

(2019) 07 DEL CK 0267

In the Delhi High Court

Case No : Income Tax Appeal No. 532 Of 2019

M/S Avaya India Pvt. Ltd

APPELLANT

Vs

ACIT

RESPONDENT

Date of Decision : 24-07-2019

Acts Referred:

Income Tax Rules, 1962 — Rule 10A, 10B, 10B(1)(a), 10B(1)(b), 10B(1)(c), 10B(1)(d), 10B(1)(e), 10B(1)(f), 10B(2), 10B(2)(a), 10B(2)(b), 10B(3), 10B(4), 10C, 10C(2)(f), 10D, 10E
Income Tax Act, 1962 — Section 92B, 92B(2), 92C, 144C, 260A

Citation : (2019) 07 DEL CK 0267

Hon'ble Judges : Dr. S. Muralidhar, J; Talwant Singh, J

Bench : Division Bench

Advocate : Dr. Shashwat Bajpai, Sharad Aggarwal, Vibhooti Malhotra

Final Decision : Allowed

Judgement

Dr. S. Muralidhar, J

1. The Assessee is in appeal against an order dated 3rd December, 2018 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No.

1904/Del/2015 for the Assessment Year (AY) 2010-11.

2. This appeal was admitted on 11th July, 2019 and the following question of law was framed for consideration:

Whether the ITAT was justified in upholding the order of the TPO and the DRP in not excluding M/s TCS E-Serve Limited; M/s TCS E-Serve

International Limited from the list of comparables for the purposes of determining the arms-length price of the international transactions involving the

Assessee?

3. Arguments were heard on that date and orders reserved.

Background facts

4. The Assessee is a subsidiary of Avaya International LLC, USA. It is engaged in providing programming and application support for switching

integration and PBX systems. It specifically deals with IVR, call centres, AIC, CMS technologies. The Assessee also provides marketing support

services to its Associated Enterprises (AEs), which includes assistance in advertising and promotion of the product sold by 'Avaya' group. The

Assessee also provides back-office services to its AEs, which includes provision of services relating to indirect billing, fixed assets, accounts payable,

accounts receivable etc

5. During the year under consideration, the Assessee provided software development services (â??CSDâ?), information technology enabled services

(â??ITESâ?) and marketing support services (â??MSSâ?) to its AEs on cost-plus basis. It purchased fixed assets and availed legal, finance, human

resource, IT support and other support services from its AEs.

6. On 15th October 2010, the Assessee filed its return of income for the AY in question declaring a total income of Rs.29,83,98,593/-. The return was

picked up for the scrutiny. The Assessing Officer (â??AOâ?) noticed the international transactions carried out by the Assessee with its AEs and

referred the matter to the Transfer Pricing Officer (â??TPOâ?) for determination of Arm's Length Price (â??ALPâ?) of those international

transactions.

7. The Assessee had in its transfer pricing (TP) study disclosed, inter alia, six types of international transactions, which included provision of CSD,

ITES, MSS etc. For benchmarking its international transactions, the Assessee selected the Transactional Net Margin Method (â??TNMMâ?) as the

most appropriate method (â??MAMâ?) applying the operating profit (â??OPâ?)/total cost (â??TC') as the appropriate profit level indicator

(â??PLIâ?). For the ITES segment, the Assessee selected ten comparables having an average OP/TC percent of 14.5%, whereas the Appellantâ?s

OP/TC percent was 18%. As regards the provision of MSS, the Assessee picked up seven comparables with an average OP/TC by 9.95% whereas

the Appellantâ?s OP/TC was 6.48%. This Court is not referring to the comparables pertaining to the CSD segments since that is not a matter on

which the parties have joined issue.

