

TRANSFER PRICING : A Knowledge Process Outsourcing (KPO) company could not be comparable to assessee, a Business Process Outsourcing (BPO) company

TRANSFER PRICING : Extraordinary items such as 'one-time price rebate' granted by assessee to its foreign based parent company pertaining to preceding assessment year could not be taken into account for computation of operating profit for year under consideration

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[2019] 110 taxmann.com 1 (Pune - Trib.)

IN THE ITAT PUNE BENCH 'C'

Deputy Commissioner of Income-tax, Circle-7

v.

TriZetto Services India (P.) Ltd.*

**MS. SUSHMA CHOWLA, JUDICIAL MEMBER
AND D. KARUNAKARA RAO, ACCOUNTANT MEMBER**

IT APPEAL NO. 667 (PUNE) OF 2016

[ASSESSMENT YEAR 2011-12]

JULY 24, 2019

Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables, functional similarity - BPO/Call centre) - Assessment year 2011-12 - Whether a company which constituted a Knowledge Process Outsourcing (KPO) could not be comparable to assessee, a Business Process Outsourcing (BPO) company - Held, yes [Para 16] [In favour of assessee]

Section [92C](#) of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Adjustments - Operating profit/cost, computation of) - Assessment year 2011-12 - Assessee rendered BPO services to its US based parent company and received service charges - It granted rebate of Rs. 5.32 crore to parent company on account of professional services pertaining to preceding assessment year - TPO was of view that such item being prior period one, was to be considered while computation of operating profits of year under consideration - Whether in view of legal proposition that 'extraordinary items' such as prior period rebate expense should not be considered for computation of operating profits for year under consideration, Assessing Officer was to be directed to re-compute operating profit margin of assessee without considering said 'one-time price rebate' - Held, yes [Para 28] [In favour of assessee]

FACTS

- The assessee was engaged in providing Business Process Outsourcing (BPO) and other services to its US based parent company and received service charges. There was certain acquisition and revision of pricing policy which resulted in grant of rebate to the parent company on account of professional services. The sum of Rs.4.37 crore was the rebate pertaining to the year under consideration and Rs.5.32 crore pertained to immediately preceding assessment year.

- The TPO allowed the claim relating to the instant year's rebate. However, the claim of rebate pertaining to the earlier year was not allowed while calculating the operating margin of the assessee. The TPO was of view that such item being the prior period one, should be considered while computation of operating profits for the year under consideration. By this adjustment, the TPO recomputed the Profit Level Indicator (PLI) of the assessee at -12.67 per cent. Further, the TPO also included a company, namely, Eclerx Services as a good comparable in the final set of comparables.
- The DRP granted relief on the issue of the change to the PLI of the assessee *qua* the rebate claim of prior period. It directed the Assessing Officer/TPO to re-compute the operating profit margin of the assessee without considering the one-time price rebate. Further, on the second issue *i.e.* inclusion of Eclerx, the DRP granted relief on this decision of TPO too, stating that Eclerx was a Knowledge Process Outsourcing (KPO) company and functionally incomparable with that of the assessee, a BPO company.
- On the revenue's appeal before the Tribunal:

HELD

Comparable Company Eclerx Services

- It is a settled issue that the 'Eclerx' constitutes a KPO company and the same is not comparable to that of a BPO company like the present assessee. Considering the settled nature of the issue at the level of the High Court, the order of the DRP and the Assessing Officer is fair and reasonable. [Para 16]

Computation of operating profit without considering the one-time price rebate

- The Tribunal in the case of *Dy. CIT v. Aam Services India (P.) Ltd.* [IT Appeal No. 553/(Pune)/2015, dated 23-3-2018] held that similar issue arose before the Tribunal in *Asstt. CIT v. Dana India Technical Centre (P.) Ltd.* . [\[2016\] 69 taxmann.com 15 \(Pune-Trib\)](#) wherein it was held that while computing PLI for the year under consideration, the loss arising on account of foreign exchange fluctuation to the tune of Rs. 35 lakh related to earlier year is to be excluded. In view thereof, the Assessing Officer was directed to re-compute the PLI in the hands of assessee and foreign exchange fluctuation losses of the earlier years are to be kept out of calculation of PLI for the year under consideration. [Para 25]
- Thus, it is the finding of the Tribunal Pune Bench that such prior period expenses/items/foreign exchanges losses are not to be reduced from the current year's profits for determining PLI of the year under consideration. [Para 26]
- Thus, the DRP granted relief to the assessee on this issue of prior period rebate claim *qua* the computation of the PLI of the assessee for the instant year. It is a settled legal proposition that the 'extraordinary items' such as the prior period rebate expenses should not be considered for the computation of the operating profits for the instant year. [Para 27]
- Therefore, the Assessing Officer/TPO is to be directed to re-compute the operating profit margin of the assessee without considering the said 'one-time price rebate' of Rs. 5.32 crore and thus, the views of the DRP are to be affirmed. Thus, on the strength of the precedents on the subject, the order of the DRP in giving the above direction to the Assessing Officer, is fair and reasonable. [Para 28]

