



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 12.11.2025

Judgment delivered on: 18.05.2026

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+ **ITA 656/2019**

PR. COMMISSIONER OF INCOME TAX – 1

.....Appellant

versus

M/S. AMERICAN EXPRESS (INDIA) PVT. LTD.

.....Respondent

Advocates who appeared in this case

For the Appellant : Mr. Debesh Panda, SSC, Ms. Zehra Khan and Mr. Vikramaditya Singh, JSCs.

For the Respondent : Mr. Nageswar Rao, Mr. Ravi Lochan, Mr. Parth and Mr. Pratik Rath, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. This appeal has been filed by the appellant under Section 260A of the Income Tax Act, 1961 ("Act") for the Assessment Year ("AY") 2009-10 challenging the order dated 03.08.2018 in ITA 2577/Del/2014 passed by the Income Tax Appellate Tribunal ("ITAT") wherein the ITAT has allowed the assessee's case.

2. The assessee is American Express (India) Private Limited (AEIPL)



incorporated in India, in 1994, as a 100 percent subsidiary of American Express International Inc, USA (AEII). AEIPL is engaged in data management, information analysis and control activities and provides tele-servicing and transaction processing support. AEIPL is also engaged in booking travel and accommodation for corporate clients. It was acquired from American Express Bank Ltd. (India Branches) ("AEBL") as a part of the slump sale agreement in July 2007.

FACTUAL CONTEXT

3. The assessee filed its return of income on 26.09.2009 declaring net income of Rs.1,13,42,21,352/-. Thereafter, the assessee filed its revised income on 29.03.2011. The assessee's case was selected for scrutiny through CAS and a notice under Section 142(1) of the Act was issued on 11.10.2012. The company in response to the notice appeared through its authorised representatives.

4. During the year under consideration, the assessee had undertaken international transactions with its associated enterprises to the tune of Rs.15 crore. Therefore, the Revenue in accordance with the provisions of Section 92CA of the Act referred the matter to the Transfer Pricing Officer ("TPO") for determining Arms Length Price, with the prior approval of CIT, Delhi-1, New Delhi.

5. On 16.01.2013, the TPO under Section 92CA(3) of the Act passed an order wherein, he had made an adjustment of Rs.6,26,71,930/- to the income of the assessee being the difference between Arms Length Price and the price charged by the assessee. On 28.04.2014, an assessment order under



Section 143(3) and 144C of the Act was passed for the income assessed at Rs.239,40,85,850/-. The Assessing Officer (“AO”) after the directions of Dispute Resolution Panel (DRP) has adjusted the Arms Length Price at Rs.67,05,58,495/-.

6. Aggrieved by the Final Assessment Order dated 28.04.2014, the assessee filed an appeal before the ITAT. The ITAT vide its order dated 03.08.2018 has stated that, in the grounds of appeal, the assessee had challenged the transfer pricing adjustment of Rs.67,05,58,495/- made on the account of provision for export of data processing and back office support services/ Information Technology enabled Services (‘ITeS’) and purchase of fixed assets. Therefore, the issue is mainly against the inclusion and exclusion of various comparable companies and also the corporate tax on denial of deduction under Section 10A of the Act for Rs.58,93,05,999/- in respect of APGSC (STP unit) and not granting full credit of tax deduction at source to the assessee, as claimed in the return of income. The ITAT reproduced the functions performed by the assessee in the following manner:

“AEIPL is a captive contract IT enabled service provider catering to the needs of the Group.

As per the contractual arrangement that AEIPL has with its associated enterprises for the provision of such support, the resultant output is the property of American Express Group and at no point in time shall such ownership vest with AEIPL either wholly or partly. AEIPL does not obtain any copyrights, patents rights, trade secrets or trademarks on such output.

AEIPL is remunerated on a cost-plus basis without regard to the success or failure of its activities. For this purpose, costs comprise all of the direct and



indirect costs, including salaries, travel expenses, professional fees, rent, depreciation, financial charges, etc. Therefore, AEIPL is insulated from all key business risks.

The functions performed by AEIPL were as under:-

a) Input

AEIPL receives raw data/ raw information ("raw data") in electronic form or in the form of paper-based inputs (documents, vouchers, reports etc.). The raw data is received through mail/courier, fax and electronic transmission from clients' respective locations to AEIPL servers via data links. The raw data comprises unprocessed or semi processed accounting, financial and commercial information relating to the business of American Express locations worldwide.