Order of the TPO

8. The TPO passed a detailed order on 22nd January, 2014. The TPO carried out a fresh search of comparables and applying various filters, proposed

adjustment to the ALPs of the international transactions in all three segments. For the ITES segment, he picked up nineteen comparables having an

average OP/TC of 26.61%. He recommended a TP adjustment of Rs. 19,40,74,658/-. In the MSS segment, he picked up eight comparables with an

OP/TC of 21.41% and recommended a TP adjustment of Rs.2,53,25,670. As far as the MSS segment was concerned, the TPO picked up the

comparable uncontrolled price (â??CUPâ?) method as against the TNMM method adopted by the Assessee for benchmarking and determined the

ALP at NIL, thus making a TP adjustment of Rs.2,12,31,617/-.

9. Pursuant to the order passed by the TPO, the AO issued a draft order on 27th February, 2014 under Section 144-C of the Act. Aggrieved by the

said draft assessment order, the Assessee filed objections before the Disputes Resolution Panel (â??DRPâ?). While upholding the order of the TPO

concerning the adjustments recommended for the ITES segment, the DRP directed inclusion/ exclusion of comparables in the CSD and MSS

segments. The Assessee then appealed to the ITAT.

Impugned order of the ITAT

10. The challenge in the MSS segment by the Assessee to the inclusion of TSR Darashaw Limited and HCCA Business Services Private Limited was

accepted by the ITAT and it ordered their exclusion. As regards the comparables picked up by the TPO for the ITES segment, and approved by the

DRP, the ITAT accepted the plea of the Assessee in respect of the following comparables and excluded them:

(i) Accentia Technologies Ltd.

(ii) Eclerx Limited.

(iii) Infosys BPO Ltd.

(iv) Fortune Infotech Ltd.

11. However, the plea of the Assessee for exclusion of M/s TCS E-Serve Limited and M/s TCS E-Serve International Limited was rejected by the

ITAT and that is how the Assessee is in appeal in this Court against the said decision of the ITAT. The question of law framed by this Court is

therefore confined to the exclusion of the said two comparables. It requires to be noted that the Revenue is not in appeal before this Court against the

decision of the ITAT so far as it accepted the plea of the Assessee and directed exclusion of the other comparables picked up by the TPO both in the

ITES and MSS segment transactions.

Submissions on behalf of the Assessee

12. Dr. Shashwat Bajpai, learned counsel appearing for the Assessee made the following submissions:

(i) Both the comparables i.e. M/s TCS E-Serve Limited and M/s TCS E-Serve International Limited had a high brand value and operated on a huge

economic upscale and were therefore able to command and generate better profits.

(ii) On both parameters, viz., "high-economic upscale" and "high brand value" both comparables were rendered functionally dissimilar to

the Assessee and, therefore, ought to have been excluded for the purpose of determination of the ALP. In fact, this was the very reason that the

ITAT had excluded Infosys BPO Ltd. as a comparable.

(iii) In doing so, the ITAT followed this Court's judgment in PCIT v. E-Valueserve SEZ P. Ltd. (decision dated 29th August, 2018 in ITA 948/2018)

which decision also upheld the exclusion of M/s TCS E-Serve International Limited as a comparable on the same parameters. This Court in

Evalueserve Sez (Gurgaon) Private Limited (supra) referred to the earlier decision dated 28th November, 2017 in ITA No. 1064/2017 (PCIT v BC

Management Services P. Ltd.) where again the exclusion by the ITAT of M/s TCS E-Serve Limited as a comparable was upheld by this Court. It

was noted that there was a close connection between M/s TCS E-Serve Limited and TATA Consultancy Services Ltd. ("TCS Limited") and that

for brand value, the association with TCS Limited reflected and impacted the profitability of TCS E-Serve Limited "in a very positive manner".

Although both these decisions were cited before the ITAT, in support of the plea for exclusion of both the above comparables, while discussing the

said two comparables, the ITAT failed even to mention these two decisions.

(iv) Out of the nine comparables ultimately chosen, they had a mean margin of 14%. It was only by picking up M/s TCS E-Serve Limited and M/s

TCS E-Serve International Limited that the margin got pushed to 64 and 69

percent respectively. Therefore, these two comparables were outliers. In the changed regime that has since been adopted, at present the comparables are picked up that have a 35 to 65 percent range of comparison with the compared entity instead of a simple average and a mean of comparables. The bottom and top high upscale comparables are automatically excluded even before the comparability analysis begins.

