

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
And
SHRI O.P. KANT, ACCOUNTANT MEMBER
ITA No. 1814/Del/2017, A.Y. 2012-13**

Evalueserve.com Pvt. Ltd. A-47, Lower Ground Floor, Hauz Khas, New Delhi	Vs	DCIT Circle-8(2) New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACE8014F		

**Assessee by : Ms. Ananya Kapoor, Adv.
Revenue by : Sh. H.K. Choudhary, CIT- DR**

Date of Hearing : 05.08.2019	Date of Pronouncement: 1.11.2019
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ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the assessee against final assessment order dated 30.01.2017, passed by the Assessing Officer u/s 143(3) read with section 144(c) (13) in pursuance of directions given by DRP vide order dated 21.12.2016 for assessment year 2012-13.

2. In various grounds of appeal assessee has challenged transfer pricing adjustment of Rs. 10,82,46,897/- made on international transactions with the AEs for rendering of IT enabled services (ITeS).

3. Brief facts qua the transfer pricing adjustment are that the assessee company, i.e. E-valueserve.com Pvt. Ltd. is a wholly owned subsidiary of E-valueserve Ltd. Bermuda. It is engaged in the business of providing IT enabled services to its AEs and is also registered with Software Technology Parks of India (STPI). The assessee derives business from following segments: -

- a) Corporate and Professional services
- b) Financial Services
- c) Intellectual Property Research

In the TP study report the assessee has given following analysis of these 3 segments in the following manner: -

“EVS India carries out IT enabled services inform of research activities according to the terms of the agreement with its AE. The research carried out by EVS India is driven by corporate and professional services, financial services and intellectual property research. Normally, the client executives (based in Bermuda, US, Europe and Asia- pacific) operating from overseas form the interface between the client and EVS India. The deliverable is typically in the form of a research report that is forwarded directly to the client(s) under the supervision and post a quality assurance by the AEs. The reports and research studies prepared by EVS India are owned by the client only. The operations of EVS India primarily comprise the following segments:

a) Corporate and Professional services (CAPS): This segment caters to primarily market research firms based overseas. It focuses on primary research in the nature of business to business surveys only where data is collected via telephonic surveys. The surveys are carried out on a case to case basis and as per the specific client requirements.

The employees comprise mainly graduates, undergraduates and MBA’s. The surveys carried out include surveys like analyzing the trends in IT and telecom spending, etc. These

surveys are normally carried out on the basis of a questionnaire received from the client.

EVS India carries out research based assignments of the following nature:

- **Periodic Research:** Periodic research projects are ongoing in nature. The projects include database content creation, management and updation of existing research.
- **Project Research:** project research involves research from secondary sources. It also makes use of forecasting, modeling and financial analysis. Typically, it involves industry studies covering the market size, value chain analysis, growth rates and demand and supply projections, EVS India has conducted studies and prepared research reports for various sectors like the telecom sector, pharmaceutical sector, etc. The intellectual property rights for the reports are owned by the end customer.
- **Rapid research:** Rapid research assignments typically have 24 hours as the turnaround time. These are mostly based on brief client requests received from the AEs.

b) Financial Services (FS): EVS India has a team of employees exclusively dedicated to tracking stocks and mutual funds. Typically, an investment research and financial analytics assignment, as discussed above, could also be periodic or project based.

EVS India makes use of a variety of research tools including web, databases and publications apart from analytics and forecasting. The industries covered include financial services (banking and insurance), hi-tech (software, electronics, engineering, nano-technology, networking, biomedical engineering), telecom equipment and operators, pharmaceuticals and biotech, chemicals, energy and consumer products.

c) Intellectual Property Research (IP): The intellectual property research includes research on patents, drafting of patent applications, prior art search etc. Essentially, EVS India offers the following kind of services to its AEs:

d) Patent Assessment: This is concerned with evaluating whether a product can be patented or not. It involves finding out whether a patent exists for a similar

product in the global market.

e) Drafting of patent Applications: The AEs are responsible for end to end patent application filing through patent counsels in the relevant jurisdiction. EVS India prepares a draft and sends it either to the client or patent attorney associated with AEs, to be filed. Thereafter, lawyers, associated with the AE, vet the draft and file it.

f) Intellectual Property Asset Management: EVS India offers Patent to product mapping, IP Research and analysis and Patent Consulting as part of Intellectual Property Research. It assists in maintain a relevant portfolio of patents, offers consulting in overlap and infringement, and helps in locating potential companies which would be interested in licensing a particular invention.

Marketing and After Sales: EVS India does not undertake any marketing and sales efforts as it carries out offshore research activities on behalf of its, AE. The AE is responsible for the business development, marketing activities and quality assurance for every project undertaken by EVS India. The AEs, based on the market and economic scenario, prepares the general worldwide marketing strategy for the Group.

EVS India secures contracts owing to the brand name and goodwill enjoyed by its AE. For provision of the aforementioned services, AEs remunerate EVS India on an hourly basis.

Routine functions: These business support functions are the part of normal course of business and are indispensable in the economic environment.

