

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A”BENCH: BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.513/Bang/2015
AssessmentYear:2010-11

VWR Lab Products Private Ltd. 139, 6 th Main, BDA Industrial Suburb Tumkur Road Peenya Post Bangalore-560 058 PAN NO :AACCV3080E	Vs.	Deputy Commissioner of Income-tax Circle-7(1)(2) Bengaluru
APPELLANT		RESPONDENT

Appellant by	:	Shri Darpan Kriplani, A.R.
Respondent by	:	Ms. Neera Malhotra, D.R.

Date of Hearing	:	20.01.2021
Date of Pronouncement	:	27.01.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the assessment order dated 27.01.2015 passed by the A.O. for assessment year 2009-10 u/s 143(3) r.w.s. 144C(13) of the Income-tax Act,1961 [‘the Act’ for short] pursuant to the directions given by Ld. Dispute Resolution Panel (Ld. DRP).

2. The assessee has filed concise grounds of appeal and also additional grounds of appeal. At the time of hearing, the Ld. A.R. did not press the additional grounds of appeal.

3. Ground Nos.1 to 5 raised by the assessee are general in nature. Ground No.6 relates to transfer pricing adjustment made in respect of back office support services (ITES services). Ground No.7 relates to transfer pricing adjustment made in respect of distribution segment. Ground No.9 relate to direction given by Ld. DRP to compute deduction u/s 10A of the Act after set off of loss/unabsorbed depreciation relating to non10A units.

4. The assessee is engaged in the business of Trading & Distribution of laboratory products & chemicals, strategic sourcing, information technology enabled services (offshore accounting & data management), marketing support services, research identification, improvement evaluation, selection, testing of any mechanical, electrical, electronic, chemical, plastic, telecom & information technology products.

5. We shall take up the issue relating to transfer pricing adjustment made in respect of back office support services (ITES services). The assessee adopted TNMM method and OP/OC (Operating profit by Operating cost) as profit level indicator. The assessee declared margin of 19%. The turnover of the assessee from this segment was Rs.20.27 crores. The assessee had selected 15 comparable companies. The T.P.O. rejected the transfer pricing study of the assessee and accordingly selected following 10 sets of comparables:

<i>Sl.No.</i>	<i>Name</i>	<i>PLI</i>
1.	<i>Accentia Technologies Ltd.</i>	<i>43.06%</i>
2.	<i>Acropetal Technologies Ltd. (seg)</i>	<i>22.27%</i>
3.	<i>E-Clerx Services Ltd.</i>	<i>55.97%</i>
4.	<i>Fortune Infotech Ltd.</i>	<i>22.80%</i>
5.	<i>Icra Online Ltd. (seg)</i>	<i>43.39%</i>
6.	<i>Informed technologies India Ltd.</i>	<i>26.15%</i>

7.	<i>Infosys BPO</i>	31.23%
8.	<i>Cosmic Global Ltd.</i>	14.97%
9.	<i>Sundaram Business Services Ltd.</i>	-12.31%
10.	<i>Jeevan Scientific Technology Ltd. (seg)</i>	21.05%
	<i>AVERGE</i>	26.86%

The average margin of the comparable companies was 26.86%. After allowing working capital adjustment of 0.23%, the TPO computed the adjusted margin at 26.63%. Accordingly, he made transfer pricing adjustment of Rs.1,30,63,508/-. The Ld. DRP confirmed the same.

6. The Ld. A.R. submitted that the assessee seeks exclusion of following 3 companies:

- a) E-Clerx Services Limited
- b) Infosys BPO Limited
- c) ICRA online Limited (seg)

The Ld. A.R. submitted that the above said 3 companies have been excluded in an identical case rendered in the decision by the Bangalore bench of Tribunal in the case of M/s. Akamai Technologies India Private Limited in IT(TP)A No.307/Bang/2015 dated 29.7.2020. Accordingly, he prayed for exclusion of above said 3 companies.

