

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 3892/DEL/2017
[Assessment Year: 2010-11]**

M/s Midland Credit Management India Pvt Ltd C/o Regus Business Centre Eros Corporate Towers, Nehru Place, New Delhi	Vs.	The Addl. C.I.T Special Range - 6 New Delhi
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PAN: AAECM 3260 F

**ITA No. 3765/DEL/2017
[Assessment Year: 2010-11]**

The Addl. C.I.T Special Range - 6 New Delhi	Vs.	M/s Midland Credit Management India Pvt Ltd C/o Regus Business Centre Eros Corporate Towers, Nehru Place, New Delhi
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PAN: AAECM 3260 F

[Appellant]

[Respondent]

Date of Hearing : 10.09.2020

Date of Pronouncement : 14.09.2020

Assessee by : Shri Nageshwar Rao, Adv

Revenue by : Shri Surendra Pal, CIT - DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above cross appeals by the assessee and the revenue are preferred against the order of the CIT(A) - 44, New Delhi dated 28.12.2016 pertaining to A.Y 2010- 11. Both these appeals were heard together and are being disposed of by this common order for the sake of convenience and brevity.

2. We will first take up assessee's appeal in ITA No. 3892/DEL/2017.

3. At the very outset, let us understand the business profile of the assessee. The main function performed by the assessee pertains to making outbound collection calls to debtors for recovery of US consumer debts while adhering to the necessary laws and regulations that are relevant to debt collection activities. Further, the assessee also renders services for the bankruptcy vertical of Encore US and undertakes certain tasks pertaining to bankruptcy management services rendered by Encore US.

4. International transactions reported by the assessee are as under:

- | | |
|---|----------------------|
| i) Provision of ITES | Rs. 6,53,19,30,694/- |
| ii) Purchase of fixed asset and other goods | Rs. 38,63,381/- |

5. The assessee has used TNMM with OP/TC as the PLI and has arrived at a set of 7 companies under ITES segment with an average margin of 7.41%. The assessee worked out its own margin at 21.87%. Based on the analysis, international transaction was reported at arm's length.

6. During the transfer pricing assessment proceedings, the Assessing Officer rejected the following comparables used by the assessee:

1. R System International Limited - for the reason that this company is having financial year ending other than March.
2. Aditya Birla Minacs Worldwide Ltd. - This company was found having significant segment RPT at 33.5% and also failed the export sales filter.
3. CG VAK Software and Exports Ltd - This company was rejected on the ground that under the ITES segment, sale was just Rs. 82.78 lakhs and hence segment does not pass turnover filter.

4. The CEFA Imaging Pvt Ltd - This company was rejected for the reason that it was engaged in several e-publishing services.

5. Informed Technologies India Ltd - This company did not pass turnover filter and hence rejected.

7. After rejecting the afore-mentioned comparables of the assessee, the Assessing Officer finally determined the ALP of the international transaction by including other comparable companies as under:

Sl. No.	Company Name	OP/TC
1.	Accentia Technology limited	43.07%
2.	Cosmic Global Ltd	18.28%
3.	e4e Healthcare ltd	31.03%
4.	Fortune Infotech Limited	22.80%
5.	igate Global Solutions Limited	24.54%
6.	Infosys B P O Ltd. ,	31.44%
7.	Jindal Intellicom Limited	13.62%
8.	T C S E-Serve International Ltd.	54.03%
9.	T CSE-Serve Led.	63.42%

10.	Acropetal Technology LTD	44.46%
11.	E Clerx Services	55.84%
12.	ICRA Techno Analytics Limited [Segment]	28.77%
	AVERAGE	35.94%

8. The Assessing Officer computed the arm's length adjustment as under:

Operational Cost	Rs. 53,60,18,772/-
Arm's Length Price at a Margin of. 35.94%	Rs. 72,86,63,919/-
Price Received	Rs. 65,32,24,145/-
Proposed Adjustment u/s 92CA	Rs. 7,54,39,774/-

9. Proceeding further, the claim of deduction under section 10A of the Act was denied by the Assessing Officer on the ground that the assessee's business is not eligible for the claim of deduction under section 10A of the Act. The Assessing Officer further denied the claim of interest income and miscellaneous income on the ground that such income does not constitute business income, as envisaged under section 10A of the Act and simultaneously, adjustments were made in the book profit under section 115JB of the Act.