CASE REVIEW

Dy. CIT v. Aam Services India (P.) Ltd. [IT Appeal No. 553/(Pune) of 2015, dated 23-3-2018] (para 25) followed.

CASES REFERRED TO

Pr. CIT v. PTC Software (India) Pvt. Ltd. [[2019\] 101 taxmann.com 117 \(Bom.\)](#) (para 13),

MACOM Technology Solutions (India)(P.) Ltd. v. Dy. CIT [[2019\] 107 taxmann.com 58 \(Pune-Trib\)](#) (para 14), *ITO v. EDAG Engineers & Design India Pvt. Ltd.* [[2014\] 52 taxmann.com 398 \(Delhi\)](#) (para 20), *Dy CIT v. Aam Services India (P.) Ltd.* [IT Appeal No. 553 (Pune) of 2015, dated 23-3-2018] (para 23), *Asstt. CIT v. Dana India Technical Centre (P.) Ltd.* [[2016\] 69 taxmann.com 15 \(Pune-Trib\)](#) (para 23).

Ms. Amrita Mishra, for the Appellant. **Rajendra Agiwal,** for the Respondent.

ORDER

D. Karunakara Rao, Accountant Member – This appeal is filed by the Revenue against the order of DRP-3, Mumbai, dated 14.12.2015, for the assessment year 2011-12.

2. The revised grounds raised by the Revenue are as under :—

"1. Whether the DRP was justified in rejecting Eclerx Services Ltd. treating it as KPO without appreciating that KPO and BPO companies both fell under broader ITeS category and in reality there is seamlessness in ITeS functions and comparability analysis is based on functions, assets and risk?

2. Whether the DRP was right in law and on facts in directing TPO to re-compute the operating profit margin of the assessee without considering the one-time price rebate of Rs. 5,32,10,455/-."

3. Briefly stated the relevant facts include that the assessee is engaged in providing BPO services i.e. remote processing applications including medical and health care centres, customer interaction services, business processing of medical claims for hospitals and medical centres, technical support and desk support, claim processing, remote data entry, etc. The assessee extends BPO and other services to parent company Tela Sourcing Inc, Baltimore, Maryland USA. The assessee filed the return of income declaring at Nil income.

The transfer pricing issue is involved in this case and therefore, the matter was referred to the TPO. The TPO passed an order u/s 92CA(3) of the Act on 28.01.2015 suggesting the TP adjustments amounting to Rs.6,02,78,090/- on the international transactions with parent company amounting to Rs.25,98,46,050/-.

4. During the TP proceedings before the TPO, there are a couple of issues which were subject matter of TP analysis.

A. First one relates to the amendment to the assessee PLI (OP/OC) qua the claim of rebate, being a prior period expenditure, of Rs. 5,32,10,455/-. While the assessee did not reduce the same from 'operating income', the TPO treated the rebate, otherwise. However, the DRP granted relief to the assessee on this issue relying on certain discussion of the Pune Bench of the Tribunal. The contents of paras 3 to 3.10 of DRP's order are relevant. The contents of said para 3.10 being the operative para is extracted as follows :-

"3.10 In view of the aforesaid discussion, we hold that the one-time price rebate of Rs.5,32,10,455/-

which relates to the service revenue of the earlier A.Y. 2010-11 cannot be considered as operating expense for the purpose of computing the operating profit margin of the assessee in the present A.Y. 2011-12. Hence, the consequent adjustment made by the TPO cannot be sustained. We allow the ground in favour of the assessee and direct the AO/TPO to recompute the operating profit margin of the assessee without considering the one-time price rebate of Rs.5,32,10,455/-."

