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

BEFORE SHRI R. K. PANDA ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 403/DEL/2017 (A.Y 2012-13)
(THROUGH PHYSICAL HEARING)

SBI Business Process Management Services Pvt. Ltd. earlier known as GE Capital Business Process Management Services Pvt. Ltd. 401, 402, 4th Floor, Aggarwal Millennium Tower, E-1,2,3, Netaji Subhash Place, Wazirpur, New Delhi PAN: AABCG0222E **(APPELLANT)**	Vs	DCIT Circle 10(1) C. R. Building, I. P. Estate, New Delhi **(RESPONDENT)**

Appellant by	**Sh. Himanshu S. Sinha & Bhuwan Dhoopar, Adv**
Respondent by	**Sh. Shashi Bhushan Shukla, CIT DR**

Date of Hearing	**07.04.2021**
Date of Pronouncement	**20.05.2021**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 17/11/2016 passed by DCIT, Circle-10 (1), New Delhi u/s 143(3) read with Section 144C (13) of the Income Tax, 1961 for Assessment Year 2012-13.

2. The grounds of appeal are as under:-

1. General

1.1. That on the facts and circumstances of the case and in law, the Assessing Officer ('Learned AO') erred in completing the assessment at income of Rs. 20,91,86,420 as against the returned income of Rs.

5,16,10,900 after making the following additions/disallowances:

a) *Addition of Rs. 4,85,54,206 made by the Transfer Pricing Officer ('Learned TPO') in respect of services availed by the Appellant from its associated enterprises; and*

b) *Disallowance of Rs. 10,90,21,322 under section 37(1) of the Act on account of license fee and data service management charges paid to GE Capital Corporation, USA for use of 'Vision Plus' software by erroneously treating the same as capital expenditure.*

2. Adjustment on account of Transfer Pricing Addition

The Ld. TPO/AO/DRP erred in enhancing the income of the Appellant by Rs. 4,85,54,206 by holding that the international related party transactions relating to payment for data server management charges and other transactions, aggregated being inextricably linked to the provision of information technology enabled support services (ITES), do not satisfy the arm's length principle envisaged under the Act and in doing so have grossly erred in:

2.1 *not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*

2.2 *disregarding the Arm's Length Price ('ALP') determined by the Appellant in the Transfer Pricing ('TP') documentation maintained by it as per section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');*

2.3 *disregarding approach adopted by the Appellant of using data of latest available year in TP documentation and holding that current year (i.e. FY 2011-12) data for comparable companies should be used, despite the fact that complete data for the FY 2011-12 was not available to the assessee in the public domain at the time of preparing documentation;*

2.4 *not taking business exigencies and commercial contractual limitations into consideration while evaluating related party transactions, especially in light of the fact that assessee is a Joint Venture Company, and would not have been allowed to have undertaken related party transactions at other than arm's length price*

2.5 *rejecting the comparable companies selected by the Appellant without providing any cogent and/or sufficient reasoning*

2.6 *holding that the Appellant is a KPO as against IT enabled service (ITeS) provider, without appreciating the functional, assets and risk profile of the Appellant*

2.7 *rejecting the comparability analysis conducted by the Appellant in the TP documentation and undertaking comparability analysis by rejecting / modifying quantitative filters applied by the Appellant in its TP documentation and applying additional/revised filters, as follows:*

2.7.1 *rejecting the filter of research and development expenditure/sales applied by the assesse in its TP documentation;*

2.7.2 *excluding companies whose employee cost is less than 25 percent of total cost*

2.7.3 *excluding companies having export sales less than 75% of total income;*

2.7.4 *in rejecting companies with different financial year ending without appreciating that a different financial year ending in no manner affects the comparability of the company and that such companies ought to be part of the benchmarking analyses;*

2.7.5 *increasing threshold for exclusion of companies having related party transactions from 20% to 25% of sales. Further, Ld. TPO/AO/DRP erroneously included BNR Udyog in the final set of comparables that fails to meet aforesaid filter.*

2.8 *including companies having abnormal/volatile margins due to high brand value, dissimilar to that of assessee, disregarding judicial pronouncements on the issue and with the intention of making an addition to the returned income of the Appellant*

2.9 *including certain companies that are not comparable to the Appellant in terms of functions performed, assets employed and risks assumed for benchmarking the international transaction entered by the Appellant*

2.10 *rejecting certain companies and adding certain companies to the final set of comparables for the impugned transaction on an ad-hoc basis. The Ld. TPO has resorted to cherry picking of comparables to determine ALP for the impugned transaction;*

2.11 *rejecting the additional comparables introduced by the assessee without any cogent reasons;*

2.12 *committing errors in the computation of the operating profit margin of certain companies considered as comparable;*

2.13 *While calculating impuged adjustment, ld. TPO/A.O/DRP erred in:*

2.13.1 *incorrectly computing actual price received by not considering Rs. 28.755.543 i.e. revenue accounted for during FY 2012-13 which actually pertains to FY 2011-12;*

2.13.2 *computing adjustment on transactions with Computer Science Corporation which is an unrelated entity, and which has been disclosed on abundant caution basis.*

3. Disallowance of license fee and data service management charges paid to GE Capital Corporation. USA ('GECC') - Rs. 10.90,21,322

3.1. That on the facts and circumstances of the case and in law, the Learned AO has erred in law and facts making the disallowance of Rs. 10,90,21,322 on account of license fee for use of Vision plus software and data service management charges paid to GECC, by regarding the same as capital expenditure.