Strategic Policies: All long-term policies are developed and formulated by EVS India while having consensus with its AEs. The company's management people take care of corporate communications, dealing with customer, associate companies, etc.

Finance and Accounting and IT: EVS India prepares its own financial statements. EVS India formulates its budget on an annual basis.

Human Resource Management: *EVS India performs recruitment, soft skills training, performance evaluation and other related functions,*

The employee strength of EVS India was about 1163 personnel including the corporate group as on march 31,2012.

Assets

Any business requires assets without which it cannot carry out its activities. The assets might be clearly recognizable i.e. tangible (plant & machinery, equipment, building etc) or they might be intangible assets (brand-name, trademarks, technical know-how, patents, etc.). The following is the list of assets used by EVS India:

Tangible Assets

The tangible assets employed in EVS India are considered essential for running the business. EVS India being an ITES service provider does not have a significant tangible asset base or carrying out its operations, EVS India does not own any land and carries out its operations, EVS India does not own any land and carries out its operations on rented premises. Its tangible asset base comprises of computers, office equipment and furniture and fittings and lease improvements.

Intangible Assets

EVS India, being in the research field, human capital forms its core resource. The employees of EVS India comprise undergraduates, graduates, engineers and MBAs.

The business of the E-valueserve group does not result in the development of any form of intellectual property rights. The copyrights relating to the reports, if any are held by the client only.

The marketing intangible is owned by the associated Enterprise.

EVS India does not own any non-routine intangibles and does not own trade secrets or undertake research and development activities on its account that would lead to the development of non-routine intangibles.

Risk Analysis

Risks are those business factors that may expose a company to the possibility of loss or damage. In other words, risk is the probability that a particular adverse event may occur during a stated period of time, or may result from a particular challenge. The following section discusses the risk borne by Company vis-a-vis Group Companies.

Customer Credit Risk

When a company provides services to a customer in advance of customer payment, the company runs the risk that the customer will fail to make payment. This risk is known as customer credit risk.

Foreign Exchange Risk

Exchange rate risk relates to the potential variability of profits that can arise because of changes in foreign exchange rates. Such risks arise when doing business in any market that is affected by international trade and can arise even if a company does not conduct actual transactions in a foreign currency.

EVS India is remunerated by its AEs for services provided to it in US dollars. However, in the case of third party domestic contracts, EVS India receives payment in INR. Accordingly, EVS India is exposed to foreign currency risk for AE services.

The AEs do not bear this risk to any significant extent with respect to EVS India's operations.

Entrepreneurial Risk

There are two distinct sources of uncertainty in entrepreneurial ventures: 1) uncertainty regarding market demand, and 2) uncertainty regarding capability. The first type of uncertainty is characterized as "exogenous uncertainty" because it emerges as a state of nature. The second type of uncertainty is referred to as "endogenous" uncertainty because entrepreneurs realize that there is high risk of failure as it is tied to their capability.

As EVS India is remunerated on an hourly basis by its AEs it is exposed to this risk. This AEs are indirectly exposed to this risk for the Indian operations.

Price Risk

This risk arises due to the competitive pressures prevailing

in the market, which lead to price undercutting thereby adversely impacting the profitability of the Company. EVS India is compensated for the services rendered by it by its AEs on an hourly rate basis. As this compensation is subject to market dynamics, the Company is exposed to price risk.

As the AEs compete in the open market they are exposed to this risk.

Manpower Risk

Manpower is one of the most valuable resources employed by an organization for carrying out its day-to-day operations. The increasing competition in the market place combined with other uncontrolled variables result in exposure to manpower risk. EVS India has skilled workforce and is accordingly exposed to this risk.

EVS Indian has skilled workforce and is accordingly exposed to this risk. The ITES industry is characterized by a high level of attrition.

The AEs are indirectly exposed to this risk for the Indian operations.”

4. The total transaction value with its AEs on account of provision of ITeS was declared at 137,96,87,844/- .To benchmark the said international transaction, the assessee had adopted TNMM as the most appropriate method by adopting PLI as OP/OC, which resulted into profit margin of 18.94%. After carrying out various quantitative and qualitative analyses, assessee shortlisted listed 9 comparable companies with average profit margin of 10.75%. Accordingly, it was reported that assessee's international transaction are at Arm's Length Price. The TPO rejected assessee's comparable and also the filters and other parameters adopted by the assessee in the TP study report. The TPO then carried out his own search analysis and shortlisted 12 comparables which are as under: -

S. No.	Company Long Name	OP/OC
1.	Accentia Technologies Ltd.	11.09%
2.	Eclerx Services Ltd.	59.92%
3.	Informed Technologies India Ltd.	20.66%
4.	Jindal Intellicom Ltd.	1.42%
5.	TCS E-serve Ltd.	64.09%
6.	Excel Infoways Ltd.(Seg.) (IT/BPO)	40.77%
7.	R Systems International Ltd. (Seg.) (BPO)	0.19%
8.	Infosys BPO Ltd.	36.92%
9.	Acropetal Technologies Ltd. (seg.)	17.79%
10.	BNR Udyog Limited	48.60%
11.	e4e Healthcare Business Services P. Ltd.	21.40%
12.	Microgenetics Systems Ltd.	8.07%
	Average	27.58%

5. Out of aforesaid 12 comparables, it has been contended that by the assessee if 6 comparables were to be excluded on the ground that they are not comparable on FAR analysis to the assessee, then other comparables will become academic and infructuous. The six comparables challenged by the assessee for exclusion are:

- (i) E-clerx Services Ltd.
- (ii) Accentia Technologies Ltd.
- (iii) B N R Udyog Ltd.
- (iv) Excel Infoways Ltd.
- (v) Infosys BPO Ltd.
- (vi) TCS E-Serve Ltd.