The various kinds of raw data received by AEIPL are as follows:

- Card member Data: Data pertaining to transactions executed by American Express card members.*
- American Express Company Data: Data pertaining to day-to-day transactions undertaken within American Express companies which need to be recorded and reported to the respective American Express Companies ('customer country') in different reports and accounting formats. Various types of inputs received for processing and recording in electronic or physical form are as follows:*
 - Invoices:*
 - Vouchers:*
 - Vendor Purchase Orders; and*
 - Employees Travel Expense Vouchers.*
 - Airlines/ SES/ Hotels Data: These pertain to transactions undertaken for American Express travel business and include data on:*
 - Sale of air tickets to customers and payments to airlines:*



- *Payment to service establishments for purchases made through American Express Cards; and*
- *Booking of hotels for customers and payments to hotels.*
- *Customers Bank Data: These include data on treasury and other transactions done by American Express card members.*

b) Processing of inputs (Data management, Information Analysis and Control):

The company uses the raw data as input and carries out a series of processes (i.e. reorganization, analysis and transformation and conversion of raw data) as per requirements of its customers to generate customized output.

c) Output

• The Company's output includes the following items processed and prepared as per the customers' specifications:

- Ready to use business reports and computations:*
- Financial statements such as balance sheets, profit and loss accounts, ledgers, trial balances, accounts payable analysis, accounts receivable analysis, and fixed assets registers;*
- Bank account control reports and bank transaction processing;*
- Payroll processing and reports;*
- Account reconciliation reports;*
- Payment instructions for payment to vendors;*
- Card transaction process outputs;*
- Travel MIS reports per customers' specific requirements.*

Further, AEIPL also provides fall centre services. to Group Companies, which involves answering incoming American Express card member calls for queries related to card member transactions. These queries



include, inter alia, balance enquiry, product feature queries, change in personal information, etc.”

7. The ITAT vide its order dated 03.08.2018 has held as under:-

“vi) CG-VAK Software & Exports Ltd.

24. Ld. TPO has rejected the inclusion of this company on the ground that it fails the turn over filter of Rs. 5 crores; and further this company is engaged in providing software development services. Before us, the Ld. Counsel submitted that at the entity level it has a huge turnover of more than Rs. 72 crores and such a turn over filter applied by the TPO for rejecting a comparable is not correct. The assessee has taken segmental detail of the BPO services for the purpose of benchmarking the international transaction and moreover in assessee's own case it has been held to be a good comparable in A.Y.s 2004-05, 2005-06 and 2006-07,

25. After considering the rival submissions and en perusal of the relevant records, we find that this company has been rejected for inclusion on the ground it has low turnover, which is less than Rs.1 crore. So far as exclusion of this comparable on basis of turnover filter criteria of less than Rs. 1 crore, we find that, first of all, it was a comparable chosen by the assessee and at the time of selection process the assessee as stated that it had not applied any turnover filter for accepting or rejecting the comparables. Once the turnover filter has not been applied at the quantitative level then comparability has to be done on qualitative level based on FAR analysis. If on FAR analysis it is found that there are differences on account of either assets deployed, risk assumed materially affecting the cost or margin then only comparability analysis fails in such cases. Further, under the TNMM, the comparability of an



international transaction with an uncontrolled transaction is to be seen with reference to functions performed after taking into assets employed and the risk assumed. While reckoning the comparability analysis under TNMM, the main emphasis is into net margin realized on the transactions undertaken and not the price of the product or services. The transfer pricing rules under Rule 10B and 10C also contemplate for eliminating the material effects and to make reasonably accurate adjustment for eliminating the differences on account of such material effects. Mere circumstance of a company which otherwise confirm to the comparability analysis in terms of Rule 10B(2) and (3), huge profit or huge turnover ipso facto does not lead to its exclusion unless and of course it is shown that turnover or huge profit is on account of factor leading to a different results in FAR analysis. We find that the Hon'ble Delhi High Court in the case of Chrys Capital Investment Advisors India Pvt. Ltd. Vs. DCIT (supra) after detailed analysis of rule 10B(3), has been reiterated the same principle that if the company is functionally comparable then same cannot be rejected on the basis of turnover. The Hon'ble High Court in its very detailed judgment, wherein it was required to answer, whether the comparable can be rejected on the ground that they have high profit margin as compared to the assessee in TP analysis, has also dealt upon the turnover factor in detail and held that if the company is functionally comparable then same cannot be rejected on the basis of turnover. Thus, following the ratio laid down by the Hon'ble Delhi High Court, we hold that the company cannot be held to be incomparable simply on the ground of low turnover, unless it is demonstrated that the assets and risk are completely different and are incomparable. Thus, we direct the TPO to include CG Vak Software and Export Ltd. as a comparable company.



vii) *Cepha Imaging Limited;*

26. This comparable have been rejected by the TPO on the ground that it fails the export turn over. Further there is no discussion by the DRP in the impugned order. Before us the Ld. Counsel pointed out that this company qualifies the export turnover, because during the year under consideration the export turnover of this company was 100% which is evident from the annual report of this company.