(v) The turnover as far as M/s TCS E-Serve Limited was Rs.1359 crores whereas that of the Assessee was Rs.24 crores. The Assessee's case was closer to that of Evalueserve Sez (Gurgaon) Private Limited (supra) and PCIT v BC Management Services P. Ltd. (supra) and in those cases also M/s TCS E-Serve Limited was excluded as a comparable. The turnover of Infosys BPO Ltd. was Rs.1126 crores, which was similar in scale to M/s TCS E-Serve Limited and this was also the reason why Infosys BPO Ltd. was excluded from the comparables.

(vi) M/s TCS E-Serve Limited and M/s TCS E-Serve International Limited, were associated with the Tata brand and made a brand equity contribution of Rs.37 crores. The ITAT only picked up this figure in percentage terms and not in actual money terms. The Assessee on the other hand made no brand contribution to its parent. This was another reason that made the two comparables unequal to the Assessee.

(vii) A reference was made to the Director's report of M/s TCS E-Serve Limited in the first year of acquisition by TCS of the company by the Citi Group. The total income had increased from Rs.1299 crores to Rs.1441 crores @ 11%, the profit before the tax was higher over the previous year figure of 226%, it was noted that M/s TCS E-Serve Limited along with its subsidiary M/s TCS E-Serve International Limited and M/s TCS E-Serve America, Inc. maintained its leadership position in providing ITES and business process outsourcing (BPO) in the banking and financial services industry domain (BFSI) with the City Group entities being its largest customers since 1998.

(viii) The report also referred to the the company finding the scope of its operations by commencing services of Non-Citi Accounts in the BFSI Sector and this was done by leveraging the client base of M/s TCS using its brand. It is further pointed that prior to 31st December 2008, TCS E-Serve was part of Citi group. With effect from 1st January 2009, Tata Consultancy Services

Ltd. acquired the entire holding of this entity. As a prearrangement/share purchase agreement, Tata Consultancy Services Ltd. made an agreement with Citi Group Inc. for acquisition of Citi group interest in TCS.

(ix) Thus, this type of an arrangement was covered under Section 92B (2) of the Act which contemplated that if a transaction was entered into by an enterprise with an unrelated party, then for the purpose of the said Section 92B it should be deemed to be transaction entered into between related parties i.e. two AEs. In other words, even if the transaction is between unrelated party and an enterprise, then, it would be deemed to be an international transaction if there was any prior agreement between the related parties on the basis of which present transaction is being undertaken.

(x) Dr Bajpai referred to a large number of decisions, including decisions of the various Benches of the ITAT dealing with AY 2010-11, where these very two comparables were excluded. In a tabular form, he also presented the decisions of the ITAT excluding these two comparables on both the parameters i.e. high-economic upscale and high brand value.

Submissions on behalf of the Revenue

13. Ms. Vibhooti Malhotra, learned counsel appearing for the Revenue on the other hand submitted that the ITAT is fully justified in rejecting the plea of the Assessee for exclusion of the above two comparables. The Assessee was providing ITES to its group entities, and the two comparables were service providers to the Citi group which was the major customer. Therefore, there is complete functional similarity with that of the Assessee.

She submitted that the impugned comparables offer a very fine illustration of an identical transaction being conducted in an uncontrolled manner

and hence are most opportune for computation of the ALP.

14. Ms. Malhotra submitted that as rightly pointed out by the ITAT the expenditure corresponding to the contribution of the TATA brand TCS E-serve Ltd. was only 0.43% of the total operational expenses. That the said comparables were owned by the Tata group lent credence to the TPO's conclusion that the margins earned by them from CITI group, were on arm's length. She submitted that there is no case made out for excluding the said two comparables.