6. Now we shall take up each of these 6 comparables herein below:-

i) Eclerx Services Ltd.

6.1 Before the TPO the assessee has objected for the inclusion of this comparable on the grounds that; *firstly*, it is functionally not comparable because this company is into software development and design services; *secondly*, this company had extraordinary events resulting into abnormal margins; *thirdly*, unreliable data of this company in public domain; and *lastly*, this company has been rejected in various judicial ruling as a comparable with ITeS companies. Ld. TPO has rejected all the contention of the assessee on the ground that annual report of said company makes it clear that it is engaged in data processing activities which are categorized as ITeS and there is nothing to show that increase in revenues due to amalgamation and acquisition has led to any abnormal increase in the margins earned by this entity in the year under consideration. The comparative PLI was given as under: -

Particulars	Mar-09	Mar-10	Mar-11	March-12
Sales (Cr)	197.09	257.02	341.91	472.46
OP/OC	57.16%	55.84%	56.82%	61.22%

6.2. Before us, Ld. Counsel for the assessee had submitted that Eclerx is engaged in data analytics, financial services and data processing solutions and the same company has been rejected by Hon'ble Delhi High Court in the case of Ramgreen Solutions, reported in 377 ITR 533. Apart from that, Ld. Counsel submitted that this company has two segments viz., financial services; and sales and marketing services segment. Under the financial services segment, Eclerx provides services

such as consulting, business analysis and solution testing. It provides a broad suite of services that allow its clients to operate on a day to day basis, including trade processing, reference data, accounting and finance, and expense management activities. Under sales and Marketing services, Eclerx provides online operations, web analytics, social media moderation and analytics, data reporting, CRM platform support, business intelligence, competitor benchmarking and pricing, business process consulting. These services are very different from the services rendered by the Assessee. Regarding extraordinary events, Ld. Counsel submitted that Eclerx has acquired the entire shareholding of Agilyst Inc. which is providing operations and data analysis support to the telecommunication companies. The acquisition added delivery capability of the company and added additional 1000 people into the company. Lastly, she submitted that the same very comparable has been rejected by the Tribunal in assessee's own case for A.Y. 2008-09 and also in the case of sister concern, **E-valueserve.com Pvt. Ltd. SEZ** whose functional profile is identical to the assessee. Tribunal has held that Eclerx not comparable. She also pointed out that the said Tribunal order in the case of E-valueserve.com Pvt. Ltd. SEZ passed in ITA No. 1467/Del/2015 & ITA No. 5147/Del/ 2017, have been upheld by the Hon'ble Delhi High Court in the appeal filed by the department vide judgment and order dated 26.02.2018 in ITA no. 241/2018 and 948/2018. Thus, this comparable should be excluded.

6.3 On the other hand, Ld. CIT-DR submitted that assessee is also KPO and TPO has dealt assessee's similar objection in detailed manner and under TNMM broad comparability has to be seen. This company was also engaged in data processing activities and therefore, it is akin to ITeS. Further the effect of extraordinary event does not have much impact in the PLI because the margin of this company has always between 56% to 61 %. Thus, he strongly relied upon order of the TPO and DRP.

7. We have heard the rival submissions and also perused the relevant materials referred and relied upon by the parties. From the perusal of the functional profile of the assessee for all the three segments, it is seen that in so far as corporate and professional services are concerned it is mainly in primary market research in the nature of business of certain IT and Telecom sector and collection of data and service like analyzing the trends in the industries like IT and telecom which is based on questionnaire and survey. Under the financial services it is mainly into tracking of stocks and mutual funds for which it makes variety of research tools; and under the intellectual property research it mainly concentrates on research on patents, drafting of patent applications, patent assessment etc. The assessee does not undertake any marketing and sales efforts for AEs as AE undertakes business development, marketing activities and quality assurance for project undertaken by assessee. The list of tangible and intangible assets as highlighted by the assessee show that it does not have significant tangible assets which

mainly comprises of computers, office equipment furniture, etc.; and intangible assets are basically human resources comprised of graduates, engineers and MBAs and does not own any form of IPR. Risk analysis has also been incorporated in the earlier part of the order which shows that it is a low risk entity.