27. After considering the relevant finding and submissions made by the Ld. Counsel, we find that the only dispute is with regard to export filter. Once the export of the said company is stated to be 100%, then how the TPO has held that it fails export turn over and what is the source of information is not borne from the records. Ld. Counsel has drawn our attention to the annual report and pointed out that during the year all its revenues are from export only. Thus, the reason given by the TPO to reject this comparable is contrary to the facts and records; and accordingly, we deem it proper to direct the TPO to examine this aspect of export turnover and if the contention of the assessee is found to be correct then he must include this company as comparable.”

8. The appellant is the Principal Commissioner of Income Tax-1, New Delhi and this appeal has been filed by the appellant raising the following as substantial questions of law:-

“A. Whether in the facts and circumstance of the case the Ld. ITAT erred in giving direction to the TPO for inclusion of comparable namely M/s Cepha Imaging Pvt. Ltd. on account of export earning filter without considering the TPO finding of functional dissimilarity between the assessee and the said comparable?



B. Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving direction to the TPO for inclusion of comparable M/s R System International Ltd. without considering the Rule 10B(4) of the Income Tax Rules?

C. Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving directions to the TPO for exclusion of the comparable. M/s E-clerx Services Ltd. on account of largest brand and high end ITES without considering the revised 2010 guidelines of OECD in which it is stated that 'super' normal profit making companies are also part of the industry and hence cannot be rejected merely because they have earned such profits.

D. Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving direction to the TPO for exclusion of M/s Vishal Information Technology Ltd. on account of outsourcing cost without establishing as to how the outsourcing cost adversely affects the parameter of functional comparability.

E. Whether in the facts and circumstances of the case the Ld. IT AT has erred in giving direction to the TPO for inclusion of M/s Allsec Technology Ltd. as comparable without considering the fact that this comparable fails the diminishing revenue and export earning filer.

F. Whether in the facts and circumstances of the case the Ld. IT AT has erred in giving directions to the TPO for inclusion of comparable M/s CG Vak Software & Exports Ltd. without considering the fact that this comparable failed the turnover filter applied by the TPO.

G. Whether in the facts and circumstances of the case the Ld. ITAT is justified in allowing deduction u/s 10A



of Rs.58,93,05,999/- in respect of AEGC STP unit without considering the facts and circumstances of the case that the appeal of the revenue in previous years is pending before the Hon'ble High Court?"

CASE OF THE APPELLANT

9. Mr. Debesh Panda, Senior Standing Counsel for the appellant /Revenue, submitted that the primary issue pertains to determination of the Arm's Length Price for export of data processing and office support services amounting to Rs.7,82,63,63,57,677/- provided by the assessee to its associated enterprises. For benchmarking the margins of its ITeS segment, the assessee applied the Transactional Net Margin Method ("TNMM") as the most appropriate method. There is no dispute with respect to the most appropriate method in the instant case and the dispute is with respect to inclusion and exclusion of certain comparables as directed by the ITAT.

10. He submitted that the respondent/assessee, AEIPL is a 100% subsidiary of American Express International Inc., USA, and the functional profile of the respondent-assessee, as noted by the ITAT and TPO Order, are as follows:-

- a. It is engaged in data management, information analysis and control activities for export to American Express affiliates worldwide. These services are primarily delivered to AEIPL's customers through a telecom link, under which inputs are received in electronic form and subsequently processed;
- b. Tele-servicing and transaction processing support, and booking travel and accommodation for corporate clients;



- c. AEIPL also undertakes high-end functions, including the preparation of ready-to-use business reports; financial statements such as balance sheets, profit and loss accounts, and trial balances; bank account control reports; and a wide range of other analytical reports generated from raw data. The comparability with the uncontrolled transactions has to be on a FAR analysis.
- d. It is an export-oriented entity generating 100% revenue from export. Out of total revenue of Rs. 863 crores, its income from Global Business Processing & Support is Rs. 783,22,91,481/- which is 91% of the total receipt.