Analysis and reasons

15. The above submissions have been considered. In a large number of decisions this Court has emphasized, that for there to be reliable benchmark

studies for determining ALP not only the comparables have to be functionally similar but should have similar business environment and risks as the

tested party. A detailed exposition of the legal position with specific reference to Rule 10 B (2) of the Income Tax Rules, 1962 is found in this

Court's decision in *Chryscapital Investment Advisors (India) Pvt. Ltd. v. DCIT* 376 ITR 183 (Del) as under:

30. The reasoning adopted in various judgments noticed above, shows that functional analysis seeks to identify and compare the economically

significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transaction. Quantitative and qualitative

filters/criteria have been used in different cases to include or exclude comparables. The intuitive logic for excluding big companies from the list of

comparables while undertaking the FAR analysis of a smaller company is attractive, given that such big companies provide services to diverse

clientele, perform multifarious functions, often assume risks and employ intangible assets which are specially designed, unlike in the case of smaller

companies. The bigger companies have an established reputation in the segment, are well known and employ economies of scale to a telling end. On

the other hand, these obvious - and apparent features should not blind the TPO from the obligation to carry out the transfer pricing exercise within the

strict mandate of Section 92 C and Rules 10-A to 10-E.

31. Arm's length price determination, in respect of an international transaction has necessarily to confirm to the mandate of Rule 10B. In this case, the

method followed for determining the arm's length price of the international transaction adopted by the assessee and the revenue is the TNMM. The

comparability of an international transaction with an uncontrolled transaction has, in such cases, to be seen with reference to the functions performed,

taking into account the assets employed or to be employed and the risks assumed by the respective parties to the transaction as per rule 10B(2)(b).

The specific characteristics of the property transferred or services provided (contemplated by Rule 10B(2)(a)) in either transactions may be

secondary, for judging comparability of an international transaction in the TNMM,

because the price charged or paid for property transferred or services provided and the direct and indirect cost of production incurred by the enterprise in respect of property transferred or services provided go into reckoning comparability analysis in the transaction methods, i.e. the comparable uncontrolled price, resale price and cost plus whereas the profit based method such as transactional net margin method takes into account, the net margin realised. In TNMM, comparability of an international transaction with an uncontrolled transaction is to be seen with reference to functions performed as provided in sub-rule (2)(b) of rule 10B read with sub-rule (1)(e) of that rule after taking into account assets employed or to be employed and the risks assumed by the respective parties to the transaction. As noticed earlier, Rule 10B(3) mandates that a given or select uncontrolled transaction selected in terms of Rule 10B(2) "shall be comparable to an international transaction" if none of the differences, if any, between the compared transactions, or between enterprises entering into such transactions are likely to materially affect the price or cost charged or paid or the profit arising from such transaction in the open market or reasonably accurate adjustment can be made to eliminate the effects of such difference.

32. Now, the sequitur of Rule 10B (2) and (3) is that if the comparable entity or entity's transactions broadly conform to the assessee's functioning, it has to enter into the matrix and be appropriately considered. The crucial expression giving insight into what was intended by the provision can be seen by the use of the expression: "none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, .. such transactions in the open market." The other exercise which the TPO has to necessarily perform is that if there are some differences, an attempt to "adjust" them to "eliminate the material effects" should be made:

(ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences.

33. Such being the case, it is clear that exclusion of some companies whose functions are broadly similar and whose profile - in respect of the activity in question can be viewed independently from other activities- cannot be subject

to a per se standard of loss making company or an "abnormal" profit making concern or huge or "mega" turnover company. As explained earlier, Rule 10B (2) guides the six methods outlined in clauses (a) to (f) of Rule 10B(1), while judging comparability. Rule 10B (3) on the other hand, indicates the approach to be adopted where differences and dissimilarities are apparent. Therefore, the mere circumstance of a company - otherwise conforming to the stipulations in Rule 10B (2) in all details, presenting a peculiar feature - such as a huge profit or a huge turnover, ipso facto does not lead to its exclusion. The TPO, first, has to be satisfied that such differences do not materially affect the price...or cost?; secondly, an attempt to make reasonable adjustment to eliminate the material effect of such differences has to be made.

