nature of routine BPO activity. As a matter of fact, it is explained at para 4.1.1.3 of the TP study report that the assessee helps the AE in evaluating the probable maximum loss including inspection of the location, construction, fire fighting ability etc of the property which is subject matter of insurance. The information that is provided by the assessee also assist the AE in suggesting suitable modification / improvement in the process that could reduce potential hazards and consequentially the premium. Similarly under the claims support the assessee facilities the claim survey process by supporting the international loss adjusters sent by the AE to assess the claim. Similarly "loss of profit claim" involves a considerable amount of estimation and is subjective. The process involved is inherently complicated and it is again explained at para 4.1.1.5 of the TPSR that the assessee supports and helps AE in processing such business insurance claims by gathering and processing all the relevant data in a suitable manner. All this clearly shows that the services performed by the assessee are not purely in the nature of BPO services as contended by it or even as considered by the TPO. A reference to the annual report of Eclerx also indicated that the e-clerk is engaged in similar services of providing market research, market support, analysis of data etc. Hence, functionally there appears to be no reason why Eclerx should not be compared with the assessee. Hence, this comparable is retained.

In this regard, the ld. Counsel of the assessee submitted that unlike this comparable, Eclerx Services Ltd. is not involved in high-end services and it is not a KPO. It has been submitted that the assessee is engaged into various services like data analytical, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management.

For this, the ld. Counsel of the assessee has referred to extracts from the annual report. On the other hand, it has been submitted that the assessee is merely engaged in rendering of support services to its foreign AE. Hence, it has been claimed that Eclerx Services Ltd. is engaged into the various services which are functionally dissimilar to the assessee. It has been further submitted that no segmental financial data is available and, hence, in the absence of said data, it cannot be said to be comparable to the assessee. In this regard, the ld. Counsel of the assessee submitted that without prejudice to the submission of the assessee that it is not involved in high and services and that it is not a KPO, it is submitted that two companies cannot be held to be comparable to each other merely because both the companies are engaged into KPO services.

Per contra, the ld. DR relied on the orders of the authorities below.

Upon careful consideration, we find that the ITAT has considered this issue in the case of *M/s. Fractal Analytics Private Limited* (supra), wherein the tribunal has held as under:

> "72, Upon careful consideration, we note that assessee is engaged in providing analytical solutions to its AEs to lower the cost of customer acquisition, to improve brand performances, improve multi-dimensional reporting, understand consumer behavior, and many other analytical services. As against the above, we find that Eclerx Services is engaged into diverse range of activities which includes financial services and sales and marketing support services. Its functions primarily are consultancy, business analysis and solution testing. Thus, M/s.Eclerx Services is engaged into various functions and segments. Its segmental data are not available. In following case laws it has been held that the company should he rejected as comparable as its segmental data are not available:-
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> (i) M/s.Capital IQ Information Systems (India) Pvt. Ltd. v. ACIT [ITA No.l24/Hyd/2014]
>
> (ii) M/s. Excellence Data Research Pvt. Ltd v. ITO [ITA No. 159/Hyd/2014]
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> 13. Furthermore we note that in the case of Rampgreen Solutions Private Limited (supra) has held that although super profits could not be the only reason to exclude the comparable, however, Hon 'ble High Court had expounded that in such circumstances it may be necessary to bear in mind the super normal profits in a certain cases indicated functional dissimilarity. That a wide deviation in the PLI amongst selected comparables could be indicative that the comparables selected are either materially dissimilar or the data used is not reliable. The Hon 'ble High Court in (he decision noted the findings of Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. wherein it was noted that Eclerx Services is engaged in data analytical, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. Furthermore it is noted that Eclerx Services also offered

financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services.

14. The observation of the learned DRP that assessee and Eclerx Services are KPOs and hence comparable is also not sustainable. The Hon 'ble Delhi High Court in the case of Actis Global Services Private Limited (supra) had held that even though both being KPOs two entities are not comparable if they were catering to different types of business.

15. From this it is amply clear that the said diverse activities are not comparable with the service of providing analytical solution rendered by the assessee. Moreover though some functions are similar, there are lot of other functions by M/s.EcIerx Services which are not done by the assessee. Hence, absence of segmental data make comparability not feasible. In these circumstances and in the facts and circumstances discussed above considering the precedents as above, we are of the considered opinion that Eclerx Services is not comparable in this case to that of the assessee because of diverse nature of its functions. A large number of them are dissimilar to that of the assessee and the fact that proper segmental data are not available. Hence, holding that Eclerx Services cannot be taken as a comparable in this regard, we remit the issue to the TPO to make the computation afresh after excluding Eclerx Services as a comparable, and making further-computation as per law.