7.1 In so far as Eclerx is concerned, first of all, from the perusal of the annual report, we find that under the head 'financial services' it is providing broad suite of services such as consulting, business analysis and solution testing. The services rendered under sales and marketing services as highlighted by the Ld. Counsel comprise of online operations, web analytics, data reporting, CRM platform support,, business process consulting, etc., which shows that it is providing high end KPO services in financial sector and also undertaking significant sales and marketing services and strategies. The functions carried out by Eclerx have been found to be incomparable with the assessee's function by the Tribunal in assessee's own case for the assessment year 2008-09. Not only that, in the case of sister concern of the assessee Evalueserve SEZ Gurgaon having exactly similar functions, Eclerx has been rejected. We find that, Hon'ble Delhi High Court in the case of Rampgreen Solutions (supra) qua Eclerx has observed as under :-

"37. Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining the ALP. Vishal and eClerx, both are into KPO Services. In

Maersk Global Centers (India) (P.) Ltd. (supra), the Special Bench of the Tribunal had noted that eClerx is engaged in data analytics, data processing services. pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition. eClerx 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. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee.

7.2 Following the same principle, the Tribunal in assessee's own case in A.Y. 2008-09 had made following observations: -

“44.13 Eclerx Services Ltd.: The Ld. AR submitted that this comparable is functionally dissimilar. It is engaged in data analysis and financial services and this position for this comparable has been accepted by the Hon'ble Delhi High Court in Rampgreen Solutions for A.Y. 2008-09. Eclerx Services Ltd. is engaged in providing data analysis and data process solutions. Pricing analytics, bundling optimization, content operations, sales and marketing support, product data management, revenue management are some of its functions. This company provides tailored process outsourcing and management services in addition to multitude of the data aggregation and mining and maintenance services. There is extraordinary events during A.Y. 2008-09 that of acquisition. Eclerx Services Ltd. has been acquired UK based Igentica Travel Solutions Ltd. which gave it a new customer base. The Ld. AR relied upon the decision of the Hon 'ble Delhi High Court in case of PCIT vs. Amerirprise India Pvt. Ltd. (ITA No. 461/2016).

44.14 The Ld. DR relied upon the order of the TPO/AO and the directions of the DRP.

44.15 We have heard both the parties and perused all the relevant material available on record. Eclerx Services Ltd. is

engaged in providing data analysis and data process solutions. Pricing analytics, bundling optimization, content operations, sales and marketing support, product data management, revenue management are some of its functions. It is engaged in data analytics and financial services and this position for this comparable has been accepted by the Hon'ble Delhi High Court in Rampgreen Solutions for A.Y. 2008-09. There is extraordinary events during A.Y. 2008-09 that of acquisition. Therefore, it will be appropriate to exclude this comparable. Therefore, we direct the TPO/AP to exclude this comparable from the final list of the comparables.”

7.3 Further in the case of Evalueserve SEZ this comparable has been excluded after observing as under :-

“12. The next comparable by the assessee is that eClarx Services submitting that it is a Knowledge process outsourcing (KPO) unit and therefore cannot be compared with the ITES service provider like assessee. The assessee has relied on the decision of Hon'ble Delhi High Court of Ramgreen Solutions Pvt. Ltd Vs. CIT.

13. The Id DR submitted that the assessee is also a knowledge process outsourcing unit as it employs 616 personnel. He referred to page No. 6 of the order of the Id Transfer Pricing Officer for this. He submitted that assessee's case falls into all three horizontal segments of ITES industries such as call centre and technical support, payment supply chain and analytics. He therefore, stated that eClarx is the right comparable.

14. We have carefully considered the rival contentions and perused the annual report of the comparable for AY 2010-11 at page No. 734 to 83.7 of the paper book. The functions of the company are described at page No. 23 of its annual report under management discussion and analysis. It provides that eClerx supports its clients through its two

business units- Capital markets and sales and marketing support. Across both these units, the company supports and improves processes that are core of its customers day to day business operations. The company continues to focus on engagements where it can tap the largest percentage of client spend by leveraging its domain expertise and by bringing together consulting, project management and solution based service delivery. In the capital markets division, the company today provides end-to-end financial transaction support services such as trade booking, trade confirmation, asset servicing cash settlements, client servicing risk management and reference data integrity across all asset classes, and its services span both sell side (the large banks) and buy side (the funds and assets managers) Furthermore, the company provides strategic and process consulting services helping clients devise solutions to improve efficiency, reduce risk and meet regulatory and market demands. Similarly, in the sales and marketing support division, the company today supports clients in all elements of product and services marketing and sales with a focus on online support to include content development and management, search engine management, web operations, pricing and customer analytics, product database management and catalog audits. The company is also pursuing a strategy of creating a portfolio of platform attached services, by creating a suite of services that are complementary to industry standard it platforms. A glance at the functional profile of this company divulges that it is basically 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. Further this company has also developed it tool and process automation. From the above discussed nature

of business carried on by e- Clerx Services Ltd., it is patent that the same being a KPO company, is quite different from the assessee, providing only IT enabled services to its AE, which fall in the realm of BPO services. 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. The Hon'ble jurisdictional High Court in Rampgreen Solutions (P.) Ltd. v. CIT [2015] 234 Taxman 573/60 taxmann.com 355 (Delhi), has held that e-Clerx Services Ltd., being engaged in KPO, cannot be treated as comparable of an assessee engaged in rendering BPO services. In view of the direct judgment of the Hon 'ble jurisdictional High Court on the point, we direct to eliminate e- Clerx from the list of comparables. As such, e-Clerx Services Ltd. cannot be considered as comparable.”