34. The Court is also aware of the factors mentioned in Rule 10B (2), i.e. characteristics of the service provided, functions performed taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions; contractual terms of the transactions indicating how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions; conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and the Government orders in force; costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail. These elements comprehend the similarities and dissimilarities; clause (f) of Rule 10C(2) specifically provides that "the extent to which reliable and accurate adjustments can be made to account for differences, if any, between the international transaction or the specified domestic transaction and the comparable uncontrolled transaction or between the enterprises entering into such transactions and the nature, extent and reliability of assumptions required to be made in application of a method" have to be taken into consideration by the TPO.

36. This Court holds that in the facts of the present case, the assessee was incorrect, both in its reliance placed upon previous years' data as well as the manner of such reliance. First, the assessee's justification for relying on such data is the volatility in the comparables' profit margins and the consequent inability to transact at a consistent ALP. However, this is not

warranted herein. Whilst there may be a wide fluctuation in the profit margins of comparables from year-to-year, this by itself does not justify the need to take into account previous years' profit margins. The transfer pricing mechanism provided in the Act and the Rules prescribes that while determining the ALP, the arithmetic mean of all comparables is to be adopted. This is to offset the consequence of any extreme margins that comparables may have and arrive at a balanced price. Similarly, the wide fluctuations in profit margins of the same entity on a year-to-year basis would be offset by taking the arithmetic mean of all comparables for the assessment year in question. In any case, in the event that the volatility is on account of a materially different aspect incapable of being accounted for, the analysis under would Rule 10B (3) would exclude such an entity from being considered as a comparable. Secondly, as regards the manner of using previous years' data, the assessee has taken the arithmetic mean of the comparables' profit margins for the assessment year in question and two previous years. This Court disagrees. The proviso to Rule 10B(4), read with the sub-rule, itself indicates that the purpose for which previous years data may be considered is - analysing the comparability of an uncontrolled transaction with an international transaction. It does not prescribe that once an uncontrolled transaction has been held to be a 'comparable', in order to obviate an apparent volatility in the data, the arithmetic mean of three years (the assessment year in question and two previous years) may be taken. That would amount to assigning equal weight to the data for each of the three years, which is against the mandate of Rule 10B(4). The use of the word 'shall' in Rule 10B(4) and, noticeably, 'may' in the proviso, implies that the relevant assessment year's data is of primary consideration, as opposed to previous years' data.

39. This Court proceeds on the basis that there is sufficient guidance and clarity in Rule 10B on the principles applicable for determination of ALP.

These include the various factors to be taken into consideration, approach to be adopted (functions performed, taking into account risks borne and assets employed, size of the market, the nature of competition, terms of labour, employment and cost of capital, geographical location etc). The extent of accurate adjustments possible, too, is a factor to be considered. Rule 10B (3) then underlines what the ALP determining exercise entails, if there

are dissimilarities which materially affect the price charged etc: the first attempt has to be to eliminate the components which so materially affect the price or cost. In other words, given the data available, if the distorting factor can be severed and the other data used, that course has to be necessarily adopted.â?? (all emphasis in original)

16. In Rampgreen Solutions Pvt. Ltd. v. CIT (2015) 377 ITR 533 this Court further discussed Rule 10-B (2) of the IT Rules. This Court pointed out

how although both the Knowledge Process Outsourcing (KPO) services and the Business Process Outsourcing (BPO) services fall within the broad

definition of ITES, companies engaged in KPO services cannot be used as comparables for the TP study of a company engaged in providing BPO

services. In that process, it was observed by this Court as under:

â??20. In order for the benchmarking studies to be reliable for the purposes of determining the ALP, it would be essential that the entities selected as

comparables are functionally similar and are subject to the similar business environment and risks as the tested party. In order to impute an ALP to a

controlled transaction, it would be essential to ensure that the instances of uncontrolled entities/transactions selected as comparables are similar in all

material aspects that have any bearing on the value or the profitability, as the case may be of the transaction. Any factor, which has an influence on

the PLI, would be material and it would be necessary to ensure that the comparables are also equally subjected to the influence of such factors as the

tested party. This would, obviously, include business environment; the nature and functions performed by the tested party and the comparable entities;

the value addition in respect of products and services provided by parties; the business model; and the assets and resources employed. It cannot be

disputed that the functions performed by an entity would have a material bearing on the value and profitability of the entity. It is, therefore, obvious

that the comparables selected and the tested party must be functionally similar for ascertaining a reliable ALP by TNMM. Rule 10B (2) of the Income

Tax Rules, 1962 also clearly indicates that the comparability of controlled transactions would be judged with reference to the factors as indicated

therein. Clause (a) and (b) of Rule 10B (2) expressly indicate that the specific characteristics of the services provided and the functions performed

would be factors for considering the comparability of uncontrolled transactions

with controlled transactions.

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30. As indicated above, in order to determine the ALP in relation to a controlled transaction, the analysis must include comparables which are similar

in all aspects that have a material bearing on their profitability. Paragraph 1.36 of the ""OECD Transfer Pricing Guidelines for Multinational Enterprises

and Tax Administrations"" published in 2010 (hereafter 'OECD Guidelines') indicates the ""comparability factors"" which are important while considering

the comparability of uncontrolled transactions/entities with the controlled transactions/entities. Sub-rule (2) of rule JOB of the Income Tax Rules, 1962

also mandates that the comparability of international transactions with uncontrolled transactions would be judged with reference to the factors

indicated under clauses (a) to (d) of that sub-rule, which are similar to the comparability factors as indicated under the OECD Guidelines.

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36. As pointed out earlier, the transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an

ALP. The methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as

product/service characteristics, functions undertaken, assets used, risks assumed. This is essential to ensure the efficacy of the exercise. There is

sufficient flexibility available within the statutory framework to ensure a fair ALP"".

17. The above dictum was followed and reiterated in Avenue Asia Advisors Pvt. Ltd. v. Dy CIT (2017) 398 ITR 320 (Del) where this Court, inter

alia, observed that â??though in the TNMM method there is sufficient tolerance, mere broad functionality is by itself insufficient.â??

18. On the aspect of exclusion of comparables that have a high economic upscale viz., Infosys, TCS and Wipro, particular reference may be made to

the decision of this Court in PCIT v. BC Management Services Pvt. Ltd. (supra) where a particular reference was made to TCS E-serve as under:

â??13. ...The third comparable that the AO/TPO excluded is TCS E-serve. The ITAT observed that though there is a close functional similarity

between that entity and the assessee, however, there is a close connection between TCS E-serve and TATA Consultancy Service Ltd. which was

high brand value: that distinguished it and marked it out for exclusion. The ITAT recorded that the brand value associated with TCS Consultancy

reflected impacted TCS E-serve profitability in a very positive manner. This inference too in the opinion of Court, cannot be termed as unreasonable.

The rationale for exclusion is therefore upheld.â??

19. The same decision also noted that one reason for exclusion was the â??unavailability of the segmental dataâ?? for the above comparable.

20. In M/s. Oracle (OFSS) BPO Services Pvt. Ltd. (decision dated 5th February 2018 in ITA 124 of 2018) while upholding the exclusion of

M/s.Wipro Ltd. from the list of comparables it was noted that the ITAT took into account the Related Party Transactions (â??RPTâ?).The filter

adopted was to exclude comparables with unrelated party transactions equal to or in excess of 75% of their business. The ITAT did that on the basis

that Wipro Ltd. had a significant brand presence in the market and could, therefore, not be deemed to be a comparable entity. This Court explained

the RPT filter as under:

â??The RPT filter, is relevant and fits in with the overall scheme of a transfer pricing study which is premised primarily on comparing light entities

having similar if not identical functions. Therefore, if a particular entity predominantly has transactions with its associate enterprise - in excess of a

certain threshold percentage, its profit making capacity may resulted in a distorted picture, either way.â??