In view of the above precedent, we allow the grievance of the assessee and hold that this comparable is functionally different.

c) **Accentia Technologies Ltd.:**

In this regard, the assessee's objection against this comparable selection is that it is engaged in providing software services and since the TPO himself has rejected other cases that are engaged in software business, this case also should be excluded on the principle of consistency. The assessee has also referred to the fact that this company is concentrating on health care, receivable cycle management, which are not similar to the assessee's activities.

The DRP in this regard rejected the assessee’s contention and gave the following directions:

The assessee contests on the ground that segmental data are not available. The support services provided by the company are classified under BPO/ITES. It is also seen from the Annual Report of the company that

> income from ITES is 78.72% of total operational revenue, further, in case of M/s Willis Processing Services (india) Pvt Ltd in ITA No.4547/Mum/2012 in Para 18, as well as Delhi Benches of the Tribunal in the case of Actis Advisors Pvt Ltd in ITA No. 5277/Del/2011 have accepted this as a comparable. Hence, the claim of the assessee is rejected and the action of TPO is upheld in this case.

The ld. Counsel of the assessee in this regard submitted that the Hon'ble jurisdictional High Court in the case of *PTC Software (I) Pvt. Ltd* (supra) has upheld the exclusion of Accentia Technologies Ltd. on the ground of it being functionally different inasmuch as it develops its own software and render medical transcription services and that profit of Accentia Technologies Ltd included external event of merger and amalgamation. The Hon'ble High Court has held as under:

> (i) The impugned order of the Tribunal has excluded M/s. Accentia Technologies Ltd., from the list of comparables to determine the ALP of the Respondent's transactions.
>
> (ii) The impugned order renders a finding of fact that the nature of activities carried out by M/s. Accentia Technologies Ltd., are different from that carried out by Respondent. M/s. Accentia Technologies Ltd., developes its own software and rendered Medical transcription services while the Respondent is providing BPO Services. Besides, the impugned order of the Tribunal held that high profit margins of M/s. Accentia Technologies Ltd., was attributable to amalgamation which took place in the previous years relevant to subject Assessment Year. Therefore, not comparable.
>
> (iii) In fact, this Court in GIT v/s. Aptara Technology Ltd., (Income Tax Appeal No. 1209 of 2015) has upheld the view of the Tribunal in not accepting the Accentia Technologies Ltd., as comparable, inter alia, on account of fact that extra ordinary event such as merger/ amalgamation would affect the profitability of M/s. Accentia Technologies Ltd., Thus, making it incomparable.
>
> (iv) Further, in that case, as in this case, the Tribunal has also recorded a finding of fact that the / activities of M/s. Accentia Technologies Ltd., and the Respondent are different. Thus, not comparable. The above finding of fact is not shown to be perverse.
>
> (v) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

> In view of the above decision of the Hon'ble High Court, we allow the grievance of the assessee and hold that this comparable is not valid in the present comparability analysis."

20. Considering the decision of Tribunal in assessee's own case for A.Y. 2009-10, wherein the Tribunal excluded the eClerx and Accentia from final set of comparable for determining the ALP of similar international transaction of assessee with its AE. No contrary facts or law is brought to our notice to take other view. Thus, respectfully following the decision of co-ordinate bench for AY 2009-10, we direct the AO/TPO to exclude Accentia Technology and eClerx from final set of comparable.

21. So far as exclusion of Infosys BPO is concerned, we have seen that the assessee itself included Infosys BPO Ltd. in its TP study and furnished related data about this comparable. For exclusion of this comparable, the assessee raised additional ground of appeal, which we have admitted for adjudication. Before us, the ld. AR of the assessee vehemently submitted that the assessee inadvertently included as a comparable by the assessee itself in its Transfer Pricing Study, and there is no estoppel in law to exclude the comparable, if the same is not comparable with the assessee on functional comparability. Infosys BPO is a giant company with different risk profile and nature of services, has brand value and owns IPs unlike the assessee who broadly provides back office support service and hence not comparable to the assessee. We have seen that the Tribunal in case of Stream International Services (P.) Ltd. vs. ADIT (141 ITD 492 Mum-Trib),