7.4 The said judgment has also been confirmed by the Hon'ble High Court in the following manner: -

“1. The Revenue challenges an order of the Income Tax Appellate Tribunal (ITAT) which accepted the assessee's contentions so far as comparison with six entities in the determination of Arm's Length Price (ALP) and Transfer Pricing adjustment under Section 93CA of the Income Tax Act, 1961 [hereafter “the 1961 Act”], was concerned.

2. The assessee is engaged in IT-enabled services (ITeS) such as research activities in terms of agreements with its Associated Enterprise (AE). It primarily concerns itself with business information, market research and intellectual property research.

3. The Transfer Pricing Officer (TPO), while carrying out the ALP determination procedure took into account the profitability and margins often comparable entities. The assessee was aggrieved by the inclusion of six of them and approached the Disputes Resolution Panel (DRP). Its

contentions were rejected and the draft assessment order was finalized by the Assessing Officer (AO).

4. The assessee, therefore, appealed to the IT AT which accepted the assessee's plea and directed the exclusion of the said six comparables for various reasons. That is the subject matter of Revenue's appeal.

*5. This Court notices that as far as the exclusion of three comparables - M/s. TCS E-Serve Limited; M/s. TCS E-Serve International Limited and M/s. Infosys BPO Ltd. is concerned, the IT AT was cognizant of and took note of the circumstances that these entities had a high brand value and, therefore, were able to command greater profits; besides, they operated on economic upscale. This approach cannot be faulted having regard to the decision of this Court in *Pr. Commissioner of Income Tax v. B.C. Management Services Pvt. Ltd.* 2018 (89) Taxman.com 68 (Del), which reads as follows:*

"13. The exclusion of second comparable ICRA Techno Analytics Ltd. was on the basis that it had engaged itself in processing and providing software development and consultancy and engineering services/web development services. The reasons for exclusion were functional dissimilarities and that segmental data were unavailable. Again the findings of the IT AT are reasonable and based on record. The third comparable that the AO/TPO excluded is TCS E-serve. The IT AT 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. The assessee was aggrieved by the inclusion of Accentia a Software Development Company. The Revenue is aggrieved by the exclusion of Accentia from the TP analysis. The DRP had directed its deletion. We observe that the ITAT has noticed the unavailability of the segmental data so far as these comparables are concerned. Furthermore, the functionality of this entity was concerned, it is different from that of the assessee; Accentia was engaged in KPO services in the healthcare sector.

14. In view of the above findings, this Court is of the opinion that no substantial question of law arises. The appeals are dismissed.”

6. The ITAT noted that M/s. Accentia Technologies Ltd. was mainly performing medical transcription services. It was of the opinion that its service was similar to the one that the assessee was engaged in. However, it also noted that there was no segmented data and, on that account, directed the exclusion of that entity from the list of comparables. Likewise, in the case of M/s. ICRA Techno Analysis Ltd., it was found that the said entity was engaged in business intelligence and analytics supplies, software development, consultancy services, engineering services, web development and hosting services. Besides functional dissimilarity, the ITAT also noted that there was no segmented data to compare its activity with the assessee. Likewise, in the M/s. eClerx Services, the ITAT noted that its activity was functionally dissimilar because it performed KPO function whereas the assessee was classifiable as BPO.

7. All the reasons given by the ITAT, in the opinion of the Court, are justified and supported by the judgment in B.C. Management (supra). In the case of M/s. eClarx Services, the findings of fact with respect to dissimilarity binds the Revenue.”

7.5 When on similar facts and circumstances, Eclerx has been found to be incomparable with the assessee, which finding has been affirmed by Hon'ble Delhi High Court and there is no change in the material facts and circumstances in this year, then we do not find any reason to deviate from such finding. Accordingly, respectfully following the same, we direct the TPO/ AO to exclude Eclerx from comparability list.

ii) Accentia Technologies Ltd.

8. This comparable chosen by the TPO was objected by the assessee before the TPO on the ground that, firstly, it is functionally not similar; *secondly*, presence of IPRs, *thirdly*, extraordinary event of acquisition of a software development company during the financial year 2011-12; and *lastly*, there are no segmental details. This company is into medical transcription, medical billing, medical coding, claims processing and software development implementation services. Ld. TPO held that since the comparables chosen by him are providing ITeS services similar to the assessee and under TNMM brought comparability has to be seen, therefore it is a fit comparable. He observed that, this company is into health care receivable cycle management, which is pre-dominantly under ITES. The entire functions of medical transcription, coding billing and collection is one complete segment and all these various specific segments are closely related to each other. As far as developing of proprietary software products, TPO observe that there is no reference of any revenue from the

software products in the annual report. Thus, he held that same is a good comparable.