Thus, at the end of the TPO proceedings, the PLI (OP/OC) of the assessee is worked out (paras 3.6 and 3.7 of the DRP's order) as under :—

"3.6 Consequently, the TPO re-computed the PLI of the assessee at (-) 12.67% as against 21.15% computed in the assessee's TP Study Report, as per the following details:

	<i>Assessee's computation in the TP Study Report</i>	<i>TPO's computation in the order u/s.92CA(3)</i>
<i>Operating revenue</i>	19,05,78,106/-	19,05,78,106/-
<i>Less: One-time price rebate</i>	-	5,32,10,455/-
<i>Net Operating Revenue</i>	19,05,78,106/-	13,73,67,651/-
<i>Less: Operating cost (OC)</i>	15,73,11,160/-	15,73,11,160/-
<i>Operating profit (OP)</i>	3,32,66,946/-	(-)1,99,43,509/-
<i>OP/OC (PLI)</i>	21.15%	(-)12.67%

3.7 In view of the re-computation of the assessee's PLI as shown above and the determination of the average PLI of the comparable companies at 25.64% (as against 15.66% computed by the assessee in the TP Study Report), the TPO determined the adjustment on account of adopting the ALP for the international transaction of provision of ITeS at Rs.6,02,78,090/-."

B. Second issue relates to the changes to the final list of comparables, in general and the correctness of the inclusion of Eclerx Services Ltd. in the final list of comparables.

5. The TPO included the E-clerx Services Ltd. (Eclerx) as a good comparable in the list of final set of comparables. Assessee argued that the same is a KPO company and hence, it is not a good comparable. However, the TPO rejected the assessee's explanation and finally included the same.

6. Aggrieved with the same, assessee approached the DRP. However, the DRP considered the explanation of the assessee and directed for exclusion of the same as per the discussion given in paras 6.27 to 6.30 of his order. As per the DRP, Eclerx, being a KPO company, is not comparable to the ITES or BPO company like the present assessee. The relevant paragraphs from the said order of the DRP are extracted hereunder :—

"E-clerx Services Ltd:

6.27 We have considered the submissions of the assessee and the order of the TPO. The assessee contended that this company is functionally different from its ITES activities as it is engaged in high end KPO services. In this regard, it would be useful to refer to the relevant part of the annual report explaining the functions being performed by the company:

"Our Key Differentiators

As a leading offshore provider of end-to-end services to the Sales & Marketing universe, eClerx has deep domain knowledge and process expertise that enable it to serve and adapt to the fast growing and evolving digital marketplace. We deploy skilled resources together with process redesign and automation to provide best-in-class service delivery to industry leading firms. Our sales and marketing clients view us as trusted and expert partners, and come to us for our business solutions and our ability to provide cost effective scaling to their operations..."

"...We are pleased to inform that eClerx has become one of India's first KPO to be appraised for and

rated at maturity level 3 of the People Capability Maturity Model... "

6.28 The product description in the notes to accounts shows that the assessee is engaged as a KPO Service provider. On perusal of the above, there is no doubt that the company is a KPO engaged in providing specialised services in data analytics and process outsourcing. The activity of this company is functionally different from that of the assessee's ITES segment, which is a low end activity.

6.29 Therefore, this company is not functionally comparable with the assessee both in terms of Safe Harbour Rules as well as the decisions of the Hon'ble Special Bench of Mumbai Tribunal in case of Maersk Global Centres (India) Pvt. Ltd. [ITA No. 7466/MUM/2012 (SB)].

6.30 Hence, the objection of the assessee is accepted and the AO /TPO is directed to exclude E-clerx Services Ltd. from the set of comparables."

7. Thus, on the first issue, being the change to the PLI of the assessee qua the rebate claim of prior period, the DRP granted relief. Further, on the second issue i.e. inclusion of Eclerx, DRP granted relief on this decision of TPO too. DRP held that 'E-clerx' is a KPO company and incomparable functionally with that of the assessee, a BPO company.

8. Aggrieved with the said direction of the DRP, the Revenue is in appeal before the Tribunal with the above extracted two grounds.

9. The Revenue filed the appeal before us with the delay of 14 days. We shall take up this preliminary issue first.

Preliminary Issue-Condonation of Delay

10. Before us, at the outset, ld. DR for the Revenue submitted that the appeal could not be filed in time and the said appeal is now filed with the delay of 14 days. In this regard, ld. DR filed an affidavit stating the reasons for non-filing the appeal in time. For the sake of completeness, the relevant paras of the said affidavit are extracted hereunder :-

".....There was a heavy burden of time barring assessment in this circle, and the undersigned has completed 128 time barring assessments in the Month of March, 2016. There was other time barring matters such as penalty orders, reopening of cases, judicial matters and audit related matters. The scrutiny report in the case was called for from the Transfer Pricing Officer on 01/01/2016. Moreover, the report of the TPO recommending filing of further appeal was received by e-mail on 07/04/2016. No hard copy has been received till date.