3.2 That on the facts and circumstances of the case and in law, the learned AO has grossly erred in not following the decision of the Hon'ble Tribunal in Appellant's own case for ASSESSMENT YEAR 2007-08 and 2008-

09 that has deleted the said disallowance by treating the payment of license fee paid for use of vision plus software and data service management charges as revenue expenditure and without appreciating that there has been no change in the facts/circumstances of the case since the time the said order was passed by the Tribunal

3.3. That on the facts and were Ssmstances of the case and in law, the learned AO has erred in making disallowance on account of license fee for use of visions plus software and data service management charges without appreciating that the said issue has been consistently decided in favour of Appellant in Appellant's own case for AYs 2008-09, 2009-10, 2010-11, by the Commissioner of Income Tax (Appeals).

3.4 That on the facts and circumstances of the case and in law, the leaned AO has erred in not following the doctrine of judicial discipline by which the AO was duty bound to follow the orders of the superior judicial authorities passed in Appellant's own case.

3.5 That on the facts and circumstances of the case and in law, the Ld. DRP has also grossly erred to an extent it has directed the AO to disallowed the amount paid for use of vision plus software and data service management charges if the department has preferred an appeal before the High Court without appreciating that Ld. DRP is bound by the orders passed by this Hon'ble Tribunal in Appellant's own case for AY 2007-08 and 2008-09.

3.6 That on the facts and circumstances of the case and in law, the Ld. AO and the DRP has erred in not appreciating that to the extent information available with the Appellant, the order of the Tribunal has not been appealed against before the Delhi High Court and has become final and accordingly accepted by the tax department.

3.7. That on the facts and circumstances of the case and in law, the Learned AO has grossly erred in law and in complete contravention of the provisions of section 144C(13) of the Act, neither followed the directions received from the Hon'ble DRP nor provided any evidence The Hon'ble DRP had directed the Learned AO to provide relief to the Appellant upon confirmation that the Revenue has accepted the decision of the Hon'ble Tribunal for AY 2007-08 and AY 2008-09 and has not agitated the order further.

3.8. That on the facts and circumstances of the case and in law, the Learned AO has erred in facts by making incorrect factual observations with respect to the End User License Agreement entered into between the Appellant and GECC, which are absolutely contrary to the contents of the agreement.

3.9 Without prejudice to the above, the Learned Assessing Officer

3.9.1 erred in facts and in law in disallowing the entire amount without regarding the fact that the said sum was already disallowed by the Appellant under section 40(a)(i) of the Act while computing its total income as per the return of income, leading to double taxation of the self-same amount.

3.9.2 erred in not allowing depreciation @ 60% on the above payments applicable to computer software in accordance with the provisions of section 32 of the Act.

4. Short grant of prepaid taxes and erroneous levy of interest

4.1. *That on the facts and in the circumstances of the case and in law, the Learned AO has erred in not granting the TDS credit to the extent of Rs. 4,40,63,648 as claimed by the Appellant in the revised return of income.*
4.2. *That on the facts and in the circumstances of the case and in law, the Learned AO has erred in levying excess interest under section 234C of the Act.*
4.3. *That on the facts and in the circumstance of the case, the Appellant has filed a rectification application before the Learned AO on December 13, 2016 requesting rectification of the above mentioned mistakes apparent from records and the same is pending for disposal with the Learned AO as on the date of filing of this appeal.*

3. SBI Business Process Management Services Pvt. Ltd. (earlier known as GE Capital Business Process Management Services Private Limited) which was a Joint Venture in which GE Consumer Mauritius Investment Ltd II held 60% and SBI held 40%) now merged with SBI Cards and Payment Services Limited (earlier known as SBI Cards and Payment Services Pvt. Limited) was engaged in providing IT enabled services to banks who issued credit cards. It was carrying out back end activities of card operations, i.e., transaction processing on cards, billings, updating of collections, statements of account, resolving card- member queries, etc. The assessee not being a captive service provider, rendered the aforementioned services to various credit card companies in India and entire revenue in the present financial year (of Rs. 183.11 crores) is earned from unrelated parties. In order to provide these services, the assessee had obtained software licenses, data server '"management services, CIS training from its Associated Enterprises ("AE") located in Australia and USA. During the relevant financial year, the assessee had entered into the following international transactions with its Associated Enterprises.