7. On the contrary, the Ld. D.R. supported the order passed by the Ld. DRP.

8. We heard rival contentions and perused the record. We notice that the coordinate bench in the case of Akamai Technologies India Pvt. Ltd. has examined the above said 3 companies in the context of "ITES services" rendered by an the Indian company to its foreign associated enterprises. The coordinate bench has held as under in respect of these 3 companies:

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16. As far as Gr.No.4 & 5 raised by the revenue are concerned, the Revenue is challenging the exclusion ICRA, Infosys BPO Ltd., and Eclerx Services Ltd.

17. As far as exclusion of ICRA is concerned, before the DRP the Assessee sought exclusion of ICRA from the list of comparables on the ground that this company is functionally dissimilar to the Assessee. It was submitted that ICRA is engaged in providing services which are in the nature of KPO services. It provides financial and analytical services and support to clients in the area of Data Extraction, Aggregation, Electronic Conversion of Financial statements, Validation and Analysis, Accounting and Finance, Research and Analytics which are dissimilar to the services rendered by the Assessee. It was submitted that outsourced services segment of the company is engaged in the provision of high end consultancy services which cannot be compared to the assessee who is into provision of low end IT enabled services which are routine in nature. Further, the safe harbour rules clearly distinguish between an ITE service provider and a KPO service provider. The DRP has not considered any of the above objections.

18. Before the Tribunal, the Assessee has brought to our notice that this Tribunal has held that a KPO service provider cannot be compared to an ITE service provider. Reliance in this regard is placed on the decision in the case of Arctern Consulting Pvt. Ltd. (supra) IT(TP)A No.195/Bang/2015 & 302/Bang/2015 Order dated 11.08.2017 for AY 2010-11, & in the case of Outsource Partners International (P) Ltd. I.T(TP).A No.337/Bang/2015 Order dated 6.2.2017 for AY 2010-11, wherein on identical circumstances, the exclusion of this company came to be upheld/the company was directed to be excluded. The learned DR reiterated the stand of the revenue as reflected the grounds of appeal of the revenue.

19. We have carefully considered the rival submissions. In the case of Outsources Partners International (P) Ltd.,(supra), this Tribunal has adjudicated identical issue and held that this company was not functionally comparable to an ITeS company such as the Assessee and for the reason that this company fails the export earning filter. Respectfully following the said decision, we uphold exclusion of this company from the list of comparable companies for the reasons given in this paragraph.

20. As far as exclusion of Infosys BPO Ltd., is concerned, the said company was excluded on the ground that the company is engaged in providing high-end integrated services, and whereas, the Assessee is engaged in providing low level back-office support services. Further, the company has huge brand name and owns significant intangibles. It is submitted that the brand name that is associated with Infosys Technologies Ltd. has an impact on the business operations of Infosys BPO. Also, during the financial year 2009-10, the company acquired all the outstanding membership interests of McCamish Systems LLC which constitutes a peculiar economic

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circumstance for which no reasonable adjustment could be made to mitigate its effect on the company's margin. Also, the company has incurred huge selling and marketing expenses and the same has been increasing year on year. Reliance in this regard was placed on the decision in the case of Arctern Consulting Pvt. Ltd. (supra) and Tesco Hindustan Service Centre (P.) Ltd. (2017)77 taxmann.com 48 (Bangalore) for AY 2010-11, where in identical circumstances, the exclusion of the company came to be upheld/company was directed to be excluded. The learned DR reiterated the stand of the revenue as reflected in the grounds of appeal of the revenue.

21. We have carefully considered the rival submissions. In the case of Tesco Hindustan Service Centre Pvt.Ltd.(supra) vide paragraph 47 & 48 of its order, the Tribunal upheld exclusion of this company from the list of comparable companies, on the ground of presence of brand value and other factors. Respectfully following the decision of the Tribunal, we uphold the order of DRP excluding this company from the list of comparable companies.