The delay has been caused inadvertently and due to the above reasons. It is most humbly and with sincere apologies requested that the delay in filing appeal may kindly be condoned."

11. Considering the above reasons given by the Revenue in the affidavit, we find it is a fit case for condoning the delay of 14 days. After condoning the delay, we proceed to adjudicate the appeal of the assessee in the following paragraphs.

12. We shall now take up the issue-wise adjudication in the following paragraphs.

1. Inclusion/Exclusion of E-clerx Services Ltd. - Ground No.1

13. Before us, at the outset, ld. Counsel for the assessee suited that this is a covered issue and the said comparable is functional different as it is engaged in KPO services; while the assessee is a ITeS/BPO company. This is good enough reason for exclusion of the said comparable from the scope of the TP study. Further, ld. Counsel submitted that the said comparable is engaged in providing data analytic,

data management and process improvement solutions to the customers. In this regard, Id. Counsel for the assessee brought our attention to the contents of page 80 of the Annual Report of the said company. Further, referring to the Bombay High Court's judgment in the case of *Pr. CIT v. PTC Software (India) (P.) Ltd.* [\[2019\] 101 taxmann.com 117](#), Id. Counsel submitted that the KPO companies are not good comparable, when it comes to benchmarking of the international transactions of BPO companies like the present assessee. In the case of *PTC Software (India) Pvt. Ltd. (supra)*, the comparable i.e., Eclerx Services Ltd. being a KPO company if held by the Hon'ble Jurisdictional High Court as not a good comparable. The contents of para 6 of the said judgment of the Jurisdictional High Court (*supra*) is relevant and the same are extracted hereunder :—

"6. Re. Question (d):—

- (i) The impugned order of the Tribunal held that E-clerx Services Ltd., is not a comparable to the Respondent-Assessee for the reasons that it was providing Knowledge Process Outsourcing (KPO) - whereas Respondent is engaged in BPO Services.
- (ii) The impugned order of the Tribunal place reliance upon the 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 \(Mum.-Trib.\)](#), to hold that E-clerx Services Ltd., was engaged in providing KPO Services which is distinct from the BPO Services. Thus, excluded the same from the list of comparables.
- (iii) The impugned order of the Tribunal, in fact, relies upon the following extract in the Special Bench's decision of the Tribunal in *Maersk Global Centres (India) (P.) Ltd.* 's case (*supra*) as under:-
"Keeping in view the nature of services rendered by M/s. Eclerx Services Pvt. Ltd., and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee-company which is mainly engaged in providing low-end services to the group concerns."
- (iii) Although both are providing ITES series, by virtue of that alone, both units will not become comparable as observed by this Court in *Aptara Technology (P.) Ltd.s case (supra)* rendered on 26th March, 2018, - as follows:- 'merely because the tested party and the comparable provide ITES, they do not become comparable. The content of the services rendered by virtue of IT is to be examined before holding it to be comparable.'
- (iv) Further, our attention is invited to the decision of the Delhi High Court in *Rampgreen Solutions (P.) Ltd. v. CIT* [\[2015\] 60 taxmann.com 355/234 Taxman 573/377 ITR 533](#) wherein Delhi High Court held that KPO services could not be compared to call centre services, although both would fall under the umbrella of ITES. Therefore, the functions of two cannot be considered to be similar for the purpose of being comparable.
- (v) In the above view, this question also does not give rise to any substantial question of law. It is essentially a finding of fact which is not shown to be perverse. Thus, not entertained."

14. Further, Id. Counsel for the assessee brought our attention to the decision of the Co-ordinate Bench of the Tribunal in the case of *MACOM Technology Solutions (India)(P.) Ltd. v. Dy. CIT* [\[2019\] 107 taxmann.com 58 \(Pune-Trib\)](#) and submitted that the Tribunal in the said decision excluded "Eclerx

Services Ltd." from the final set of comparables. The contents of paras 8 to 17 are relevant in this regard. For the sake of completeness of this order, the said paras 8 to 17 are extracted hereunder :—