S. No.	Description of the transactions	Amount (In INR)	Method Selection	Profit Level Indicator (PLI)	No of comparables
1	Payment of the transactions	44,91,106	TNMM	OP/TC	8

2	Payment for software licenses, data server management services and CIS training IITes)	24,01,26,768	TNMM	OP/TC	7

The Transfer Pricing addition made by the Transfer Pricing Officer ("TPO") is in respect to services mentioned at S.No.2. There has been no Transfer Pricing dispute in the preceding years. For purposes of benchmarking the transaction of ITeS Services, the assessee used three- year weighted average of 7 comparables and the OP/TC was calculated at 4.91% (working capital adjusted margin was 0.95%)while the OP/TC of the assessee was 2.95%. The transactions were considered to be at arm's length on the basis of permissible range of 5%. The TPO vide order dated January 21, 2016 rejected the comparability analysis in respect to transaction of ITeS Services and conducted a fresh benchmarking study on the basis of additional/ modified quantitative filters. The TPO arrived at a final list of 10 comparables out of which 3 comparables were chosen by the assessee and fresh 7 comparables were introduced by the TPO. Further, the TPO rejected the working capital and risk adjustment and recalculated the margin of the assessee. A summary of the transfer pricing adjustment carried out by the TPO is as follows:

Transaction	No. of comparables	Arm's Length Margin	Margin of the assessee	Quantum of Addition (In INR)
Transaction of ITes Services	10	28.34%	1.74%	6,38,80,109/-

Proportionate Adjustment made by the TPO i.e. adjustment made only on the international transactions entered with the related parties. Aggrieved by the order of the TPO, the assessee filed its objections before the DRP. The DRP vide

order dated September 14, 2016 directed the TPO to re-compute margin of comparables and allowed working capita adjustment. The rest of the contentions of the assessee were rejected. Subsequently, the DRP passed a rectification order dated March 24, 2017 under Rule 13 of the Income Tax (Dispute Resolution Panel) under which it directed the exclusion of BNR Udyog Ltd. from the final list of comparables. The assessment order dated 17/11/2016 was passed and as per the DRP under Rule 13 of the Income Tax (Dispute Resolution Panel) Rules 2009 passed order dated 24/3/2017 thereby rectifying the earlier order.

4. Being aggrieved by the assessment order, the assessee filed appeal before us.

5. As regards to Ground No. 2.1 to 2.12 relating to Transfer pricing adjustment of Rs. 4,54,80,952 in respect o transaction of ITeS Services, the Ld. AR submitted that the assessee is aggrieved by the inclusion of 5 comparables i.e. Acropetal Technologies Ltd.(seg), E4e Healthcare Services Pvt. Ltd., Eclerx Services Ltd, Infosys BPO and TCS e-serve Ltd. The assessee is also aggrieved by rejection of one comparable i.e. R Systems International Ltd.

5.1 Eclerx Services Limited: The Ld. AR submitted that this comparable company is functionally different from that of assessee company. Eclerx is engaged in the provision of high-end Knowledge Process Outsourcing ("KPO") services such as data analytics, operation management services and audit reconciliation services. The Ld. AR further submitted that significant expenditure on Advertising and marketing expenses amounting to Rs 6.74 Million were made by this company. The company owns significant amount of intangibles amounting to Rs.28.07 million. The Segmental details are not available. There is abnormal growth in revenue @ 38% in FY 2011-12 vis-a-vis FT 2010- 11. The Ld. AR relied upon following decisions:

- Rampgreen Solutions (P) Ltd Vs CIT: [2015] 377 ITR 533 (Del HC)

- Pr. CIT v Actis Global Services Pvt. Ltd: [Delhi High Court in ITA No. 417/2016, Order dated August 5, 2016]
- Pr.CIT v BC Management Services Pvt. Ltd: [2018] 403 ITR 55(Del HC)
- Pr. CIT v evalueserve (SEZ) Gurgaon Pvt. Ltd: [Delhi High Court in ITA No. 241/2018, Order dated February 26, 2018]
- Pr. CIT v H&S Software Development and Knowledge Management Centre Pvt. Ltd: [Delhi High Court in ITA No. 912/2017, Order dated January 3, 2018]
- Timex Group India Ltd vs DCIT: [2019] 102 taxmann.com 459(Del I TAT
- Inductis India Pvt. Ltd. Vs. ACIT(2019) 101 taxmann.com 110 (Del ITAT)

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

5.3 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the functions of Eclerx Services Limited are different than the functions of the assessee company. Besides this, significant expenditure on Advertising and marketing expenses were made by this comparable company and there is significant intangible assets owned by this company. There is no segmental details available of this company. All these factors determine that Eclerx Services Limited is not a good comparable. Therefore, we direct the TPO to exclude this comparable from the final set of comparables.