22. As far as exclusion of Eclerx Services Ltd., is concerned, it was submitted on behalf of the Assessee the DRP rightly excluded this company from the final list of comparables as the same is functionally dissimilar to the Assessee. In this regard, it was submitted that the company is functionally dissimilar as it is a KPO engaged in providing data analytics and data process solutions. It provides end-to-end support through the trade lifecycle, including trade confirmation, settlements, transaction maintenance, risk analytics and reporting. The data analytics services being provided by Eclerx is significantly different from the routine ITE services provided by the Assessee. Reliance in this regard was placed on the decisions in the cases of Arctern Consulting Pvt. Ltd. (supra) and Tesco Hindustan Service Centre (P.) Ltd. (supra), where in identical circumstances, the exclusion of the company came to be upheld/the company was directed to be excluded. The learned DR reiterated the stand of the revenue as is reflected in the grounds of appeal raised by the revenue.

23. We have carefully considered the rival submissions. In the case of Tesco Hindustan Service Centre (P) Ltd. (supra), this company was excluded from the list of comparable companies in the case of a company rendering ITeS similar to the services rendered by the Assessee in this appeal, observing as follows:

"37. Eclerx Services Ltd. : In this regard, the ld. counsel for the assessee has contended that this company's function is dissimilar with the assessee company as it provides industry specialised services like data analytics, operations management and audits & reconciliation services which cannot be compared to a BPO or IT Offshoring company. It was further contended that this company

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has abnormal profits and sales for the year. The ld. counsel further contended that this company was examined by the Tribunal in the case of Stream International Services (P) Ltd. (supra) and the Tribunal has held that even the company's functions are different, therefore it cannot be considered as comparable, following the order of the Mumbai Special Bench of the Tribunal in the case of Maersk Global Centres (India) (P.) Ltd. v. Asstt. CIT [2014] 43 taxmann.com 100/147 ITD 83 (Mum.) (SB). Therefore, this company may be excluded from the list of comparables.

38. *The ld. DR simply placed reliance upon the order of the AO.*

39. *Having carefully examined the orders of lower authorities in the light of Tribunal's finding in the case of Stream International Services (P) Ltd. (supra), we find that the profile of this company was examined by the Tribunal in this case and following the order of the Special Bench of the Tribunal in the case of Maersk Global Centres (India) (P.) Ltd. (supra), the Tribunal held this company to be non-comparable. For the sake of reference, we extract the relevant portion of the order of the Tribunal:--*

"(xi) Eclerx Services Ltd. & Mold-Tek Technologies Ltd.:-- For both these companies, the ld. Counsel for the assessee stated that these companies are functionally different, therefore, cannot be considered as comparables. We find that the Mumbai Special Bench of the Tribunal in the case of Maersk Global Centres (India) Pvt. Ltd. in ITA No. 7466/Mum/2012 has rejected eClerx Services Limited because solutions offered by this company included data analytics, operations, management, audits and reconciliation, metrics management and reporting services. The Special Bench opined that if these functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Limited and Mold-Tek Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparable for the purpose of determining ALP of the transactions of the assessee company with its AEs. Facts being identical, respectfully following the observations of the Special Bench (supra), we direct that these two entities be excluded from the list of final comparables."

40. *Since the Tribunal has examined this issue under similar set of facts, we find no reason to take a contrary view. Accordingly following the order of the Tribunal in the case of Stream International Services (P) Ltd. (supra), we hold that this company is not a good comparable and direct the AO/TPO to exclude it from the list of comparables."*

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Respectfully following the aforesaid decision, we uphold the order DRP excluding the aforesaid company from the list of comparable companies.

24. Thus Gr.No.4 & 5 raised by the revenue is without any merit.”

Both the parties agreed that there is parity of facts between the instant case and the case decided by the co-ordinate bench. Accordingly, respectfully following the above said decision, we direct exclusion of M/s. E-Clerx Services Ltd., ICRA online Ltd. and Infosys BPO Ltd. The ALP of the international transactions shall be computed afresh accordingly.

9. The next issue relates to transfer pricing adjustment made in respect of distribution segment.

10. The Ld A.R submitted that the assessee is engaged in the business of distribution of pharmaceutical products without making any value addition. Accordingly, he submitted that the “Resale Price Method” is the most appropriate method to benchmark the international transactions under this segment. In support of this proposition, he relied upon the decision rendered by the co-ordinate bench in the case of M/s Element 14 India Pvt Ltd vs. DCIT (IT(TP)A No.351/Bang/2016 dated 16.09.2020).