"8. Ground No.4 relates to the inappropriate selection of comparables which are functionally different from that of the assessee. In this regard, ld. Counsel for the assessee brought our attention to the functions of the assessee and submitted that the assessee is engaged in the "business of designing and development of chip, integrated circuits and storage components and allied services" for its holding company AMCC, USA. In this regard, ld. Counsel submitted that the comparables (i) E-Clerx Services Ltd. and (ii) Genesys International Corporation Ltd. are required to be excluded as they are completely of "dissimilar functions". Further, ld. Counsel submitted that the TPO/DRP/Assessing Officer was of the views that both these comparables as well as the assessee are engaged in the KPO services and, therefore, they are of similar functions. In this regard, ld. Counsel brought our attention to the order of the TPO. Referring to para 5.8 of sub-para (viii) of the order of the TPO relating to E-Clerx Services Ltd., ld. Counsel read out the reasoning given by the TPO for inclusion of the said comparable as a good comparable. For the sake of completeness, the relevant lines of the TPO's order are extracted hereunder :—

"(viii) E-Clerx Services Ltd:

The assessee took the objection to include this company on the ground that it is engaged in the Data Analytics.

I have perused the objection of the assessee. Rule 10TA (g) of the Income Tax Rules, gives the definition KPO. In this definition, Data Analytics and Design Engineering service has been considered as KPO only. Hence, the objection of the assessee is not accepted."

9. Further, referring to para 5.8 of sub-para (vi) of the TPO's order relating to Genesys International Corporation Ltd., ld. Counsel read out the reasoning given by the TPO for inclusion of the said comparable as a good comparable. For the sake of completeness, the relevant lines of the TPO's order are extracted hereunder :-

"(vi) Genesys International Corporation Ltd.:

The assessee stated that this comparable was rejected by itself, as it is functionally different. It also argued that there is abnormal trend in the unadjusted profitability of this company.

The objection of the assessee has been perused. The company is not persistent loss making. Hence it satisfies all the accepted filters. Further, rule 10TA(g) of the Income Tax Rules, gives the definition KPO. In this definition, Geographical Information System and Design Engineering service has been considered as KPO only. Hence, the objection of the assessee is not accepted."

10. From the above, it is evident that the data analysis function of (i) E-clerx Services Ltd. are loss making company and (ii) Genesys International Corporation Ltd. are not comparable that of the assessee. It is also a fact that the TPO never granted any adjustments to the functional differences.

11. Further, bringing our attention to the order of the DRP, ld. Counsel submitted that the reasoning given by the TPO was approved without application of mind to the actual functions of the comparables qua the assessee. Further, referring to the persistence of this issue, ld. Counsel brought our attention to the various decisions to demonstrate that the data analysis as function is no way comparable to the function of engineering designs reported by the assessee. The ld. Counsel for the assessee brought our attention to the decision of the Hon'ble Delhi High Court in the case of *Actis Global Services Pvt. Ltd. v. PCIT* vide ITA 417/2016, dated 05.08.2016, (page 648 of the Paper Book) and submitted that *E-Clerx Services Limited* being a KPO services company, was considered

as a good comparable in that case with KPO functions. In this case, the Hon'ble High Court held that mere grouping into KPO companies cannot be considered as good comparables. The characteristic features of the services actually rendered are important and mere the companies falling in the 'KPO group' cannot give rise to a good comparable. Relying on the decision of Hon'ble Delhi High Court in the case of *Rampgreen Solutions Pvt. Ltd. v. CIT* [2015] 377 ITR 533 (Del), the Hon'ble Delhi High Court held that *E-clerx Services Ltd.* is not a good comparable. For the sake of completeness, the relevant paras 4 to 6 are extracted as follows :—

"4. As far as the exclusion of ESL is concerned, the ITAT appears to have relied upon para 31 of the decision of this Court in *Rampgreen Solutions Pvt. Ltd. v. Commissioner of Income Tax* [2015] 377 ITR 533 (Del). The ITAT has extracted para 31 of the said decision where inter alia the Court pointed out that:

"...31 We find it difficult to accept this view as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITES encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel, ITA 102/2015 Page 31 of 42 involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITES would also include voice based call centers that render routine customer support for their clients. Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous...."

5. It is urged by Mr Sanjay Kumar, learned counsel for the Revenue, that the ITAT ought not to have excluded ESL as a comparable because both ESL and the assessee were KPOs and both were catering to high-end clients.

6. The above submission overlooks what ITAT itself has noted in its impugned order, that the function profile of the two companies were different. While the Assessee is catering to the capital and financial services markets, ESL works in the area of sales, marketing and supporting financial services. The financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to."

