

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 5582/DEL/2019
[Assessment Year: 2013-14]**

Bureau Veritas Consumer Products Services
(India) Private Limited
2nd Floor, C-19, Sector -7
Noida, Uttar Pradesh

Vs. The A.C.I.T
Circle 5(1)
New Delhi

PAN: AAACM 6792 J

[Appellant]

[Respondent]

Date of Hearing : 03.08.2020

Date of Pronouncement : 05.08.2020

Assessee by : Shri Ravi Sharma, Adv

Revenue by : Shri M. Baranwal, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the
CIT(A) - 44, New Delhi dated 16.04.2019 pertaining to assessment year
2013-14.

2. The grievances of the assessee read as under:
 1. That the Ld. CIT(A) has erred in facts and in law, in partly confirming the disallowance made by the Ld. TPO on account of Transfer Pricing Adjustment.
 2. On the facts and in law, the Ld. TPO/AO and Ld. CIT (A) violated the provisions of Rule 10B (2) of the Rules by arbitrarily rejecting the companies selected by the appellant in the TP Documentation/fresh search which are functionally comparable to the appellant.
 3. On the facts and in law, the Ld. TPO/AO and the Ld. CIT(A) has erred in not accepting /veBPO Services Private Limited as a valid comparable to the Information Technology Enabled Services segment of the Appellant, even though the company passes all the quantitative filters applied by the Ld. TPO, and is functionally comparable to the Information Technology Enabled Services segment of the Appellant.
 4. On the facts and in law, the Ld. TPO/AO has erred in selecting companies (viz. TCS E- Serve International Ltd., Infosys BPO Limited, Capgemini Business Services (India) Pvt. Ltd., Tech Mahindra Limited and Hartron Communications Limited), which are not comparable to the Information Technology Enabled Services segment of the Appellant, on account of various quantitative/ qualitative filters, acceptable

to the Ld. TPO himself. Further, the Ld. CIT(A) has erred in not adjudicating on the action / approach of the Ld. TPO, w.r.t. selection of the aforesaid companies.

5. That the Ld. CIT(A) has erred in facts and in law, in confirming disallowance made by the Ld. AO amounting to INR 3,50,08,872/- incurred in relation to rebates / discounts paid to the holding company of the Appellant without appreciating the fact that these were in the nature of sale and promotional expenses.
6. That the Ld. CIT(A) has erred in facts and in law, in not appreciating that the rebates/ discount payments have been made to an associated enterprise and no adverse inference has been drawn by the Ld. TPO in this regard.
7. That the Ld. CIT(A) has erred in law in confirming the disallowance made by the Ld. AO on account of rebates/ discounts without appreciating that the Ld. AO cannot question the commercial expediency of the transaction.
8. That the Ld. CIT(A) has erred in facts and in law, in charging interest under section 234B of the Act.
9. That the Ld. CIT(A) has erred in facts and in law, in initiating penalty proceedings against the Appellant under Section 27i(i)(c) of the Act".

3. Though, while challenging the selection of the comparable companies, the assessee has challenged several companies, but, at the very outset, the ld. counsel for the assessee stated that the appellant is challenging the inclusion of TCS e-Serve International Limited and Tech Mahindra Limited only and solely on the ground that both these companies do not pass the filter of 25% of Related Party Transactions [RPT].

4. Briefly stated, the facts of the case are that the appellant-company BVCPS is a wholly owned subsidiary of Bureau Veritas SA., France and was incorporated in India in April 2003. BVCPS provides testing, inspection and audit services to clients for a full range of consumer products/softlines/textiles, toys and juvenile products, hardlines/hard goods and house hold products throughout the supply chain.

5. During the year under consideration, the appellant company has undertaken the following international transactions:

Sl. No	Nature of transactions	Value [Rs.]
1	Import of stores and spares	5,32,550
2	Payment of license fees	85,61,954
3	Payment of technical know-how fee	5,07,39,945
4	Availing of testing services	1,18,96,267
5	Provision of testing services	2,40,26,662
6	Provision of inspection and audit services	5,09,90,406
7	Payment of rebate	2,93,22,603
8	Reimbursement of expenses paid/payable	2,05,72,720
9	Provision of information technology enabled services	7,10,50,617
10	Provision of software development services	1,28,86,089
11	Reimbursement of expenses received/receivable	4,80,31,644

6. The arm's length price of the international transactions representing software development provided to the Associated Enterprises (AE) is determined by applying transactional net margin method (TNMM), which is stated to be the most appropriate method in the facts and circumstances of the case. The operating profit to total cost (OP/TC) ratio is taken as the profit level indicator (PLI) in the TNMM analysis. The PLI of the company is arrived at 10% on cost whereas the average PLI of *the* comparables is arrived at 9.64% and hence, international transaction was taken to be at Arms Length Price [ALP].

7. During the course of transfer pricing assessment proceedings, the TPO questioned the selection matrix and pointed out that some of the filters used are inappropriate, as the economic analysis is inadequate and proposed his own filters, which are as under:

- i) companies whose date is not available for F.Y. 2012-13 are excluded;
- ii) companies whose software development service income is less than Rs. 1 crore are excluded;
- iii) companies whose revenue from services is less than 75% of the total operating revenues are excluded;
- iv) companies who have export sales less than 75% of the sales from software development services are excluded;
- v) companies having more than 25% related party transactions, sales as well as expenditure combines, of the sales are excluded;

vi) companies who have persistent losses for the last three years upto and including F.Y. 2011-12 are excluded;

vii) companies whose employees cost is lower than 25% of the total costs are excluded;

viii) companies having different financial year ending or data of the company does not fall within 12 months period are rejected;

ix) companies that are functionally different from the tax payer are excluded and

x) companies that are having peculiar economic circumstances are excluded.

8. As mentioned elsewhere, the appellant has only questioned the inclusion of TCS e-Serve International Limited and Tech Mahindra Ltd on the ground that both these companies fail [Related Party Transaction] filter adopted by the TPO.

9. The ld. counsel for the assessee drew our attention to the computation of RPT in respect of these two companies and pointed out that in the case of TCS e-Serve Ltd and Tech Mahindra Ltd, the RPT is more than 40%.

10. A perusal of the order of the TPO shows that when this objection was raised before the TPO, the TPO summarily rejected the objection by stating that both these companies pass the filter, as can be seen from clause 2 at page 50 and clause 5 at page 51 of the TPO's order.

11. Though before us, the ld. DR has strongly objected to this line of argument by the ld. counsel for the assessee stating that this issue was never raised before the first appellate authority, this contention of the ld. DR does not hold any water, in as much as a detailed computation of RPT was given before the ld. CIT(A) also, which is evident from page 93 onwards of his order.

12. After giving thoughtful consideration to the orders of the authorities below and after going through the computation of RPT as mentioned elsewhere, we are of the considered opinion that the TPO/Ld. CIT(A) should have examined the calculation provided by the

assessee. Thereafter, should have rejected the contention of the assessee. Therefore, in the interest of justice and fair play, we deem it fit to restore this issue to the file of the Assessing Officer/TPO with a direction to examine the arithmetical accuracy of computation of RPT and, if found correct, both these companies should be excluded from the final set of comparables. Otherwise, the Assessing Officer/TPO shall demonstrate how these two companies passed the RPT filter.

13. The next grievance in respect of TP adjustment relates to not accepting Ace BPO Services Pvt Ltd as a valid comparable to the ITES segment of the appellant.

14. Before us, the ld. counsel for the assessee vehemently stated that the TPO has rejected this company on the ground that it is functionally not comparable to the assessee company. It is the say of the ld. counsel for the assessee that this company is functionally comparable as it is engaged in rendering BPO services which is evident from the Annual Report of this company. The ld. counsel for the assessee further stated that the BPO services are akin to the ITES services rendered by the assessee. The ld. counsel for the assessee

further stated that this company also passes all the filters applied by the TPO and, therefore, prayed for inclusion of this company.

15. The ld. counsel for the assessee drew our attention to the decision of the co-ordinate bench at Hyderabad in the case of M/s. Hyundai Motor India Engineering Pvt. Ltd ITA No. 1807/HYD/2017 and pointed out that on similar circumstances, the Tribunal has directed for inclusion of this company.

16. Per contra, the ld. DR strongly objected for inclusion of this company on the ground that this company is functionally dissimilar as held by the TPO and is engaged in medical health care services.

17. We have given thoughtful consideration to the orders of the authorities below. It is true that the TPO has rejected the inclusion of this company on the ground that this company is functionally dissimilar as is evident from para 3 at page 47 of his order. No reason has been given to demonstrate the dissimilarity in the functions.

18. A perusal of the Annual Report of Ace BPO Services Ltd shows that under Schedule “Types of Principal Products or Services”, it has been mentioned that this company is engaged in BPO services, though in the health care segment. Nevertheless, in our considered opinion, since this company is engaged in BPO services, the TPO should not have rejected this company merely by stating that this company is in the health care segment and is functionally dissimilar.

19. Similar quarrel arose before the coordinate bench at Hyderabad [supra], the relevant findings of which read as under:

“14. Having regard to the rival contentions and the material on record, we find that from the Annual Report of Ace BPO Services Ltd, at Page Nos. 1318 and 1368 of the paper book, this company is into BPO services and the transactions with related parties are also reported. Therefore, we are of the opinion that this company needs to be considered as a comparable. The AO is directed to verify the information filed by the assessee and if it satisfies the RPT filter, then the same should be considered as a comparable.”

20. Respectfully following the findings of the co-ordinate bench [supra], we restore the inclusion or otherwise of this company to the file of the TPO/Assessing Officer to examine the same in light of the directions of the co-ordinate bench. Accordingly, all the grounds related to TP adjustments in so far as these two comparable companies are concerned are treated as allowed for statistical purposes.

21. Next substantive grievance relates to disallowance of Rs. 3,50,08,872/- incurred in relation to rebates/discounts paid to the holding company.

22. The underlying facts in issue are that during the year under consideration, the assessee provided testing services to various to various customers and raised invoices on such companies on which the assessee received service fee which is credited to the Profit and Loss Account of the assessee. The assessee incurred an expenditure of Rs. 3,50,08,872/- towards rebate and discounts on sale of services rendered to various parties. Complete details of discount paid to its AEs vis a vis sales of services to various customers alongwith percentage of discount offered during the year were furnished. The

Assessing Officer asked the assessee to justify the payment in light of fact that there was no nexus between the customer and holding company and, therefore, expenses so made are not allowable. The assessee filed detailed submissions vide letter dated 19.12.2016 which has been extracted by the Assessing Officer from pages 3 to 10 of assessment order.

23. After perusing the submissions of the assessee, the Assessing Officer was of the opinion that the assessee has not been in a position to justify the payment of discount to the holding company in place of repayment of the same to customer on its own. According to the Assessing Officer, in common parlance, a discount is given by the service provider to a customer against agreed charges to promote business and obtain repeated orders. But the assessee, for reasons best known to him, in place of offering discount to customers, has chosen to pass on the discount to the holding company. The Assessing Officer, accordingly, disallowed the entire claim, as, according to him, expenditure is not wholly and exclusively for business purposes and a device to transfer the profit to the holding company.

24. The assessee carried the matter before the Id. CIT(A) but without any success.

25. Before us, the Id. counsel for the assessee vehemently stated that the entire transactions have been done as per the agreement between the assessee and its AEs and also through MOUs between the AEs and customers. The Id. counsel for the assessee drew our attention to Clauses of the agreement/MOUs which are placed in the paper book and pointed out the relevant clauses of the agreement.

26. Per contra, the Id. DR strongly supported the findings of the lower authorities and vehemently stated that there is no tripartite agreement and the client of the assessee are in oblivion and there is no evidence that any such rebate/discount was passed on to the clients of the assessee.

27. We have given thoughtful consideration to the orders of the authorities below. It is true that the assessee has paid rebate/discount to its overseas AEs. It is equally true that such arrangement has been done through Master Service Agreements ('MSA') with various overseas

companies (sample *JC Penny*) for providing testing and inspection services. Under such MSA, BV overseas entities have agreed to provide for a volume rebate and discount at a pre-decided percentage to the overseas customers in relation to worldwide sale of services made to the entire group of overseas customers.

28. We find that the discounts and rebates have to be provided at a global level and not directly by the company rendering the services. We further find that such rebate/ discount payments are recovered by the BV overseas entities from their affiliates which included the appellant, as per allocated percentages based upon their respective sales proportion on the global sales. We further find that for recovery of such rebate/ discounts, BV overseas entities have entered into a Memorandum of Understanding ('MOU') with the appellant company which provides that the appellant is required to render testing and inspection services to various affiliates / suppliers / agents of the overseas vendors in India. These MOUs are placed in the paper book.

29. We find that as per the agreement/MOUs, BV overseas entities entered into MSA with overseas customers for provision of testing and inspection services. Simultaneously, BV overseas entities enter into a

MOU with the appellant, instructing them to provide testing and inspection services to the overseas customer /agents/ affiliates/ supplier. The assessee provides services as required, from time to time and BV overseas entities computes the global sale of services made to the overseas customers and accordingly computed the volume discount payable to them. Such discount percentage is allocated amongst the affiliates of BV overseas entities which also included the assessee company based upon their proportionate sales vis-à-vis global sale and such discounts are recovered from its affiliates which also included the assessee company and finally, rebate is passed upon to third party vendor. Some sample proof of remittances are placed in the paper book.

30. In our humble opinion, these agreements/MOUs were before the lower authorities and nowhere the Assessing Officer has demonstrated that these are sham transactions. Without properly appreciating the agreement, the Assessing Officer has rubbished the same stating that:

"In common parlance, a discount is given by the service provider to a customer against agreed charges to promote business and obtain repeated orders. But the assessee, for reasons best known to him, in place of offering discount to

customer has chosen to pass on the discount to the holding company."

31. In our considered opinion, the Assessing Officer should have examined the transactions in light of agreements/MOUs and related documentary evidences before coming to any conclusion. We further find that all the documents were not furnished before the Assessing Officer as the same has been placed before us in the form of Additional Evidences to demonstrate that the discounts/rebates have ultimately been passed on to the customers.

32. In the interest of justice and fair place, we deem it fit to restore this issue to the file of the Assessing Officer. The assessee is directed to demonstrate that discounts/rebates have ultimately been passed on to customers and the Assessing Officer is directed to verify the same in light of Agreements/MOUs. Needless to mention, the Assessing Officer shall give reasonable and sufficient opportunity of being heard to the assessee. This grievance is also set aside and allowed for statistical purposes.

33. In the result, the appeal of the assessee in ITA No. 5582/DEL/2019 is treated as allowed for statistical purposes.

The order is pronounced in the open court on 05.08.2020.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 05th August, 2020.

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	
Date on which the file goes to the Bench Clerk	
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	