5.4 TCS-e-Serve Limited: The Ld. AR submitted that this comparable company is functionally different. TCS e-Serve is primarily engaged in the business of providing Business Process Services (BPO) for its customers in Banking, Financial Services and Insurance domain which includes high-end analytics and insights (KPO) services. Its operations include delivering core business processing services, analytics/insights and support services for both data and voice processes. TCS e-Serve has a very high turnover i.e Rs.1578.44 crores as compared to that of the assessee which is Rs. 183 crores, which is 80 times that of the assessee. There was acquisition by TCS Limited / Brand

Value of TCS. This Company was taken over by Tata Consultancy Services Limited (TCS) during FY 2008-09. After the takeover the assessee company was able to utilize TCS's large customer base to achieve greater operational efficiencies. The assessee company has also contributed towards TATA brand equity. Further, after the acquisition by Tata group, there has been a substantial increase in the turnover and profitability of the assessee company which clearly indicates the impact of the TATA brand on the assessee company's operations. The Ld. AR relied upon the following decisions:

- Pr. CIT v BC Management Services Pvt. Ltd: [2018] 403 ITR 55 (Del HC)
- Pr.CIT v evalueserve (SEZ) Gurgaon Pvt. Ltd: [Delhi High Court in ITA No. 241/2018, Order dated February 26, 2018]
- Pr. CIT v Actis Global Services Pvt. Ltd: [Delhi High Court in ITA No. 94/2017, Order dated May15, 2017]
- Orange Business Services India Solutions Pvt. Ltd vs DCIT: [2016] 71 taxmann.com 206 (Del-ITAT)
- Timex Group India Ltd vs DCIT: [2019] 102 taxmann.com 459(Del ITAT.
- Inductis India Pvt. Ltd v ACIT: [2019] 101 taxmann.com 110(Del ITAT)

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

5.6 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the functions of TCS-e-Serve Limited are different than the functions of the assessee company. Besides this, TCS e-Serve has a very high turnover. There was acquisition by TCS Limited / Brand Value of TCS in the present assessment year. All these factors determines that TCS E-Serve Ltd. is not a good comparable. Therefore, we direct the TPO to exclude this comparable from the final set of comparables.

5.7 Infosys BPO Ltd.: The Ld. AR submitted that this comparable company is functionally different and has diversified business which comprises customer service outsourcing, finance and accounting, human resources outsourcing, legal process outsourcing, sales and fulfillment, sourcing and procurement outsourcing etc. Infosys BPO is engaged in the providing high-end integrated services by assisting its clients in improving their competitive positioning by

managing their business processes in addition to providing increased value. The brand value of Infosys BPO Ltd enjoys the benefit of brand value of "Infosys", one of world's leading companies. It has consistently spent substantial amount of money on brand building. There was an extraordinary financial events during Financial Year 2011-12 as it acquired 100% voting rights in Portland Group Pty. Limited (strategic sourcing & category management services provider based in Sydney, Australia) and also invested in Mc Camish Systems LLC. The Ld. AR relied upon the following decisions:

- Pr. CIT v Actis Global Services Pvt Ltd: [Delhi High Court in ITA No. 417/2016, Order dated August 5, 2016]
- Pr.CIT v evalueserve (SEZ) Gurgaon Pvt Ltd: [Delhi High Court in ITA No. 241/2018, Order dated February 26, 2018]
- Orange Business Services India Solutions Pvt Ltd vs DCIT: [2016] 71 taxmann.com 206 (Del-ITAT)
- Symphony Marketing Solutions India Pvt Ltd v ITO: [2013] 38 taxmann.com 55(Bangalore ITAT)
- Timex Group India Ltd vs DCIT: [2019] 102 taxmann.com 459(Del ITAT)

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

5.9 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the functions of Infosys BPO Ltd. are different from the functions of the assessee company. Besides this, the brand value of Infosys BPO Ltd enjoys the benefit of brand value of "Infosys", one of world's leading companies. It has consistently spent substantial amount of money on brand building. There was an extraordinary financial events during Financial Year 2011-12 as it acquired 100% voting rights in Portland Group Pty. Limited (strategic sourcing & category management services provider based in Sydney, Australia) and also invested in Mc Camish Systems LLC. All these factors determines that Infosys BPO Ltd. is not a good

comparable. Therefore, we direct the TPO to exclude this comparable from the final set of comparables.

5.10 Acropetal Technologies Ltd. (Healthcare Segment): The Ld. AR submitted that this comparable company is functionally different. Acropetal is engaged in software services, solutions and product development in healthcare, energy and environment sector. The company is engaged in software development can be evidenced from the investment to the tune of Rs. 2618.67 lakhs made in setting up software development centre. Further, it provides healthcare services which includes innovation, patient life cycle management, physician and clinical life cycle management, hospital administration management, drug discovery and disease life cycle management. There is significant AMP expenses. Acropetal has incurred significant AMP expenses amounting to Rs. 21,80,89,723/-. There was extra-ordinary economic event during the relevant Previous year. Acropetal acquired two US based companies subsequent to which it will get into IP development by exploring the expertise and design skills available in the Silicon Valley. It can be seen that Acropetal has unallocable expenditure amounting to Rs. 23,76,51,122 which has not been allocated to any of the operating segment and thus the financial information relating to the three segments is not reliable. The Ld. AR relied upon the following decisions:

- Timex Group India Ltd vs DCIT: [2019] 102 taxmann.com 459(Del ITAT)
- Inductis India Pvt. Ltd v ACIT: [2019] 101 taxmann.com 110(Del ITAT).