8.1 Before us the Ld. Counsel for the assessee submitted that from the perusal of the P & L Account it can be seen that revenue's from operations are from different sources i.e. medical transcription, billing and coding and EMR and SAAS. However, the annual report states that it has only one segment. Thus, there is no segmental detail for various streams of revenue. She further submitted that this company is into medical transcription, coding and medical billing services and also software development services and also has developed its own products such as, IMTAS, IRTS, IAMS, IPMS. Apart from that, she submitted that there were extraordinary events in A.Y. 2012-13 in the form of amalgamation and acquisition, therefore, due to such extraordinary event this comparable cannot be included in this year. She further pointed out that in the assessment year 2008-09, the Tribunal in assessee's own case following the principle laid down by the Hon'ble Delhi High Court in the case of **CIT vs. Ameriprise India (P) Ltd. in ITA No. 461/2016** has upheld the exclusion of the said comparable. Apart from that, the Tribunal in case of sister concern, i.e., Evalueserve.com SEZ which has a similar function profile has directed to exclude the said comparable; and this judgment of the Tribunal has been upheld by the Hon'ble Delhi High Court also.

8.2 On the other hand, Ld. CIT-DR strongly relied upon the order of authorities below and submitted that the activities carried out by Accentia Technologies Ltd. is nothing but ITeS services and all the three functions are inter related and therefore, no separate segment is required to be seen. Under the TNMM, if a comparable company is carrying out similar functions which are in the category of ITeS, then same cannot be excluded on such minute functional difference. He submitted that assessee is also rendering KPO services through professionals and therefore, Accentia technologies Ltd. which is into health care and KPO therefore, it is a good comparable.

9. We have heard the rival submissions and also perused the relevant finding given the impugned orders as well as the material referred before us. Accentia Technologies Ltd. is a company which is providing medical transcription services which encompasses process of prescribing or converting voice recorded reports as detected by physicians or other health care professionals who vet the actual transcription. Apart from that it is providing medical coding, billing and collection services. Medical coding is related to procedures of financial assessment which help insurance companies and Government companies. Medical billing is described as medical practice management which involves bill on insurance companies by hospitals for on behalf of the personnel for medical care expenses, which are majorly from US markets. No doubt Eclerx is providing kind of ITeS services which requires special skills, but what is relevant to analyse is the nature of business

and the functions carried out for earning the revenue and profitability. Highly specialized and skilled services definitely have higher profitability. Further assets deployed in the form of human resources and other tangible and intangible and risks undertaken also impacts the margins. Apart from that, from the perusal of the annual accounts of the said company it is seen that it has shown revenues from various operations separately, like from billing, coding, medical discrete reportable transcription and medical transcription. However, for various streams of income there are no segmental details or segmental account. In fact it has been reported that there is only one segment called as health care receivable management. As pointed out by the Ld. Counsel this company is also into software development services and also own proprietary products like IMTAS, IRTS, IAMS, IPMS, which is used for various functions. Due to these factors and comparison of functional profiles, the Tribunal in assessee's own case for A.Y. 2008-09 has directed to exclude this company. Further, in this year there was acquisition of software development company namely, Medex Healthcare Global which is into development of software related to EMR and SAAS.

9.1 Other important fact is that the Tribunal in the case of sister concern, i.e. Evaluate SEZ which is having identical functional profile has directed to exclude the said comparable after observing as under :-

“11. We have carefully considered the rival contentions as well as perused the annual accounts of the comparables. At

page No. 1172, we have perused schedule 10 of the notes on account wherein it has mentioned that w.e.f. 01.04.2008 a company which was engaged in the business of medical transcription and coding has been amalgamated with the comparable. It is further stated figures for this year are related to amalgamating company also. The profit and loss account of the comparable shows that sales and services of the company are according to Schedule No. 8. There is no change in the income segment of the assessee after amalgamation as amalgamating company was also having the same business, hence, there is no impact of amalgamation on the company with respect to functions performed. Therefore, merely there is an amalgamation during the year it cannot be excluded as comparable as it does not change the functional profile of the comparable company. However, at page No. 27 the Ld TPO has confirmed that this company is engaged in the business of healthcare cycle management which comprises of medical transcription, coding and billing and collection. The medical transcription business requires special skill and also employs medical professional who finally vet the actual transcription. Further medical coding is related to procedure of financial assessment. Medical billing is maintenance of financial accounts on insurance company etc for the purposes of recovery of sums by Doctors. Therefore, medical transcription is a service which requires employment of medical professional also. However, the medical coding the billing may not require higher technical skill. In annual

report the company has mentioned that it has only one segment and therefore it does not have segmental results pertaining to medical transcription vis-a-vis coding and billing activity. According to us the medical transcription itself cannot be said to be comparable with the functions performed by the assessee. However, the medical coding and billing activities are similar to the functions performed by the assessee. But, in absence of the segmental accounts with respect to medical coding and billing activities this comparable cannot be included. Hence, TPO is directed to exclude it.”