while considering the functional similarity/dissimilarity excluded this comparable by taking view that Infosys BPO is a market leader and a giant company with a different risk profile and nature of service, has brand value and hence not comparable to the assessee due to huge difference in the size and scale of the company. Further, we have noted that the TPO himself in A.Y. 2009-10 himself rejected this comparable on account of Multiple Functional Segments with huge allocated items. The Hon'ble Bombay High Court in CIT vs. Pentair Water India (P.) Ltd. (supra) while considering the question of law relating to the exclusion of this comparable on size and turnover filter affirmed the exclusion. The Hon'ble Delhi High Court in Sanvih Info Group (supra) also confirmed the exclusion of Infosys BPO being a giant company. We have further noted that by following the decision of Hon'ble Bombay High Court in CIT vs. Pentair Water India (P.)Ltd. (supra), the co-ordinate bench of Tribunal in Hapag Lloyd Global Services Ltd. vs. DCIT (ITA No. 7539/Mum/2014 held that the turnover of Infosys BPO is very high comparative to tested party and excluded and excluded this comparable. Considering the consistent view of Hon'ble Delhi High Court, Hon'ble Bombay High Court and co-ordinate bench of Tribunal, we are of the view that Infosys BPO is a market leader and a giant company with a different risk profile and nature of service, has brand value and hence not comparable to the assessee due to huge difference in the size and scale of the company. Therefore, we direct the AO to exclude Infosys

BPO from final set of comparable as the same is not comparable with assessee, which is proving captive services.

22. Now turning to the comparability of Acropetal Technology Ltd. we have seen that the ld. TPO while considering the functional comparability has considered all of its three segments including the IT Segment. The ld. AR vehemently submitted that the segments of this comparable are provided at page 24 of this comparable company are the segments for AY 2009-10. And that ld. TPO has wrongly mentioned the IT segment of Acropetal as ITeS segment which is factually incorrect. It was also argued that there are three segments of this comparables; namely, (i) Engineering Design Service, (ii) Information Technology Services ('IT Segment') and (iii) Healthcare. For the concerned year three segments of Acropetal are provided at Page 23 of its Annual Report and that IT segment of Acropetal cannot be compared to the assessee company, which is undisputedly an ITeS company. The TPO while including Acropetal Technology perused the page no.24 of its Annual Report and concluded that this company operates in two segments namely Engineering Design segment and ITeS. The ITeS segmental results were considered. The objection of assessee about the high turnover, the ld. TOP concluded that assessee failed to demonstrate as to in what way turnover impact the profitability of the comparable company. Before the ld. DRP, the assessee objected for inclusion of this comparable. The DRP concluded that the TPO has considered only ITeS segment as comparable. There is nothing

in the annual report to suggest that ITeS segment of this comparable has exported any software product. There is nothing to indicate that there is expenditure of Rs. 4.23 crore on Site Development Expenses in ITeS segment.

23. On perusal of page no. 23 & 24 (page no.387 & 388 of PB) of Annual Report of Acropetal, we find that these reports pertaining to AY 2009-10 and relates to Engineering Design Services and Information Technology Services (IT Services) and healthcare. Thus. we find force in the submission of ld. AR of the assessee that TPO wrongly mentioned IT Segment of Acropetal as ITeS segment. Accordingly the activities undertaken by Acropetal as reported at page no. 23 of Annual Report (PB 387) are not comparable with the function of assessee, which is primarily in ITeS Services. We have noted that this fact was demonstrated before ld. DRP. However, the ld DRP concluded the ITeS segmental results were considered, which is factually incorrect. In our view in absence of reliable segmental data with regard to ITeS services, the Acropetal cannot be considered as valid comparable. Thus, we direct the AO/TPO to exclude this comparable from final list of comparable.

24. Now turning to the inclusion of Datamatics Financial services Ltd (Datamatics). As noted above the ld AR for the assessee vehemently argued that the TPO has rejected Datamatics on the ground that it is a “persistent loss making” company, though Datamatics has earned net profits (Profits

before Tax) in FY 2007-08 to FY 2010-11. And relied on the decisions of Hon'ble Bombay High Court in Goldman Sachs (India) Securities Pvt. Ltd. vs. CIT (supra), wherein it was held that a company which had losses in two consecutive years were held not to be a persistent loss making company and was accepted as a comparable. The TPO rejected Datamatics by taking view that it is a loss making company. Though, the assessee brought the facts on record that in FY 2007-08 this company earned profit of R. 3.77 Crore before tax. The ld. DRP affirmed the action of AO by taking view that the segmental information of this comparable for ITeS is not available and has not been considered by the assessee. And the revenue earned by this comparable includes processing, printing as well as export of ITeS thus financial compared by the assessee are not comparable.