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

5.12 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that Acropetal Technologies Ltd. (Healthcare Segment) is functionally different as the Healthcare Segment has been taken into account. The company is engaged in software development. It provides healthcare services which includes innovation, patient life cycle

management, physician and clinical life cycle management, hospital administration management, drug discovery and disease life cycle management. There is significant AMP expenses. Acropetal acquired two US based companies subsequent to which it will get into IP development by exploring the expertise and design skills available in the Silicon Valley. It has un-allocable expenditure. All these factors determine that Acropetal Technologies Ltd. is not a good comparable. Therefore, we direct the TPO to exclude this comparable from the final set of comparables.

5.13 E4e Healthcare Services Pvt. Ltd.: The Ld. AR submitted that this comparable company is functionally different as the company is engaged in Drovidina healthcare business services. The DRP had set aside the examination of this comparable to the TPO which is beyond its powers in Section 144C(8).

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

5.15 We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that E4e Healthcare Services Pvt. Ltd. is engaged in the healthcare business services which are functionally different. The assessee company is engaged in providing IT enabled services to banks who issued credit cards. Thus, E4e Healthcare Services Pvt. is not a good comparable. Therefore, we direct the TPO to exclude this comparable from the final set of comparables.

5.16 Now coming to the exclusion of R Systems International Ltd.: The Ld. AR submitted that this company was rejected as a comparable on the ground that it has different financial year ending. In this regard it is submitted that the data for the entire FY can be extrapolated from its quarterly filings made in the stock exchange. The same is available in the public domain. The Hon'ble Delhi

HC in the case of Mckinsey Knowledge Centre (ITA no. 217/2014 dated 27.03.2015) has held that if the data pertaining to a comparable having a financial year ending other than end-March can be reasonably extrapolated and used. In the present case, R Systems International Ltd., is a listed company and makes quarterly filings with the stock exchanges and regulatory authorities.

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

5.18 We have heard both the parties and perused all the relevant material available on record. As per the submissions of the Ld. AR, this company was rejected as a comparable on the ground that it has different financial year ending. The contention of the Ld. AR that the data for the entire FY can be extrapolated from its quarterly filings made in the stock exchange, appears to be plausible when the same is available in the public domain. The reliance of the decision of McKinsey Knowledge Centre (supra) is relevant wherein it is held that if the data pertaining to a comparable having a financial year ending other than end-March can be reasonably extrapolated and used. Therefore, we direct the TPO/AO to verify this comparable and its functions as well as the principle laid down in the decision of the Hon'ble Delhi High Court and if found suitable, this comparable be included in the final list of the comparables. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice.

6. Thus, Ground No. 2.1 to 2.12 are partly allowed for statistical purpose.

7. As regards to Ground No. 2.13.1 relating to incorrect computation of assessee's margin, the Ld. AR submitted that the TPO while computing the adjustment has wrongly considered the operating revenue of the assessee to be Rs. 183,11,04,381 instead of Rs. 185,87,78,312/-. The TPO while calculating

the operating revenue did not consider the amount of Rs. 2,87,55,643/-. The TPO and the DRP completely disregarded the submissions made by the assessee in this regard. The Ld. AR submitted that the assessee (previously known as GE Capital Business Process Management Services Private Limited) rendered services worth Rs. 2,87,55,643/- to SBI for collection of overdue amounts from SBI's customers and up-gradation of customer databases. However, in the absence of any agreement between SBI and GE Capital Business Process Management Services Private Limited till F.Y. 2011-12, the revenue accruing to the company for rendering these services was not recognized. Subsequently, during FY 2012-13, the company entered into an agreement with SBI resulting in the recognition of the revenue amounting to Rs. 49,535,290 pertaining to the period 01 September 2010 to 31st March 2012 (out of which Rs. 2,87,55,643 pertains to F.Y. 2011-12). This has been duly recorded by the statutory auditor in its report for FY 2012-13. In the financial statement for the relevant year (F.Y. 11-12), the auditor has made a clear disclosure that no revenue has been recognized on account of services rendered to SBI despite having incurred a cost of Rs. 3.2 crore. Moreover, as per the matching 'principle, if cost in connection with provision of the said services has been incurred and accounted for in books in FY 2011-12, the revenue corresponding to the same (Rs. 2.87 crore) must also be considered in F.Y. 2011- 12. Alternatively, the Ld. AR submitted that the cost incurred during the year (Rs. 3.2 crore) for which no revenue has been recognized must be excluded.