10. The assessee carried the matter before the CITA.

11. The Id. CIT(A) directed for exclusion of the company Accentia Technology Private Limited and rejected the claim of inclusion of R Systems International Ltd, CG VAK Software Technologies Ltd but accepted the inclusion of Micro Land Ltd. The Id. CIT(A) further allowed the claim of deduction u/s 10A of the Act.

12. Aggrieved by this, both the parties are before us.

13. Before us, the counsel for the assessee argued for the exclusion of TCS E-Serve Ltd and TCS E-Serve International Ltd.

14. The learned counsel for the assessee vehemently stated that both these companies are functionally dissimilar and are part of Tata group and because of that, these companies have huge brand value having been associated with Tata brand. The learned counsel for the assessee further stated that these companies bear high risks and are functionally dissimilar as they are engaged in software testing, verification and validation of software.

15. Per contra, the Id. DR strongly supported the findings of the lower authorities. The Id. DR vehemently stated that the appellant is also part of a global group and its AEs have presence in 15 countries and have huge brand value, which is comparable to these comparables. It is the say of the Id. DR that the parent company of the assessee are handling debt accounts of more than 7 million consumers with large number of employees, around 8300, across the globe in various countries. The risks taken by the parent company are substantial as the assessee takes over the doubtful debt account, which are highly risky and the turnover of the parent company is in excess of 140 billion dollars. Therefore, the TPO has rightly included the comparables.

16. We have given thoughtful consideration to the orders of the authorities below. The undisputed fact is that although TCS E-Serve and TCS E-Serve International Limited are also included in the software testing, verification and validation of software at the time of implementation and data center management activities, it is also true that no segmental information is available. Moreover, both these companies have huge brand value for having been associated with Tata brand. The Hon'ble High Court of Delhi in the case of Avaya India Private Limited has held as under:

"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 9 ITA 532/2019 Page 10 of 21 established reputation in the segment, are well known and employ economies of scale to a telling end. On the other hand, these obvious - and apparent features should not blind the TPO from the obligation to carry out the transfer pricing exercise within the strict mandate of Section 92 C and Rules 10-A to 10-E. 31. Arm's length price determination, in respect of an international transaction has necessarily to confirm to the mandate of Rule 10B.

In this case, the method followed for determining the arm's length price of the international transaction adopted by the assessee and the revenue is the TNMM. The comparability of an international transaction with an uncontrolled transaction has, in such cases, to be seen with reference to the functions performed, taking into account the assets employed or to be employed and the risks assumed by the respective parties to the transaction as per rule 10B(2)(b). The specific characteristics of the property transferred or services provided (contemplated by Rule 10B(2)(a)) in either transactions may be secondary, for judging comparability of an international transaction in the TNMM, because the price charged or paid for property transferred or services provided and the direct and indirect cost of production incurred by the enterprise in respect of property transferred or services provided go into reckoning comparability analysis in the transaction methods, i.e. the comparable uncontrolled price, resale price and cost plus whereas the profit based method such as transactional net margin method takes into account, the net margin realised. In TNMM, comparability of an international transaction with an uncontrolled transaction is to be seen with reference to functions performed as provided in sub-rule (2)(b) of rule 10B read with sub-rule (1)(e) of that rule after taking into account assets employed or to be employed and the risks assumed by the respective parties to the transaction. As noticed earlier, Rule 10B(3) mandates that a given or select uncontrolled transaction selected in terms of Rule 10B(2) "shall be comparable to an international transaction" if none of the differences, if any, between the compared transactions, or 10 ITA 532/2019 Page 11 of 21 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 11 ITA 532/2019 Page 12 of 21 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 12 ITA 532/2019 Page 13 of 21 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 13 ITA 532/2019 Page 14 of 21 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 14 ITA 532/2019 Page 15 of 21 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 15 ITA 532/2019 Page 16 of 21 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 16 ITA 532/2019 Page 17 of 21 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."

17. A similar view was taken by the coordinate bench in the case of American Express [I] Pvt Ltd in ITA No. 1426/DEL/2015 and following the decision of the Hon'ble Jurisdictional High Court these companies were directed to be excluded from the final set of comparables.

18. Same view was taken by the coordinate bench in the case of United Health Group ITA 1038/DEL/2015 relating to A.Y 2010-11. Respectfully following the decision of the Hon'ble Jurisdictional High Court [supra], we direct for exclusion of these two companies from the final set of compatibles.