25. We have seen that Datamatics was accepted by TPO as a comparable in A.Y. 2009-10. The Hon'ble Bombay High Court in Goldman Sachs (India) Securities Pvt Ltd Vs CIT (supra) held that only persistent loss making unit cannot be said as comparable. Thus, considering the fact that this company was accepted as comparable by TPO himself in AY 2009-10, thus, we direct the AO/TPO to include this comparable in final set of comparable. However, the assessee is directed to provide segmental data for ITeS services of Datamatics.

26. In view of the aforesaid discussion and following the decisions, we direct the AO/TPO to exclude Infosys BPO Ltd., Accentia Technology Ltd.,

Acropetal Technology Ltd. and Eclerx Services Ltd. and include Datamatics Financial Services Ltd. in the final set of comparable and recompute the ALP of ITeS support services with its AE. The AO/TPO is further directed to follow the direction of DRP on objection no.1.6 & 1.7 while re-computing the ALP. In the result, this ground of appeal is partly allowed.

27. Ground No.2 relates to initiation of penalty under section 271(1)(c). This ground of appeal is premature, therefore, needs no adjudication.

28. Ground No.3 relates to Short Credit of TDS. Considering the nature of grounds of appeal, we direct the AO to verify the facts and grant appropriate relief to the assessee.

29. Ground No.4 relates to consequential relief, this ground of appeal being consequential, therefore, needs no specific adjudication.

30. In the result, appeal of the assessee is partly allowed.

<u>ITA No. 389/Mum/2016 (AY 2011-12)</u>

31. In appeal for this assessment year the assessee has raised following grounds of appeal:

> **Ground 1 - Transfer Pricing Adjustment of Rs. 36,593,538 relating to provision of support services**
>
> 1.1 On the facts and in the circumstances of the case, the learned Transfer Pricing Officer ('TPO') and the learned Assessing Officer ('AO') under the directions of the Hon'ble Dispute Resolution Panel (‘DRP') erred on facts and in law in making an addition of Rs. 36,593,538 to the international transaction of the Appellant based on the provisions of Chapter X of the Income-tax Act, 1961 ('the Act').

1.2 The learned AO / TPO under the directions of the Hon'ble DRP erred on facts and in law in disregarding the various submissions made by the Appellant without providing any cogent reasons thereof and rejected comparable companies selected by the Appellant without appreciating the fact that such selection was based on contemporaneous data and the transfer pricing study report prepared and maintained as per Section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('the Rules').

1.3 The learned A.O / TPO under the directions of the Hon'ble DRP erred on facts and in law in considering additional companies for determining the arm's length price of the international transactions, without taking into consideration the differences in the functions performed, assets employed and risks undertaken between the Appellant and the companies considered by the TPO as comparable and without finding any material deficiencies in the benchmarking analysis undertaken by the Appellant.

The ld. TPO/AO/DRP have erred in erroneously selecting comparable company and adding certain companies to the final set of comparable companies on the following basis.

31.3.1 The learned TPO/AO/DRP erred in upholding the selection of Eclerx Services Ltd. ('Eclerx'), on the ground that Eclerx operates in the domain of ITES even though Eclerx is not functionally comparable and subcontracts/outsources its work, thereby operating in a different business model and hence is not comparable to the Appellant.

31.3.2 The learned TPO/AO/DRP has erred in including Accentia Technologies Ltd ('Accentia') on the ground that Accentia is engaged in ITES, even though Accentia is not functionally comparable of the Appellant and has undergone extraordinary event during the year under consideration and hence should be rejected.

31.3.3 The Learned TPO/AO/DRP has erred in including Acropetal Technologies Ltd. on the factually incorrect ground that it operates in two segments namely engineering design and ITES and the ITES segmental results were considered to be comparable to the assessee. However, it is evident from the Annual Report of the company that its segments are Engineering Design., IT (& not ITeS) and Health Care Services. Moreover, the TPO and DRP erred in not considering that Acropetal is engaged in development of software products and hence not comparable to the Appellant.