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

9. We have heard both the parties and perused all the relevant material available on record. From the perusal of records, it can be seen that the assessee company rendered services to SBI for collection of overdue amounts from SBI's customers and up-gradation of customer databases. But as there was no agreement between SBI and GE Capital Business Process Management

Services Private Limited till F.Y. 2011-12, the revenue accruing to the company for rendering these services was not recognized by the Assessee. Subsequently, during F.Y. 2012-13, the company entered into an agreement with SBI and the assessee recognized the revenue amounting to Rs. 49,535,290 pertaining to the period 01 September 2010 to 31st March 2012 (out of which Rs. 2,87,55,643 pertains to F.Y. 2011-12). This has been duly recorded by the statutory auditor in its report for F.Y. 2012-13. In the financial statement for the relevant year (F.Y. 2011-12), the auditor has made a clear disclosure that no revenue has been recognized on account of services rendered to SBI despite having incurred a cost of Rs. 3.2 crore. These facts were totally ignored by the TPO/AO and therefore, in the interest of justice, we deem it proper to remand back this issue to the file of the TPO/AO for proper verification and adjudication as per the facts and law. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Hence, Ground No. 2.13.1 is partly allowed for statistical purpose.

10. As regards to Ground No. 2.13.2 relating to incorrect calculation of Proportionate Adjustment by the TPO, the Ld. AR submitted that the total related party transactions for the transaction of ITes Services, as per the TP Study, is Rs. 24,01,26,768/- which also includes Rs. 12,92,90,597/- which was paid by the Assessee to CSC Australia Pty Ltd ("CSC Australia"), a third party for the receipt of data processing and related services pursuant to a Master Technology Services Agreement between GE Capital Corporation USA ("GECC") and Computer Sciences Corporation ("CSC USA") and was reported as an international transaction only out of abundant caution. Therefore, the related party transaction or AE transactions amounts to only Rs. 11,08,36,171/-. The TPO while computing the proportionate adjustment has considered the operating expenses for related party transaction as Rs. 24.01 crores and, accordingly, calculated the proportionate factor as 13.34%. The Ld. AR submitted that the aforementioned operating expenses for related party transaction Rs. 24.01 crores also include Rs. 12,92,90,597/- which was paid

by the Assessee to CSC Australia, a third party for the receipt of data processing and related services pursuant to Master Technology Services Agreement between GECC and CSC USA. As the invoicing of the services rendered by CSC Australia has been done through GECC, the transaction was disclosed in the Form 3CEB only out of abundant caution. However, neither CSC USA nor CSC Australia are Associated Enterprises of the Assessee within the meaning of Section 92A(1) or 92A(2) of the Act. Accordingly, the payment of Rs. 12,92,90,597/- to CSC Australia does not qualify as related party transaction and, thus, ought to be excluded while computing the proportionate adjustment. The Ld. AR submitted that only international transactions entered between associated enterprise are covered by transfer pricing regulation under Chapter X of the Income-tax Act, 1961. The Ld. AR further submitted that after excluding the aforementioned amount of Rs. 12,92,90,597/-, the total operating expenses with related party comes to Rs.11,08,36,171 and the correct proportionate adjustment is only to the extent of 6.16% as given below:

Particular	Proportionate Adjustment calculated by TPO	Corrected Proportionate Adjustment
Related Party Transactions	24.01 crores	11,08,36,171
Total Operating Expenses	179.98 crores	179.98 crores
Proportionate factor	13.34%	6.16%

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

13. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that as per the TP study of the assessee, the total related party transactions for the transaction of ITes Services is Rs. 24,01,26,768/- and the same also includes Rs. 12,92,90,597/- paid by the Assessee to CSC Australia Pty Ltd., a third party for the receipt of

data processing and related services as per the Master Technology Services Agreement between GE Capital Corporation USA and Computer Sciences Corporation, USA as per the contentions of the Ld. AR. The Ld. AR's submission during the hearing was that this transaction was reported as an international transaction only out of abundant caution. But, the related party transaction or AE transactions amounts to only Rs. 11,08,36,171/-. After perusal of the records, these facts have to be verified by the TPO/AO which was not done by the Revenue authorities. It appears that the Computer Sciences Corporation, USA and CSC Australia Pty Ltd., both are not associated enterprises of the assessee as set out by the provisions under Section 92A(1) or 92A(2) of the Income Tax Act, 1961. But the TPO ignored these facts and while computing the proportionate adjustment has considered the operating expenses for related party transaction as Rs. 24.01 crores, thereby, calculating the proportionate factor as 13.34%. Therefore, we remand back this issue to the file of the TPO/AO and after verifying the transactions between Computer Sciences Corporation, USA and CSC Australia Pty Ltd., the same should be taken cognizance as per the facts and provisions of Income Tax Act, 1961. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Hence, Ground No. 2.13.2 is partly allowed for statistical purpose.