9.2 This decision of the Tribunal has also been upheld by the Hon’ble High Court. Since functional profile and other comparability factors of the assessee as well as comparable company Accentia Technologies Ltd. remains the same, therefore, we do not find any reason deviate from earlier year orders of the Tribunal as well as the judgment of Hon’ble Delhi High Court. Accordingly, Accentia Technologies Ltd. is directed to be excluded.

iii) BNR Udyog Ltd.

10. The Ld. TPO has included this comparable by taking the medical transcription segment of the said company and also held that it also passes the RPT filter. He observed that the factor of RPT transaction which was objected by the assessee was Rs. 1.7 crores, and such transactions are only with the enterprises having common management personnel. These transactions have no bearing on the medical transcription

segment because transaction of Rs. 1.7 crores shown as related party transaction pertains to 2 enterprises, both of which are independent enterprises. Before us, the Ld. Counsel submitted that, firstly, it is dissimilar like Accentia Technologies Ltd. as it is providing medical transcription services and has no segmental details.

10.1 On the other hand, Ld. CIT-DR submitted that this company has two streams of revenue and has segmental results, one, business support and other medical transcription. Medical transcription is different from medical coding and therefore, it cannot be at par with Accentia Technologies. TPO has only taken segmental result of medical transcription segment which is nothing but ITeS.

11. After considering the aforesaid submissions, we find that, first of all, on perusal of the annual report it is seen that apart from medical transcription activities, it is also into medical billing and coding services. The functional profile of the medical transcription segment is almost akin to functions of Accentia Technologies Ltd. and again for the various activities of medical transcription, medical billing and coding services there is no separate segment. In the case of Evalueserve SEZ, the Tribunal after detail analysis has excluded the said comparable. The finding of the Tribunal now stands confirmed by the Hon'ble Delhi High Court (supra). Accordingly, respectfully following the same, this comparable is also directed to be excluded.

iv) Excel Infoways Ltd.

12. The assessee has objected inclusion of this comparable on the ground that it fails employee cost to total sales filter, as it is less than 25%. Ld. TPO on the basis of information received from the said company u/s 133(6) observed that the employee cost Rs. 2.02 crores which pertains to ITES/BPO segment and looking to the fact that segment revenue under ITES / BPO segment is Rs. 7.07 crore, is more than 25% of the segmental revenue. Hence, the company passes the filter of employee cost. Regarding objection of high turnover and high margin of this company, the same has been rejected after detail discussion.

12.1 Before us, the Ld. Counsel submitted that the employee cost to net sales as reported in annual report was as under :-

Employee Cost (Amount in 000)	Net Sales (Amount in 000)	Employee cost/Net Sales
INR 20,215	INR 154,921	13.05%

The information and the manner it has been clubbed by the TPO cannot be held to be reliable, because this company revenue from infra activity segment is 49% and it is not possible that no employee was hired in infra activity segment. Due to this discrepancy, this Tribunal in the case of Baxter Indian vs. ACIT ITA No. 6158/2016 has directed to exclude the said company. Further, this company is also involved in development of infrastructure facility for which there is no

segmental details. Apart from that, she pointed out that there is huge diminishing revenue and profit margin, which according to TPO's own filter could not have been included. The details of revenues and profit margin right from the F.Y 2009-10 to 2014-15 was given in the following manner :-

Particulars	Financial Year					
	2009-10 (INR'000)	2010-11 (INR'000)	2011-12 (INR'000)	2012-13 (INR'000)	2013-14 (INR'000)	2014-15 (INR'000)
Revenue	204,161.34	203,526.39	79,096.95	76,098.54	52,792.12	22,994.38
Operating Cost	43,986.99	50,751.24	55,991.57	47,539.99	41,355.78	22,895.57
Operating Profit	160,174.35	152,775.14	23,105.38	28,558.55	11,436.34	98.81
OP/OC (%)	364.14%	301.03%	41.27%	60.07%	22.65%	0.43%

12.2 On the other hand, Ld. CIT-DR relied order of the TPO, and submitted that from the perusal of the annual report it can be seen that this company has shown sale of infra activities under the head other sales; and it has declared purchase of stock in trade and when there is purchase and sale of stock, then there is no requirement of any employee cost to be allocated and further, information received u/s 133(6) cannot be doubted. Further the concept of diminishing revenue cannot be a factor for exclusion.

13. After considering aforesaid submissions, we find that apart from ITeS-BPO segment, this company is also carrying business of infrastructure facility which almost constitutes 49% of the revenue. There are no segmental details for these

two activities. The profit margin on such activity of development of infrastructure facility cannot be identified and therefore, it cannot be held that such a huge margin reported by the said company is on account of ITeS/BPO segment or development of infrastructure facility. On this ground alone, we do not find it to be fit comparable. Other aspect of employee cost filter and diminishing revenues and profits are not being considered.

v) Infosys BPO Ltd.

14. Regarding this comparable, TPO has rejected all the contention of the assessee that this company has high brand value and intangibles and it is a giant company in terms risk profile and nature of services and held that, since it is also into providing ITeS same should be included.