11. On the contrary, the Ld D.R placed her reliance on the decision rendered by co-ordinate Bangalore bench of Tribunal in the case of Kohler India Corp (P) Ltd vs. DCIT (2016)(67 Taxmann.com 200) and submitted that it is imperative to make close analysis of items which were bought by the assessee from its AE so as to verify whether such items were comparable with the items sold by the comparable companies. Accordingly, the Ld DR prayed that the matter may be restored to the file of the TPO.

12. We heard the parties on this issue and perused the record. We notice from paragraph 13.1 of the TPO's order that the TPO has observed that the assessee has applied TNMM method for distribution segment also. However, as per paragraph 9 in page 79 of the Transfer Pricing Study of the assessee, it is stated that the assessee has considered Resale Price Method as an appropriate method to evaluate the arm's length nature of the import of pharmaceutical products by the assessee from its group company. Thus, there is misunderstanding on the part of the TPO on this basic aspect, which goes to the root of the issue.

13. Before Ld DRP also, the assessee has raised an specific objection in paragraph 6.1 that the TPO has not given cogent reason for selecting TNMM as most appropriate method as against Resale Price Method adopted by the assessee. However, the Ld DRP also upheld TNM method adopted by the TPO without addressing the contentions of the assessee for adopting Resale Price Method.

14. The net effect is that neither the TPO nor the Ld DRP has examined the T.P study of the assessee made by adopting Resale Price Method. Further, as noticed earlier, the TPO was under erroneous belief that the assessee has adopted TNM method for its distribution segment also, which is patently wrong. It is well settled principle that the TPO has to give cogent reason as to why the method selected by the assessee is not an appropriate method in the facts and circumstances of the case, before discarding it. Since the TPO had misdirected himself, there was no occasion for him to examine the Resale price method adopted by the assessee. In this view of the matter, we are of the opinion that the entire issue relating to Transfer pricing adjustment made in respect of

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Distribution Segment needs to be examined afresh by duly considering the Transfer Pricing study conducted by the assessee. Accordingly, we set aside the order passed by the AO on this issue and restore the same to the file of AO/TPO for examining it afresh.

15. The last issue relates to the computation of deduction u/s 10A of the Act. The assessee was having a unit in Coimbatore, which is eligible for deduction u/s 10A. It was also having other business units located in Mumbai, Bangalore and Hyderabad. The assessee made profit from its Coimbatore unit and made losses from other units. It claimed deduction u/s 10A of the Act without adjusting loss from other units. The AO, however, adjusted business losses of other units against the profits of Coimbatore unit and accordingly allowed deduction u/s 10A of the Act. The Ld CIT(A) also confirmed the same.

16. We heard the parties on this issue and perused the record. This issue has since been settled by Hon'ble Supreme Court in the case of CIT & Ans. Vs. M/s Yokogawa India Ltd (Civil Appeal No. 8498 of 2013 dated 16-12-2016). The relevant observations made by Hon'ble Supreme Court are extracted below:-

“16. From a reading of the relevant provisions of [Section 10A](#) it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that, “The export turnover and the total turnover for the purposes of [sections 10A](#) and [10B](#) shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision.”

17. If the specific provisions of the Act provide [first proviso to [Sections 10A\(1\)](#); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000)

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understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in [Sections 70, 72 and 74](#) of the Act would be premature for application. The deductions under [Section 10A](#) therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression “total income of the assessee” in [Section 10A](#) has already been dealt with earlier and in the overall scenario unfolded by the provisions of [Section 10A](#) the aforesaid discord can be reconciled by understanding the expression “total income of the assessee” in [Section 10A](#) as ‘total income of the undertaking’.

18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though [Section 10A](#), as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly.”

17. Accordingly, we set aside the order passed by the AO on this issue and direct him to compute the deduction u/s 10A without adjusting losses as held by Hon’ble Supreme Court in the above said case.

18. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 27th Jan, 2021.

Sd/-
(N.V. Vasudevan)
Vice President

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 27th Jan, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.