14. As regards to Ground No. 3.1 to 3.8 relating to disallowance of license fee of Rs. 10,90,21,322/-, the Ld. AR submitted that this issue is covered issue. During the relevant financial year, the Assessee had paid license fee of Rs. 1,23,99,705/- for the use of Vision plus software and Rs. 9,66,21,617 for data service management charges to GECC. The software was developed by 'Pay Sys', USA, a company incorporated in USA. GECC entered into an agreement with Pay Sys for the use of this software and by virtue of this agreement, GECC became the global license holder of Vision Plus software programs. Subsequently, the Assessee entered into an agreement with GECC on July 7,

2000 for the use of this software for processing of credit card applications, production of statements etc. The agreement entered is an 'End User License Agreement' which restricts the Assessee from transferring the licensed program by way of making available the program to any person and making copies thereof. The Assessing Officer treated the entire amount paid to GECC as capital expenditure and disallowed the entire expenditure claimed by the Assessee in its Profit & Loss Account. The Assessing Officer treated this amount as the amount paid towards acquisition of right to operate exclusively grant of license, know-how and other commercial rights. The Assessee filed objections before the DRP against the disallowance made by the Assessing Officer. The DRP held that it is not aware whether appeal has been filed before the Hon'ble Delhi High Court against the order of the Tribunal on the said issue and to keep the issue alive, the said amount is treated as capital in nature. The Ld. AR submitted that this issue is covered in favour of the Assessee by the decision of this Tribunal in Assessee's own case for Assessment Year 2007-08 (ITANo. 2806/Del/2011, Order dated October 16, 2015), 2008-09 (ITA No. 2124/Del/2013, Order dated October 16, 2015), 2010-11 (ITA No. 6836/Del/2014, Order dated October 5, 2017) and 2011-12 (ITA No. 4975/Del/2015, Order dated September 1, 2017)**.** The Ld. AR further submitted that the Revenue has not filed any appeal before the Hon'ble Delhi High Court on this issue and, thus, the matter has attained finality.

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

16. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that this issue is covered by the order of the Tribunal in assessee's own case and there is no appeal filed by the Revenue before the Hon'ble High Court. The Tribunal in A.Y. 2007-08, 2008-09, 2010-11 and 2011-12 held as under:

"7. We have considered the rival submissions, perused the orders of the

authorizes below, material available on record and gone through the case laws cited by both the parties. From the above narration of facts, we find that the arguments advanced by both the parties rest on the vital question whether under the facts and circumstances of the case, the payment of licnese fee, connectivity charges and co-ordination charges amounting to Rs.2,19,60,467/- made by the assessee to GECC(USA) under the end-user agreement shall fall within the category of capital expenditure or revenue expenditure? The stand of the assessee is that it is in the nature of revenue expenditure and deductible u/s 37(1) of the Act whereas the ld. Authorities below have put it in the category of capital expenditure and disallowed the claim of assessee. The basic reasons of Assessing Officer for giving the license fee a treatment of capital expenditure are that the agreement provides exclusive right to use vision plus software which provides enduring benefits to the assessee; that the consideration is in respect of grant of licnese and that the information was not only in relation to use of license, but co-ordination and connectivity services were also provided by GECC(USA). He, therefore, held that the acquisition of license granted by the licensor in itself is a capita asset, being "intangible asset", which having long validity is capital in nature. We have gone through the End-User license agreement dated 07.07.2000 and we do not find substance in the conclusion arrived at by the ld. Authorities below. It is notable that in terms of clause 2.2 and 2.3, the assessee company is specifically restricted to make copies of the software and make it available to any other period. There is also a bar on the assessee for use of software for the purpose other than that mentioned in clause 2.2 of the agreement. In terms of clause 2.3, the assessee does possess no right either to sell it or alienate in any other manner. The relevant clauses No. 2.2 and 2.3 of the license agreement are reproduced as under:

> *"2.2 GECC shall provide the Licensed Program, any revisions to the Licensed Program and any updates to the Licensed Program to GECPBMS for its business use only in accordance with this agreement."*
>
> *2.3 GECBPMS undertakes that it shall not;*

(a) make the licensed program or any part thereof available to any period other than its employees on a "need to know" basis;

(b) copy the Licensed Program or any part thereof, other than for archival backup purposes;

(c) use the Licensed Program for any purpose other than as permitted by clause 2.2 of license, sell or otherwise alienate the Licensed Program in any manner whatsoever; or

(d) Duplicate, market, license or develop software programs that compete with the Licensed Program and/or exploit commercially the Licensed Program in any manner whatsoever."

Similarly, clause 5 and its sub-clauses give the right of termination of license agreement to either parties under various circumstances. It is worthwhile to note that in case of default, if any, committed by the assessee, the rights of assessee to use the software would stand terminated forthwith. Under clause 5.5, the assessee is required to deliver the licensed program back immediately to GECC(USA) after removing the same from its systems on termination of agreement. Clause 5.5 of the agreement reads as under:

"5.5 Upon termination of this Agreement the right to use the Licensed Program shall end and GECBPMS shall, with immediate effect:

(a) deliver to GECC the Licensed Program; and

(b) purge all copies of the licensed program stored in any CPU or other storage medium or facility, which for any reason cannot be delivered to GECC. In addition, an officer of GECBPMS shall certify in writing to GECC that all proprietary material relating to the Licensed Program has been delivered to GECC or purged and that the use of the Licensed Program and any portion thereof has been discontinued."