15. After hearing both the parties, we find on perusal of the material placed on record that Infosys is not only high turnover company, but also has a high brand value and intangibles as compared to the assessee which has very insignificant intangibles. Apart from that, Infosys in terms of risk profile, skill, nature of services, revenue, and ownership of brand proprietary products clearly outweighs the FAR analysis comparison with the assessee. Because of these factors, Hon'ble Delhi High Court in several decisions has held that giant companies like Infosys and Wipro cannot be compared with low risk or capital service provider. The lists of said judgment are as under:-

- 1) *Delhi High Court-PCIT vs. Oracle (OFSS) BPO Services P. Ltd.*
ITA No. 124/2018)
- 2) *Delhi High Court-PCIT vs. New River Software Services P. Ltd.*
(ITA No. 924/2016) order dated 22.08.2017-
- 3) *Delhi High Court-CIT vs. Agnity India Technologies P. Ltd.*
(2013) 219 taxman 26 (Del)
- 4) *Delhi High Court-CIT vs. Agnity Indian Technologies P. Ltd.*
(ITA No. 447/2018)
- 5) *Delhi High Court in PCIT vs. Evalueserve SEZ (Gurgaon) P. Ltd.*
ITA No. 241/2018 order dated 26.02.2018
- 6) *Delhi High Court in PCIT vs. Evalueserve SEZ (Gurgaon) P. Ltd.*
ITA No. 948/2018 order dated 29.08.2018.

15.1 From the perusal of the annual report of the said company it is seen that it is amongst the top ten BPO of the country and has around 18,383 employees with huge advertisement expenditure and marketing of Rs. 8.73 crores as compared to the assessee which has 1163 employees and undertakes no such expense; and the turnover of Infosys is more than Rs.1312 crores as compared to assessee's turnover which is at Rs. 144 crores. Further, in assessee's own case as well as in the case of sister concern, this Tribunal has excluded Infosys BPO based on these comparability factors. Looking to the scale of operations and presence of high valuable assets both tangible and intangible, this company has consistently been held to be incomparable with captive

service provider companies. Accordingly, we direct the exclusion of this comparable.

vi) TCS E-Serve Ltd.

16. The TPO has included this comparable holding that it carries out the function of ITES and high turnover and brand value is not relevant factor and brand expenses is only Rs. 3.67 crores.

17. After hearing both the parties and perusal of material placed on record, we find that TCS E-serve Ltd. like Infosys BPO is a giant company which has high brand value and intangibles and in terms of risk profile, skill, nature of service, revenue etc. this comparable has been rejected in various judicial rulings. The turnover of TCS is more than Rs. 1578 crore and this company is having huge assets and is under taking high risk which have direct impact on turnover and in profitability. If a company is having huge asset base, brand value, goodwill and presence in global market with significant R & D, then it cannot be compared with a company which is purely captive service provider in ITeS/BPO, having low risk and insignificant assets. Even the deployment of human resources shows that TCS has 14,785 employees whereas the assessee has 1163 employees. This factor itself shows that in the terms of human resources, there is huge difference in the assets deployed. Now there is latest judgment of Hon'ble Delhi High Court dated 24th July, 2019 in the case of **M/s. Avaya India Pvt. Ltd. vs. ACIT** in **ITA no. 532/2019** which had considered the comparability of TCS E-serve Ltd. and TCS

serve International Ltd. with the company providing ITeS services. The relevant substantial question of law admitted by the Hon'ble High Court reads as under :-

“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?

17.1 Hon'ble High Court has dealt this issue in detail after observing as under:-

“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 conform 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." (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:

"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.

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.

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 "though in the TNMM method there is sufficient tolerance, mere broad functionality is by itself insufficient."

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:

"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."

19. The same decision also noted that one reason for exclusion was the "unavailability of the segmental data" 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 („RPT□).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:

"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."

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 "a high brand value and therefore were able to command greater profits; besides they operated on economic upscale."

22. The Revenue'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 vitiated 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 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 recalibrate 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.”

18. Respectfully following the aforesaid principle of Hon'ble Jurisdictional High Court which applies in the present case also we direct the TPO to exclude the said comparable.

19. In view of our aforesaid finding, the Ld. AO/TPO is directed to recompute the ALP after excluding the aforesaid six comparables.

20. Other grounds have neither been pressed nor argued, therefore, same are dismissed.

21. In the result appeal of the assessee is partly allowed.

Order pronounced in the open court on 1st November, 2019

Sd/-

(O.P.KANT)

ACCOUNTANT MEMBER

Sd/-

(AMIT SHUKLA)

JUDICIAL MEMBER

Dated: 01/11/2019

Binita

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)

5. DR, ITAT, New Delhi.

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Asstt. Registrar

ITAT, New Delhi

Sl.No.	Description	Date
1.	Date of dictation by the Author	.11.2019
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5.	Date of approved order comes to the Sr. PS	
6.	Date of pronouncement of order	
7.	Date of file sent to the Bench Clerk	
8.	Date on which file goes to the Head Clerk	
9.	Date of dispatch of order	