12. Explaining the above said principle laid down by the Hon'ble Delhi High Court, Id. Counsel brought our attention to the various other decisions to demonstrate that mere grouping of KPO companies will not sufficient for identifying a good comparable by the TPO.

13. Further, referring to the Genesys International Corporation Limited, Id. Counsel for the assessee brought our attention to various decisions such as :

- (i) *Vistcon Engineering Centre (India) Pvt. Ltd. v. ACIT* (ITA No.358/PN/2013 (AY 2008-09) (Pune ITAT) (21 October, 2015).
- (ii) *Vistcon Engineering Centre (India) Pvt. Ltd. v. ACIT* (ITA No.331/PN/2014 (AY 2009-10) (Pune ITAT) (11 April, 2016).
- (iii) *John Deere India Pvt. Ltd. v. DCIT* (ITA No.827/PN/2014) (AY 2009-10) (Pune ITAT) (27 October, 2016).

(iv) *Hyundai Motors India Engineering Pvt. Ltd. v. DCIT (ITA No.255/Hyd/14) (AY 2009-10) (Hyderabad ITAT) (31 July, 2014).*"

14. The Id. Counsel submitted that mere grouping into KPO companies does not create a good comparable unless the functions of the comparables under characteristic of the services rendered are similar. For the sake of completeness, the relevant extracts from the decision of Pune Bench of the Tribunal in the case of *Vistcon Engineering Centre (India) Pvt. Ltd. (supra)* are extracted hereunder :—

"27. So far as Genesys International Corporation Ltd. is concerned the Id. Counsel for the assessee submitted that the above company is functionally different. The company is engaged in providing Geographical information services comprising Photogrammetry, Remote Sensing, Cartography, Data conversion and related computer based services according to the information provided in the annual report. Further, it owns intangible assets of computer and GIS database and has acquired new business. Referring to the copy of the assessment order for A.Ys. 2010-11 and 2011-12 he submitted that the TPO, based on the submissions made by the assessee, has dropped Genesys International Corporation Ltd. from the final set of comparables. Referring to the decision of the Hyderabad Bench of the tribunal in the case of *Hyundai Motors India Engg. Pvt. Ltd. v. ITO vide ITA No.1850/Hyd/2012* order, dated 21-02-2014, he submitted in that case Genesys International Corporation Ltd. was excluded from the list of comparables on the ground that this company is a Geospatial services content provider specialising in land based technologies. Further, the business of this company requires skilled manpower and scientists and Civil Engineers etc. It also carried out R&D services and own intangibles. Following the decision of the Bangalore Bench of the Tribunal in the case of *Sumphony Marketing Sales India Pvt. Ltd.* reported in 38 taxmann.com 5 (Bangalore) order, dated 14-08-2012, the Tribunal has held that this company cannot be regarded as comparable and deserves to be excluded from the list of comparables.

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31. We have considered the rival arguments made by both the sides, perused the orders of the TPO/AO/DRP and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. As regards the selection of Genesys International Corporation Ltd. as comparable company is concerned we find the said company has not been considered as comparable by the TPO himself in A.Ys. 2010-11 and 2011-12. During A.Y. 2010-11 a specific show-cause notice was given to the assessee and the same was excluded after considering the detailed reply filed thereto. In A.Y. 2011-12, the said company was not included as comparable company even in the show cause notice.

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33. Since the assessee-company is engaged in providing Engineering Design Services and since the Hyderabad Bench of the Tribunal in the case of *Hyundai Motors India Engg. Pvt. Ltd. (supra)* has excluded *Genesys International Corporation Ltd.* from the list of comparables on the ground that the company is functionally different, therefore, following the decision cited (supra) and further considering the fact that Genesys International Corporation Ltd. was not included as comparable company in A.Yrs. 2010-11 and 2011-12 by the AO himself in assessee's own case, we direct the TPO to exclude Genesys International Corporation Ltd. from the list of comparables."