Under clause 3.1, the license agreement allows GECC to receive license fee from assessee on quarterly basis as mutually agreed upon. The agreement provides for periodic payment for use of software to GECC, which is subject matter of renewal and revision every calendar year. No case is made out by the department to assume that the periodic payment made by the assessee

were the installments for acquisition of such software and the payment was not for mere usage of software. It is a matter of fact on record that M/s GECC(USA) itself has received the right to use the software internally including its group entities for its business and it does not have any right to commercially exploit the software. The assessee is vested with limited right to use the licensed program during the currency of license agreement. The agreement nowhere provides any exclusive right to the assessee, but the assessee was vested with the right to use the licensed program for facilitating its business operations enabling the assessee day-to-day management of business and to work with more efficiency. In view of all these terms of agreement and the facts & circumstances attending to the case, we are of the considered opinion that end user license agreement in the instance case does not have the effect of any enduring benefit for holding the same as capital in nature. The ld. DR has failed to rebut the contention of the assessee that the impugned software is an application software and is being used for accounting purposes. Such software are used by various banks and financial institutions. Moreover, the ld. CIT(A) in succeeding assessment years 2008-09, 2010-11 and 2011-12 has categorically gave finding of fact that the software is a application software which is routine in nature and used for accounting purposes. Therefore, in view of decisions in the case of CIT vs. Asahi India Safety Glass Ltd. (supra) and CIT vs. Amway India Enterprises (Supra), we are of the considered opinion that the right to use the visions plus software program does not have any effect of providing enduring benefit and the payment made to GECC(USA) is only the license fees and not the price for acquisition of capital asset. The assessee did not acquire any ownership on the software and after termination of license agreement, all the rights and title remained with GECC(USA). The ld. DR failed to dislodge the findings of the ld. CIT(A) given in the orders passed for subsequent years after considering the same license agreement and various decisions of Hon'ble High courts and Supreme Court. It is also a matter of record that the assessee has returned its income for the relevant previous year at Rs. 152.88 crores whereas the

amount expended towards use of routine application software is Rs. 2.19 crores which is 1.43%. This shows that implies that this software only is not the soul of assessee's business as argued by the ld. DR. In the case of southern Switchgear Ltd. (supra), the technical knowledge and information remained with the assessee even after termination of agreement which constituted enduring benefit to the assessee whereas in the present case, the software in question is an application software and after termination of license agreement, said software was to be delivered back to the licensor and the same cannot be made to use by the assessee in any manner. Similarly in the case of Jones Woodhead and Sons (India) (supra) relied on by the Assessing Officer is also distinguishable on facts inasmuch as in that case the agreement between the assessee and the foreign collaborator was in relation to setting up of a new business and the foreign collaborator besides furnishing information and technical know-how, rendered valuable assistance in setting up of the factory itself. No such situation arises in the present case. In view of this discussion and relying on various decisions cited by assessee, we are of the considered opinion that the license fee etc. paid by the assessee to M/s GECC(USA) is revenue expenditure deductible u/s 37 of the Act. The appeal of the assessee is accordingly allowed."

This view was again taken in A.Y. 2010-11, 2011-12 by the Tribunal and allowed this issue in favour of the assessee. For A.Y. 2007-08, the Hon'ble High Court has affirmed the order of the Tribunal in favour of the assessee (ITA No.766/2014 & CM 20436/2014 CIT vs. GE Capital Business Process Management Services Pvt. Ltd. order dated 24.12.2014), but this issue was not contested by the Revenue in the High Court. Thus, the issue of disallowance of license fee is attains finality and is in favour of the assessee as held by the Tribunal. Hence, Ground No. 3.1 to 3.8 are allowed.

17. As regard to Ground No. 4.1 to 4.3 relating to short grant of prepaid taxes and erroneous levy of interest, the Ld. AR submitted that the Assessing Officer erred in not granting the TDS credit to the extent of Rs. 4,40,63,648/- as claimed by the assessee in the revised return of income. The Ld. AR submitted that a direction may be given to the Assessing Officer to grant credit for the same after verification.

18. The Ld. DR relied upon the order of the TPO, order of the DRP and Assessment Order.

19. We have heard both the parties and perused the material available on record. From the perusal of record, it appears that the TDS credit to the extent of Rs. 4,40,63,648/- as claimed by the assessee in revised return of income was not looked into by the Assessing Officer. Therefore, we remand back this issue to the file of the Assessing Officer for proper verification of the claim of TDS credit and grant the same as per the provisions of law. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Hence Ground No. 4.1 to 4.3 are partly allowed for statistical purpose.

20. In result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on this Day of May, 2021

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

Dated :20/05/2021

*R. Naheed **

Copy forwarded to:-

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

ASSISTANT REGISTRAR
ITAT NEW DELHI