21. A reference may next be made to the decision in The Principal Commissioner of Income Tax-3 v. Evalueserve Sez (Gurgaon) Pvt. Ltd. (supra)

where a reference is made to the earlier decision to the BC Management Services Pvt. Ltd. (supra). This decision dealt with the exclusion of three

specific comparables, which have also involved in the present case namely M/s.TCS E-Serve Ltd., M/s.TCS E-Serve International Ltd. and M/s.

Infosys BPO Ltd. This Court upheld the exclusion of all three comparables and in particular since the entities had â??a high brand value and

therefore were able to command greater profits; besides they operated on economic upscale.â??

22. The Revenueâ??s appeal against the same Assessee for AY 2011-2012 against another order of the ITAT excluding TCS E-Serve International

Limited, Infosys BPO Limited from comparables met the same fate. In its

decision dated 29th August, 2018 the Court referred to the earlier decision dated 26th February, 2018 which again pertained to AY 2010-2011. Reference was again made to the decision in BC Management Services Limited.

23. It appears therefore that this Court has consistently upheld decisions of the ITAT excluding both these very comparables. The ITAT itself appears to have taken a consistent view in a large number of cases excluding these two comparables and its decisions have been upheld by this Court.

Illustratively reference may be made to the decision of the Tribunal in Vertex Customer Services India Private Limited v. DCIT (2017) 88

Taxmann.Com 286 (Del-Tri), Stryker Global Technology Centre Private Limited v. DCIT (2017) 87 Taxmann.com 43 (Del-Tri), Samsung Heavy

Industries Private Limited v. DCIT (2017) 84 Taxmann.com 154 (Del-Tri) and Equant Solutions India Private Limited v. DCIT (2016) 66

Taxmann.com 192 (Delhi-Tribunal).

24. All of these decisions pertained to AY 2010-2011. What weighed invariably is the fact that both companies had huge turnovers when compared to

the tested entity. Both entities had close connection of the Tata Group of Companies and TCS E-Serve International had given a huge amount to TCS

towards brand equity. Further there was no segmental bifurcation between the transaction processing and technical services. The assets employed by

TCS E-Serve along with huge intangibles in the form of brand value were found to have a definite considerable effect on its PLI. These factors

vitiating its comparability under the FAR analysis with the tested company, which could be a capital service provider without much intangible and risks.

25. In this context it requires to be noted that the ITAT also referred to the decision of this Court CIT v. Agnity India Technologies Private Limited

(2013) 36 Taxmann.com 289.

26. The Court may also note that the Karnataka High Court has in PCIT v. Softbrands (2018) 406 ITR 513 (Kar) noted as under:

48. The Tribunal of course is expected to act fairly, reasonably and rationally and should scrupulously avoid perversity in their Orders. It should

reflect due application of mind when they assign reasons for returning the particular findings.

49. For instance, while dealing with comparables of filters, if unequals like software giant Infosys or Wipro are compared to a newly established small

size Company engaged in Software service, it would obviously be wrong and perverse.

The very word "comparable" means that the Group of Entities should be in a homogeneous Group. They should not be wildly dissimilar or unlike

or poles apart. Such wild comparisons may result in the best judgment assessment going haywire and directionless wild, which may land up the

findings of the Tribunal in the realm of perversity attracting interference under section 260-A of the Act."

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 TCS's 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 apposite 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.

Conclusion

30. For the aforementioned reasons, the question framed is answered in the negative i.e. in favour of the Assessee and against the Revenue. The

impugned order of the ITAT as well as the corresponding orders of the DRP and TPO on the issue are hereby set aside. The appeal is allowed in the

above terms but in the circumstances no order as to costs.