19. The learned counsel for the assessee also pleaded for inclusion of R Systems and CG Vak Software. We find that R System International was rejected on the ground that it has different accounting year. We are of the considered view that if the audit results are available, then the TPO can extrapolate qua the figure to fit into financial year ending in March. Since R Systems is functionally similar to the assessee, we direct the TPO to adjust the audited quarterly figures by extrapolating them in the FY of the assessee and include this company in the final set of compatibles.

20. In so far as CG VAK is concerned, though this company is functionally similar to that of the assessee but its turnover is less than Rs. 5 crores and does not pass the turnover filter. However, before us the learned counsel for the assessee stated that this company passes

turnover figure as the entity wide turnover of Rs. 594 crores and segments are reported to comply with requirements of AS-17. The learned counsel further pointed out that this company was accepted by the TPO in A.Y 2009-10. We are of the considered view that the TPO should look into the financials of this company once again and decide whether it passes the turnover filter and decide afresh the inclusion or otherwise of this company in the final set of compatibles. Grounds relating to TP adjustments are decided accordingly.

21. Next grievance raised relates to denial of deduction under section 10A of the Act on additional receipts claimed by filing the revised return of income.

22. Facts on record show that after the closure of accounts for the year under consideration, during the course of audit, it was brought to the notice of the assessee that certain invoices raised in subsequent year pertains to F.Y. 2009-10 and since income has accrued in 2009-10, the same should be incorporated in the income of FY 2009-10.

23. Since the Assessing Officer has denied claim of deduction under section 10A of the Act, he did not consider this claim of the assessee.

However, before the Id. CITA the assessee raised this issue of claiming deduction under section 10A of the Act on two additional invoices which were raised during the year under consideration. Claim was denied by the Id. CIT[A] who was of the opinion that the appellant has raised these invoices after closure of books of account and has not revised its books of account and only through computation of income claim has been made and confirmed the findings of the Assessing Officer by holding that any income accruing to separate year on account of error in accounting entries cannot be revised without changing the books of account. The Id. CIT(A) further observed that the assessee has not complied with the provisions of the Act and has not furnished any certificates in support of its claim.

24. Before us the learned counsel for the assessee drew our attention to the certificates which are placed at pages 283 and 284 of the paper book and pointed out that the Id. CIT[A] has grossly erred in not considering these certificates which were part of the record before him. The counsel further stated that the assessee could not have revised the audited books of account and could only claim during the assessment proceedings by way of computation of income and, therefore, the claim is bonafide and deserves to be allowed.

25. Per contra the ld. DR strongly supported the assessment order.

26. We have carefully considered the orders of the authorities below and have also gone through the certificates placed at pages 283 and 284 of the paper book. Though the assessee could not have revised its books of account but has furnished certificates from the Chartered Accountant, as per provisions of the law, the same cannot be brushed aside lightly. We are of the considered view that since the assessee has been allowed deduction under section 10A of the Act by the first appellate authority [against which revenue is in appeal] the assessee is entitled for claim of deduction under section 10A of the Act on additional receipts claimed by filing revised Return of income. We, accordingly, direct the Assessing Officer to allow deduction under section 10A of the Act on additional receipts.

27. Second grievance relating to this issue is that interest income on fixed deposits amounting to Rs. 59,664/- and miscellaneous income of Rs. 30,451/- were denied for deduction under section 10A of the Act on the ground that such income does not constitute 'business income' as envisaged under section 10A of the Act.

28. The Hon'ble High Court of Delhi in the case of Riviera Home Furnishings in 9 ITR OL 401 has allowed the interest earned on Fixed Deposit as eligible for deduction under section 10A of the Act, where the assessee showed that the Fixed Deposit receipts were under lien to the bank for facilitating letter of credit and bank guarantee facilities.

29. The Hon'ble High Court of Karnataka in the case of Hewlett Packard Global Soft Ltd 403 ITR 453 had the occasion to consider a similar claim and held in favour of the assessee the relevant findings of the Hon'ble High Court read as under:

"The incidental activity of parking of Surplus Funds with the Banks or advancing of staff loans by such special category of assesseees covered under Section 10-A or 10-B of the Act is integral part of their export business activity and a business decision taken in view of the commercial expediency and the interest income earned incidentally cannot be de-linked from its profits and gains derived by the Undertaking engaged in the export of Articles as envisaged under Section 10-A or Section 10-B of the Act and cannot be taxed separately under Section 56 of the Act."

30. In light of the aforementioned decision of the Hon'ble High Court, we direct the Assessing Officer to allow claim of deduction under section 10A of the Act on interest income. No details of miscellaneous income has been given and, therefore, we are not in a position to examine the nexus with the business income of the assessee. Therefore, the claim of deduction for Rs. 30,451/- is denied,

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

32. Coming to the revenue's appeal in ITA No. 3765/DEL/2017, the grounds relating to Transfer Pricing relates to exclusion of Accentia Technology Pvt Ltd and Infosys BPO Ltd by the ld. CIT(A)

33. Before us, the ld. DR reiterated what has been observed by the TPO in his order the learned counsel for the assessee relied upon the findings of the ld. CIT(A).

34. We have carefully considered the orders of the authorities below. In so far as Accentia Technology is concerned, we find that there is an extraordinary event of merger with Accentia Info Serve Pvt. Ltd. Pursuant to this event, effect on overall profit from profitability and

turnover cannot be ruled out. This single factor alone is sufficient for exclusion of this company from the final set of comparables and no interference is called for.

35. In so far as Infosys BPO is concerned, we are of the opinion that this company is a giant company in the area of development of software and it assumes all risks leading to higher profit. This company also has substantial intangibles. This company has also been included by the Hon'ble High Court of Delhi in the case of [CIT v. Agnity India Technologies Private Limited](#) (2013) 36 Taxmann.com 289 and further by the Hon'ble Delhi High Court in the case of *Avaya India Private Limited* [Supra]. In the case of *Cadence Design Sstems India Pvt Ltd* 333 of 2019, this company has been excluded from the final set of comparables in ITES segment. Respectfully following the jurisdictional High Court decision we decline to interfere with the findings of the Id. CIT(A).

36. Grounds relating to TP adjustments are, accordingly, dismissed.

37. Next grievance of the revenue relates to allowing the claim of deduction under section 10A of the Act.

38. Claim was denied by the Assessing Officer on the ground that the assessee is running call centre for parent company and there is no export of computer software or ITES. We are of the considered view that the Assessing Officer has blown hot and cold in the same breath. The TPO completed the TP proceedings treating the assessee under the ITES segment. The Assessing Officer himself has assessed the assessee under the ITES segment and when it came to the claim of deduction under section 10A of the Act the Assessing Officer says that the assessee is merely running a call centre.

39. In Notification No. SO 890E dated 26.09.2000, it has been mentioned that ITES include call centres and, therefore, we do not find any reason why the assessee was denied deduction under section 10A of the Act by the Assessing Officer. However the Id CIT(A) has rightly considered the facts of the case in true perspective and allowed the claim and, therefore, we do not any reason to interfere with the findings of the Id. CIT(A). This ground is accordingly dismissed.

40. In the result the appeal of the revenue is dismissed.

41. Before parting, the assessee by way of additional ground has claimed deduction of cess on the ground that the same is not covered under section 40(a)(ii) of the Act.

42. Though this claim was not made before the lower authorities, but being a statutory claim, we admit the additional ground.

43. The Hon'ble High Court of Bombay at Panaji bench in the case of Sesa Goa 423 ITR 426 had the occasion to consider a similar issue and has held as under:

"In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise :Absoluta sententia www.taxguru.in 10 TXA17&18-13 dt.28.02.2020 expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it. 19. Besides, when it comes to interpretation of the IT

Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See *CIT vs Motors & General Stores* 66 ITR 692 (SC)]. 20. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature [See *CIT Vs Radhe Developers* 341 ITR 403]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See *Goodyear Vs State of Haryana* 188 ITR 402(SC)]. 21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted www.taxguru.in 11 TXA17&18-13 dt.28.02.2020 liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See *AGS Tiber Vs CIT* 233 ITR 207]. 22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on

"profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act. 23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the legislature has not done so means that the legislature did not intend to prevent the www.taxguru.in 12 TXA17&18-13 dt.28.02.2020 deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession."

44. Respectfully following the decision of the honourable High Court of Bombay we direct for allowing deduction for cess. Accordingly, additional ground is allowed.

45. In the result the appeal of the assessee is allowed in part on the grounds argued before us whereas the appeal of the revenue stands dismissed.

The order is pronounced in the open court on 14.09.2020.

Sd/-

**[SUDHANSHU SRIVASTAVA,
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 14th September, 2019.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	