15. On the other hand, Id. DR for the Revenue relied heavily on the orders of the DRP/TPO/Assessing Officer.

16. We heard both the sides on this issue and perused the orders of the revenue authorities and the Paper Book filed before us. We also considered the judgmental laws placed before us. On hearing

both the sides, we find the core issue for adjudication is that if company becomes a good comparable merely because the same is engaged in KPO activity like the assessee. We find, now it is decided at the level of the Hon'ble Delhi High Court that the similarity of functions/characteristic of services rendered by the assessee/comparables for identifying the good comparables assessee's importance. It is an undisputed fact, in the present case, that the DRP/TPO/Assessing Officer are categorically explained that with the similarity in grouping of KPO companies, the assessee's company is good enough for identifying a good comparable. This view is not approved by the various decisions cited by the Id. Counsel for the assessee before the Tribunal. We have already extracted the relevant portion from the judgments of the Hon'ble High Court as well as the orders of the Pune Bench of the Tribunal that for identifying a good comparable, one has to go into the characteristic of the functions rendered by the comparables. The assessee is undisputedly engaged in the business of designing and development of chip, integrated circuits and storage components and allied services for its holding company AMCC, USA, whereas (i) E-clerx Services Limited is engaged in "data analytic" and (ii) Genesys International Corporation Limited is engaged in "geographical information system services". These functions are entirely different from that of the business of designing and development of chip, integrated circuits and storage components etc.

17. Therefore, we find these two comparables i.e. (i) E-clerx Services Limited and (ii) Genesys International Corporation Limited are required to be excluded for the purpose of benchmarking of the international transactions. Accordingly, ground No.4 raised by the assessee stands allowed."

15. The Id. DR, on the other hand, relied heavily on the order of the TPO.

16. Thus, it is a settled issue that the 'E-clerx' constitutes a KPO company and the same is not comparable to that of a BPO company like the present assessee. Considering the settled nature of the issue at the level of the Jurisdictional High Court on this issue, we find the order of the DRP and the Assessing Officer is fair and reasonable and it does not call for any interference. Accordingly, ground No.1 raised by the Revenue is dismissed.

2. - Computation of operating profit margin without considering the one-time price rebate - Ground No.2

17. Ground No.2 relates to the computation of operating profit margin of the assessee without considering the "one-time price rebate" of Rs.5,32,10,455/-.

18. Briefly stated the relevant facts on this issue include that the rendered services to the parent company and receives service charges. These are certain acquisition and revision of pricing policy with effect from 01.04.2009. The same resulted in grant of rebate to the parent company on account of professional services. The sum of Rs.4,37,19,339/- is the rebate pertaining to the current year i.e. A.Y. 2011-12 and Rs.5,32,10,455/- pertains to the preceding assessment year i.e. A.Y. 2010-11. The TPO allowed the claim relating to the said current year's rebate. However, the claim of rebate pertained to the earlier year was not allowed while calculating the operating margin of the assessee. The details are discussed in para 7 and its sub-para of the order of the TPO. The TPO rejected the explanation given by the assessee on the ground that the assessee failed to furnish any comparable instance of allowability of such payment of rebate for the purpose of calculating the PLI of the assessee. Accordingly, the TPO considered the operating income after reducing the said rebate from the operating income of the assessee and the same is against the interest of the assessee. By this adjustment, the PLI (OP/OC) of the assessee is in negative (-) at 12.67%. Para 3.6 of order of DRP and the table given in that para provides for the case of the assessee and the TPO. The same is already extracted in the preceding paragraphs (para 4A) of this order.

19. During the proceedings before the DRP, the assessee explained the need for allowing the said 'prior period rebate' and not adjusting the same against the operating profits of the present year. The arguments

of the assessee are extracted in para 3.8 of the DRP's order. It is the case of the assessee that the said amount constitutes an "extraordinary item" which should not be considered while quantifying the operating profits of the assessee.

20. *Per contra*, it is the case of the TPO that such item being the prior period one, should be considered while computation of operating profits of the current year and placed reliance on the decision of the Delhi Bench of the Tribunal in the case of *ITO v. EDAG Engineers & Design India Pvt. Ltd.* [\[2014\] 52 taxmann.com 398](#). Eventually, the DRP discussed this issue in its operational paras 3.9 and 3.10 and ultimately the DRP allowed the ground in favour of the assessee.

21. Resultantly, DRP directed the Assessing Officer/TPO to re-compute the operating profit margin of the assessee without considering the one-time price rebate of Rs.5,32,10,455/-. Relevant para 3.10 of the order of the DRP is already extracted in the preceding paragraphs of this order. Eventually, the Assessing Officer passed the final order allowing the claim of the assessee on this rebate issue. Resultantly, the operating income before adjusting the said rebate as claimed by the assessee, is considered for PLI calculations of the assessee.

22. Aggrieved with the above views of the DRP, the Revenue is in appeal before the Tribunal with the above extracted ground No.2.

23. Before us, at the outset, Id. Counsel for the assessee submitted that the issue raised in the present ground No.2 relates to whether the prior period expense (rebate) is to be reduced from the operating profits of the year under consideration for computing the PLI for the current year. It has the effect of reducing the operating profits of the assessee for the year under consideration. On explaining the same, the Id. Counsel submitted that the similar issue was considered by the Co-ordinate Bench of the Tribunal in the case of *Dy CIT v. Aam Services India (P.) Ltd.* vide ITA No.553/PUN/2015 for the assessment year 2010-11, dated 23.03.2018 (copy of this order is placed at page 535 of the Paper Book) and the issue was decided in favour of the assessee as per the discussion given in paras 7 to 11 of the order of the Tribunal in the said case. While dismissing the appeal of the Revenue, the Tribunal relied heavily on another decision of the Pune Bench of the Tribunal in the case of *Asstt. CIT v. Dana India Technical Centre (P.) Ltd.* [\[2016\] 69 taxmann.com 15](#).

24. On the other hand, Id. DR for the Revenue relied heavily on the order of the TPO.

25. We heard both the sides on this issue and find similar issue of prior period expenditure items were adjudicated by the Tribunal. To support of the same, we extract the relevant operational paras 7 to 11 of the said order of the Tribunal in the case of *Aam Services India Pvt. Ltd.* (*supra*) and the same are extracted hereunder :—

"7. We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal is against determination of PLI for the year under consideration. The assessee during the year under consideration had debited certain prior period expenses and the issue is whether the same are to be excluded while determining the PLI for the year under appeal. The perusal of details filed by the assessee and computation of income at page 31 of Paper Book reflects that the assessee had not claimed prior period expenses as expenses for the year under consideration and entire prior period expenses were added while determining the gross total income of the year under consideration. The said computation of income is placed at page 31 of Paper Book.

8. The limited issue is that where the expenditure has not been claimed as deduction, then how the same could be considered while determining PLI for the year under consideration. We find no merit in the issue raised by the Revenue in this regard. The DRP has directed vide para 2.4.1 to exclude earlier year expenses for determining PLI of the year under appeal.

9. We find similar issue arose before the Tribunal in *ACIT v. Dana India Technical Centre Pvt. Ltd.* (*supra*) and it was held as under:—

"12..... The learned Authorized Representative for the assessee fairly conceded before us that out of total losses of approximately Rs.62 lakhs, losses to the tune of about Rs.35 lakhs relate to earlier year and the balance losses relate to this year. The Mumbai Special Bench of Tribunal in the case of Prakash L. Shah [115 ITD 167 \(SB\)](#) had held that gain due to exchange rate difference in the year of receipt on account of earlier exports and allowance of deduction under section 80HHC of the Act in such later year was not sustainable. Following the simile, we hold that while computing PLI for the year under consideration, the loss arising on account of foreign exchange fluctuation to the tune of Rs.35,31,729/- is to be excluded. However, the loss arising on account of export proceeds realized from exports of relevant year are to be considered while computing PLI of the assessee. In view thereof, we modify the order of CIT(A) and direct the Assessing Officer to re-compute the PLI in the hands of assessee and foreign exchange fluctuation losses of the earlier years are to be kept out of calculation of PLI for the year under consideration. The ground of appeal No.2 is partly allowed."

10. Thus, we dismiss the ground of appeal raised by the Revenue.

11. In the result, appeal of Revenue is dismissed."

26. Thus, it is the finding of the Tribunal Pune Bench that such prior period expenses/items/foreign exchanges losses are not to be reduced from the current year's profits for determining PLI of the year under consideration.

27. Thus, the DRP granted relief to the assessee on this issue of prior period rebate claim qua the computation of the PLI of the assessee for the current year. It is a settled legal proposition that the 'extraordinary items' such as the prior period rebate expenses should not be considered for the computation of the operating profits for the current year. Reliance is placed on the said Pune Bench decisions (*supra*) and the Delhi Bench decision in the case of *EDAG Engineers & Design India (P.) Ltd. (supra)*.

28. Therefore, we are of the opinion that we should direct the Assessing Officer/TPO to re-compute the operating profit margin of the assessee without considering the said "one-time price rebate" of Rs.5,32,10,455/-and thus, we affirm the views of the DRP. Thus, on the strength of the precedents on the subject, the order of the DRP in giving the above direction to the Assessing Officer, is fair and reasonable and the same does not call for any interference. Accordingly ground No.2 raised by the Revenue is dismissed.

29. In the result, the appeal of the Revenue is dismissed.

jaspreet

*In favour of assessee.