1.4 The learned AO / TPO under the directions of the Hon'ble DRP has determined the arm's length price of the comparables in violation of Sections 92C(1) and 92C(2) by resorting to cherry picking of comparables without appreciating the facts of the Assessee's case and without understanding the functions performed, assets employed and risks assumed ("FAR") by the Assessee vis-a-vis the comparables selected by the TPO.

1.5 The learned AO / TPO under the directions of the Hon'ble DRP erred on facts and in law in erroneously computing the margin of Caliber Point Business Solutions Limited at 17.74% instead of correct margin of 15.25% computed by the Appellant.

1.6 The learned AO / TPO under the directions of the Hon'ble DRP have wrongly rejected the multiple year analysis undertaken by the Appellant for computing margins of comparable companies.

1. 7 The learned AO/TPO under the directions of the Hon'ble DRP erred on facts and in law in not allowing appropriate adjustments to the comparable companies as was compulsorily required to be done in accordance with the provisions of Rule 10B(1)(e)(iii) of the Rules, to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned AO/TPO.

The Appellant prays that the learned AO/TPO be directed to consider the international transaction of the Appellant as arm's length and accordingly the transfer pricing adjustment of Rs. 36,593,538 should be deleted.

<u>Ground 2 - Penalty Proceedings under Section 271 (1)(c) of the Act</u>

2.1 On the facts and in the circumstances of the case, the learned AO has erred in law in proposing to initiate penalty proceedings under Section 271 (1)(c) of the Act.

The Appellant prays that the penalty proceedings be dropped in the matter.

<u>Ground 3 - Short credit for taxes deducted at source</u>

3.1 The learned AO erred on facts and in law in granting short credit for taxes deducted at source ('TDS') of Rs. 857,776 as against Rs. 1,145,750 claimed by the Appellant in the return of income.

The Appellant prays that the learned AO be directed to grant further credit of Rs. 287,974 for TDS as claimed by the Appellant in the return of income.

<u>Ground 4 - Consequential reliefs</u>

4.1 The learned AO under the directions of the Hon'ble DRP erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material in deciding the case. Further, they also failed to consider the contrary material and evidence adduced by the Appellant. Accordingly, the Appellant prays that the AO be directed to grant all consequential reliefs arising out of reliefs from this appeal.

4.2 The learned AO has erred in levying interest under Section 2348 of the Act of Rs. 8,475,488. Accordingly, the Appellant prays that the AO be directed to grant consequential relief in computing interest under Section 234B of the Act in accordance with the law.

4.3 The learned AO has erred in levying interest under Section 234C of the Act of Rs. 1,008,431 on the assessed income. Accordingly, the Appellant prays that the AO be directed to grant consequential relief in computing interest under Section 234C of the Act in accordance with the law.

The Appellant craves leave to add to, alter, amend or withdraw all or any of the grounds of appeal herein above and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law.

32. Ground No.1 relates to TP Adjustment on account of provision of support services to its AE. We have noted that this ground of appeal is identical to the ground No.1 in assessee's appeal for AY 2010-11.

33. The ld. AR of the assessee while making submission confined his submissions only for exclusion of Eclerx from final set of comparable and would submits that in case EClerx is excluded, the transaction of assessee with its AE would be within tolerance range as per the Act. Considering the fact that on similar set of fact on similar transaction for AY 2010-11, we

have directed the AO/TPO to exclude Eclerx final set of comparable on functional dissimilarity. Therefore, following the principle of consistency, the AO/TPO is directed to exclude Eclerx from final set of comparable and recompute the ALP of its international transaction with AE. Since, we have accepted the limited submission made by ld. AR of the assessee and allowed the exclusion of Eclerx, therefore, discussion on other grounds/sub grounds raised by assessee have become academic.

34. Ground No.2 relates to initiation of penalty. This ground of appeal is premature and needs no adjudication at this stage.

35. Ground No.3 relates to Short Deduction of TDS. Considering the fact that similar ground of appeal was raised by assessee in appeal for AY 2010-11. We have direct the AO to verify the facts and grant appropriate relief to the assessee in accordance with laws.

36. Ground No.4 relates to consequential relief, which needs no specific adjudication.

37. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 06/01/2020.

Sd/-	**Sd/-**
SHAMIM YAHYA	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 06.01.2020
SK

<u>Copy of the Order forwarded to</u> :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT

5. DR "J" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai