

**IN THE INCOME TAX APPELLATE TRIBUNAL 'C' BENCH, PUNE**  
**BEFORE SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER**  
**AND**  
**DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER**  
**ITA No. 199/PUN/2021 : Assessment Year : 2016-17**

BNY Mellon International  
Operations (I) P. Ltd.  
Tower S-3, Level 1, Cybercity,  
Magarpatta City, Hadapsar  
PUNE – 411 -13  
PAN; AADCM 9640 E

Appellant

Vs.

The Asstt. CIT Cir. 1(1) Pune

Respondent

Appellant by : Shri Nitesh Joshi  
Respondent by : Dr. Santosh Mankoskar

Date of Hearing : 03-04-2023  
Date of Pronouncement : 05-4-2023

**ORDER**

**PER SHRI PARTHA SARATHI CHAUDHURY, JM :**

This appeal preferred by the assessee emanates from the findings of Id.  
D.R.P-3, Mumbai dated 31-12-2010 for Assessment Year 2016-17 on the  
following grounds of appeal.

1. *That the AO erred in passing the impugned Order making an addition by way of transfer pricing adjustment of Rs.68,35,68,248 and consequently, raising a demand of Rs.37,37,80,120.*
2. *That the TPO j D RP erred in rejecting the benchmarking analysis carried on by the Appellant and instead independently determined the arm's length price in respect of provision of BPO services without fulfilling the jurisdictional pre-conditions in section 92C(3) of the Act.*
3. *That the TPO erred in adding and or modifying the filters and the DRP erred in upholding the same thereby rejecting all the comparable companies identified by the Appellant in its transfer pricing study.*
4. *That the TPO/DRP erred in identifying the comparable companies without applying a proper search criteria and determined the final set of such comparables on a completely adhoc basis.*
5. *That the TPO/DRP ought to have excluded Infosys BPM Ltd. MPS Ltd. and Tech Mahindra Business Services Ltd. from the list of comparables as they were functionally different and also placed in a different market position.*

6. *That the TPO /DRP erred in excluding R Systems International Limited as a comparable as, though the financial year followed by the said entity was different from that of the Appellant, information about its financial performance for the period for 01.04.2015 to 31.03.2016 could be derived from the information available in public domain and forming part of the record.*
7. *That the TPO/DRP erred in excluding Allsec Technologies Ltd., Informed Technologies Ltd., Jindal Intellicom Ltd., and Cosmic Global Ltd. as a valid comparable.*
8. *That the TPO /DRP ought to have allowed risk adjustment for determination of the arm's length price for provision of BPO services as the risk profile of the Appellant was different from that of the comparables.*
9. *That the TPO/DRP ought to have held, based on second proviso below section 92C(2) of the Act, that variation between the service fees charged by the Appellant to its associated enterprises and its arm's length price was less than 3% and, hence, no adjustment was required.*
10. *That though the Advance Pricing Agreement between the Appellant and the CBDT was not applicable to the year under consideration, no transfer pricing adjustment could be made in the present case as the variation between the service fees charged by the Appellant to its associated enterprises and arm's length price as determined under the said agreement was within the range of +/- 3%.*
11. *That the liability for education cess on income tax ought to be allowed as tax deductible expenses while computing the taxable income.*
12. *That the A.O erred in initiating penalty proceedings u/s 274 read with section 271(1)(c) of the Act, without considering the fact that adjustment to transfer price is on account of difference of opinion on the computation of arm's length price as determined by TPO vis-à-vis arm's length price determined by the appellant.*
13. *That the appellant craves leave to add, to alter, and/or amend the grounds of appeal as may be advised from time to time."*

2. At the very outset, the Id. Counsel for the assessee submitted that in ground No. 5 raised in the grounds of appeal, the assessee is contending exclusion of certain comparables. In this ground, the assessee is not pressing (1) Tech Mahindra Business Services Ltd. for exclusion. The assessee wants exclusion of only two comparables from the final set of comparables (1) Infosys BPM Ltd. and (2) MPS Ltd. The Id. Counsel submitted that if these two comparables are excluded then they would be within the permissible +/- 5% rate and the other grounds raised in appeal would be academic in nature. The Id. Counsel further submitted that ground No. 11 pertaining to Education Cess,

they are not pressing. Ground No. 12 is premature and ground No. 13 is general.

3. In effect, the Id. Counsel submitted that if Infosys BPM Ltd. and MPS Ltd. are excluded from the final list of comparables, then grounds No. 1, 2, 3, 4, 6, 7, 8, 9 and 10 shall become academic in nature.

4. Having heard his submissions regarding ground No. 5, the assessee is not pressing exclusion of Tech Mahindra Business Services Ltd. and therefore, this part of the ground is dismissed as not pressed. Similarly, the assessee has also not pressed ground No. 11 which primarily is against the assessee and in favour of the revenue on the issue of Education Cess. Having heard the submissions of the Id. Counsel for the assessee, this ground is dismissed as not pressed. The ground No. 12 is premature and ground No. 13 is general.

5. Before emerging on the issue of exclusion of two comparables contended by the assessee, let us dwell into the functional analysis of the assessee before us. The assessee company is a subsidiary of MBC Investments Corporation, USA which is the holding company, which in turn is a subsidiary of Bank of New York Mellon Corporation, USA, which is the ultimate holding company. The assessee company BNY Mellon India is into the business of providing business process outsourcing (BPO) services to Bank of New York Mellon, USA and the Bank of New York Mellon SA/NV Brussels (i.e. to its AEs). The Id. Counsel further elaborating on the functions of the assessee submitted that the assessee is providing back office services for its two AEs viz. New York entity and another Brussels entity. The assessee has shown international transactions in form No. 3CEB and therein the following transaction is only the disputed transactions, viz. "provision of business process

outsourcing services being transaction processing of amount 69,55,125,884/-.

In this regard the assessee has selected five companies as comparables given at para 4.1 of the TPO's order. Similarly, the T.P.O has made the final set of comparables given at para 9 of her order and in that list the assessee is contending exclusion of Infosys BPM and MPS Ltd.

6. The Id. Counsel for the assessee brought to our notice functional analysis in the T.P study report of the assessee-company which is at para 2.1 and specifically it is mentioned as BPO activity and precisely the functions of the assessee BMY Mellon India is to execute the actual work based on the specifications provided by the AEs. It is also mentioned that the assessee raises invoices on its AEs for providing BPO services. The functional analyses of the assessee has been put to rest with the decision of Hon'ble Bombay High Court in the case of Pr. CIT Vs. BNY Mellon International operations (India) Pvt. Ltd. in ITA No. 1226/2015, order dated 23-04-2018 wherein at para 8 of the order it has been categorically held by the Hon'ble High Court that the assessee before us provides BPO services which are not KPO services. Therefore, the finding of the A.O/T.P.O that the assessee is providing BPO as well as KPO services is not correct as held by the Hon'ble High court that the services provided by the assessee is only BPO service.

7. Having settled the functional analyses of the assessee as BPO service provider let us examine the exclusion of comparables as contended by the assessee.

7. **Infosys BPM :**

7.1 We find that in assessee's own case in ITA No. 303/PUN/2015 for A.Y. 2010-11, order dated 27-09-2017, it was held that Infosys is not comparable

with that the assessee because of its huge brand value and higher turnover. Further, there was extra ordinary event wherein Infosys acquired McCamish Systems LLC and hence the margins of said concern could not be applied for benchmarking international transactions of the assessee. It was also observed that different Benches of Tribunal for the same assessment year 2010-11 also have held accordingly. Following the same parity of reasoning, the Tribunal held in assessee's case for A.Y. 2010-11 that because of brand value and high turnover associated with Infosys BPM Ltd. and the extraordinary financial events during the year, Infosys BPM Ltd. was excluded from the final set of comparables.

7.2 It was also brought to our notice by the Id. Counsel for the assessee that for A.Y. 2014-15 the assessee made similar submissions before the T.P.O for exclusion of Infosys BPM on the ground of huge brand value and being market leader which is placed at pages 283 to 312 of Paper book Vol. 1 and after considering the submissions of the assessee for A.Y. 2014-15 the T.P.O has accepted the international transactions of the assessee at ALP. The A.O/T.P.O has not made any upward adjustment including Infosys BPM to the final list of comparables and the very fact on the basis of the submissions of the assessee the ALP was accepted clearly means that the A.O/T.P.O was convinced that Infosys BPM cannot be compared with the functional analysis of the assessee because of huge brand value and being market leader. This order is also annexed at paper book at 334 (Vol. 1) filed before us. Similarly, in the case of the assessee for A.Y. 2017-18 also on the same functional analysis of the assessee the company Infosys BPM was not included in the final set of comparables as evident in the order of the T.P.O at para 5 wherein he has held that considering the facts and circumstances and the documents furnished by the assessee the value of international transactions with regard to ALP is not

being disturbed. Therefore, consistently from A.Y. 2010-11, 2014-15 and 2017-18 Infosys BPM has been excluded from the final set of comparables with that of the assessee-company primarily on the ground of functional non-compatibility since it has been accepted that as compared to the assessee Infosys BPM has huge brand value and is considered as market leader. The Id. Counsel for the assessee also submitted that judgments of other co-ordinate Benches of the Tribunal filed in the paper book before us wherein also Infosys BPM has been excluded from the final set of comparable companies while determining the ALP of international transactions merely on the ground of huge brand value and it being a market leader and therefore, on this functional analysis itself this company was excluded.

7.3 The Id. D.R before us could not refute the facts placed on record nor could produce any order favouring the revenue or any documents/materials to suggest otherwise. The Id. D.R fairly conceded the order of the Hon'ble Jurisdictional High Court (supra) wherein it has been held that the assessee is only providing BPO services and not KPO services. In this context regarding the exclusion of Infosys BPM the Id. D.R relied on the orders of the subordinate authorities.

7.4 We have already examined the legal parameters in this case and now it is settled with the decision of Hon'ble Bombay High Court (supra) the functional analysis of the assessee is into providing BPO services. It is also observed by us that the company Infosys BPM is not only the market leader but has huge brand value which makes it functionally different and non-compatible as compared to the assessee before us. Similarly, as observed by the Tribunal for A.Y. 2010-11 in assessee's own case (supra) that Infosys had witnessed the extra ordinary events whereby it had acquired McCamish systems LLC and

hence margins of said concern cannot be applied for bench marketing of international transaction of the assessee. It is also settled position that if any company is facing extra ordinary events by way of merger amalgamation acquisition in such scenario that company cannot be held to be comparable. This fact has been accepted by the Id. D.R before us. We also observe on the principle of consistency the revenue for .A.Y. 2014-15, 2017-18 i.e. T.P.O himself has accepted and has not disturbed the ALP of international transaction of the assessee and has not included Infosys BPM as comparable with that of the assessee. We are of considered view, therefore, and considering all these parameters Infosys BPM is held functionally different and not comparable on the functional basis with the assessee since Infosys BPM is having a huge brand value and higher turnover. On the other hand, when the assessee is providing BPO services itself and only doing the actual work based on specifications provided by its AEs it is nothing compared to the brand value of the Infosys BPM and neither the assessee is a market leader nor is having high turnover, we direct the A.O/T.P.O to exclude Infosys BPM from the final set of comparables while bench marking international transactions of the assessee company.

## 8. **M.P.S Ltd.**

8.1 We have perused the annual report of this company provided at page 523 onwards of paper book (vol. 1) wherein it is evident that MPS is e-publishing company and is one of the most trusted vendor partners to the global publishing industries. This company provides complete end to end publishing solutions and has successfully powered its service business with smart technology. It is also mentioned that MPS Ltd. made three US based acquisitions that were completed through MPS North America LLC, a wholly owned subsidiary incorporated in My 2013. We further find that Pune Tribunal

in ITA No. 133/PUN/2021, order dated 18-06-2021 pertaining to same A.Y. 2016-17 has excluded MPS Ltd. from final set of comparable companies by holding that the said company is functionally different since MPS LLC is engaged in business or providing, publishing solutions for overseas publishers and supports international publishers through every stage of author to reader publishing process and provides a digital first strategy for publishers across content production, enhancement and transformation, delivery and customer support. Further, it was observed that there were several acquisitions leading to extraordinary events. In the said order, the Tribunal relied on another decision of Pune Bench in the case of Symantec Software India Pvt. Ltd. Vs. DCIT, ITA No. 1824/PUN/2018 for A.Y. 2014-15 dated 17-02-2020 wherein it was held as follows:

*In view of the above, respectfully following the decisions of the Tribunal as mentioned hereinabove, we are of the considered view, high end activities of the MPS Limited is akin to IT services and not ITes. The activities of the MPS Limited i.e. typesetting, data digitization, content development and product development are in the nature of "Knowledge Processing Outsourcing Services (KPOs) and not BPO. Accordingly, MPS Limited cannot be treated as comparable company and the AO/TPO is directed to exclude MPS Limited from final list of comparable companies with regard to its technical support service segment."*

8.2 Considering the above, the Tribunal held as follows:

*Having gone through the annual report of the company, findings of the Sub-ordinate Authorities and the submissions of the assessee placed on record along with judicial pronouncements, it is evident that MPS Limited is functionally different from that of the assessee company in more-so that high end activities of MPS Ltd is akin to IT services and not ITes. Respectfully following the decision of the Co-ordinate Bench of the Tribunal (supra.) we direct the AO/TPO to exclude MPS Limited from final list of comparable companies."*

8.3 The Id. D.R could not refute the facts emerging from the annual report of MPS Ltd. that it is providing publishing solutions to its clients and there have been several acquisitions also. This extraordinary event itself by way of several acquisitions renders, this company as non-comparable with that of the assessee. In view of the factual and legal analysis we direct the A.O/T.P.O to exclude MPS Ltd. from the final set of comparables while bench marking international transactions of the assessee company. We order accordingly.



9. Considering the submissions made by the Id. Counsel, once these two companies i.e. Infosys BPM and MPS Ltd. are excluded ground No. 5 is therefore, partly allowed and the other grounds i.e. Grounds No. 1, 2, 3, 4, 6, 7, 8, 9 and 10 are held to be academic in nature requiring no further adjudication at this stage.

10. In the combined result, appeal of the assessee is partly allowed.

Order pronounced in the open Court on this 5<sup>th</sup> day of April 2023.

Sd/-

sd/-

**(DR. DIPAK P. RIPOTE  
 ACCOUNTANT MEMBER**

**(PARTHA SARATHI CHAUDHURY)  
 JUDICIAL MEMBER**

Pune; Dated, the 5<sup>th</sup> day of April 2023.  
 Ankam

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The D.R.P.-3, Mumbai
4. Pr. CIT concerned.
5. The D.R. ITAT 'C' Bench Pune.
5. Guard File

BY ORDER,

/// TRUE COPY ///

Sr. Private Secretary  
 ITAT, Pune.

		Date	
1	Draft dictated on	03-04-2023	Sr.PS/PS
2	Draft placed before author	05-04-2023	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on	06-04-2023	Sr.PS/PS
7	Date of uploading of order	06-04-2023	Sr.PS/PS
8	File sent to Bench Clerk	06-04-2023	Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		