11. He submitted that, since the primary issue pertains to determination of the Arm's Length Price for export of data processing and office support services amounting to Rs.7,82,63,63,57,677/- provided by the assessee to its associated enterprises, for determining the Arm's Length Price for its transactions amounting to Rs.7,82,63,63,57,677/-, using TNMM as the most appropriate method, the assessee computed the Profit Level Indicator ("PLI") being the operating profit to operating cost ratio at an average of 19.06% by identifying the following nine comparables for benchmarking:

S.No	Comparables selected by the Assessee.
1	Aditya Birla Minacs Worldwide Limited.
2	Allsec Technologies Limited.
3	CG Vak Software & Exports Limited
4	Cepha Imaging Pvt. Ltd.



5	Cosmic Global Limited
6	Informed Technologies Limited
7	ICRA Online Limited
8	R Systems International Limited
9	Vishal Information Technologies Limited (Now known as Coral Hub Limited)

12. The TPO vide its order dated 16.01.2013, rejected four comparables and accepted five comparables selected by the assessee out of the total nine and included two other comparables namely: i) E-Clerx and ii) Microgenetics systems. In view of the final comparables selected by the TPO, the average margin/PLI was computed as 29.91%, calculated as under:

S. No.	Name of the Company	OP/OC (%)
1	Aditya Birla Minacs Worldwide Limited	0.50
2	Cosmic Global Limited	36.93
3	Informed Technologies Limited	48.2
4	ICRA Online Limited	23.16
5	Vishal Information Technologies Limited (Now known as Coral Hub Limited).	47
6	E-Clerx Limited	43.6
7	Mircrogenetics Systems Limited	9.98
	Avg	29.91

13. It is his submission that, in view of the comparables , the TPO passed



order dated 13.01.2013 under Section 92CA (3) of the Act dated 16.01.2013, wherein, an upward adjustment of Rs.6,26,71,930/- to the income of the assessee, difference between Arm's Length Price and the price charged by the assessee was made. He also stated that the assessee was issued a notice dated 21.01.2013 to show cause as to why this adjustment of Rs.6,26,71,930/- to the income should not be made as determined by the TPO. The assessee filed its reply on 30.01.2013. Thereafter, the TPO passed a revised TP order under Section 92CA(5) read with Section 154 of the Act on 26.02.2013, wherein the adjustment was enhanced from Rs.6,26,71,930/- to Rs.71,41,54,973/-.

14. Mr. Panda submitted that the respondent/assessee filed objections before the DRP, and its objections were disposed of vide Order dated 24.12.2013. In compliance with the DRP directions, the AO passed the Assessment Order dated 28.02.2014, wherein an additional Rs.67,05,58,495/- was made on account of transfer pricing adjustment. Thereafter, the respondent/assessee and the Revenue challenged final assessment order under section 143(3) read with section 144C of the Act, dated 28.2.2014, passed by the AO in pursuance of directions given by the DRP, vide order dated 24.12.2013 for the AY 2009-10 before the ITAT.

15. The ITAT with regard to comparables, directed as follows:

Inclusion	Exclusion
Cepha Imaging Pvt. Ltd.	Eclerx Services Limited
R Systems International Limited	Coral Hub Limited (formerly known as Vishal Information Technologies Limited)



Allsec Technologies Limited	
CG Vak Software & Exports Limited	

16. According to Mr. Panda, the ITAT has erred in inclusions and exclusions of comparables. He submitted that, in the case of Cepha Imaging Pvt. Ltd. this Court should remand the comparable to TPO to examine the functional comparability with the assessee as Cepha Imaging Pvt. Ltd. is functionally dissimilar to the assessee. He also submitted that, Cepha Imaging Pvt. Ltd. is engaged in the service of e-publishing services whereas the assessee is engaged in data management, information analysis and control activities and provides back office operations, revenue accounting, call centre services, support centre for its associated enterprises which falls under the ITeS sector and its function is wholly different from that of a company engaged in e-publishing services. It is also his submission that the ITAT did not render any finding on whether Cepha Imaging Pvt. Ltd. was functionally comparable with the assessee. The ITAT remanded this comparable to the TPO to examine if Cepha Imaging Pvt. Ltd. satisfied the export turnover and if yes, to include it. Mr. Panda submitted that, according to the assessee, the TPO waived the objection of functional dissimilarity in light of its objections and only excluded Cepha Imaging Pvt. Ltd. on account of its failure to the export earning filter, to which he submitted that, it is settled law that merely because the TPO admits a functional dissimilar comparable or the assessee proposes a comparable, the ITAT is not bound by the same and is required to examine this, and that the e-publishing services are not ITeS as per CBDT Notification No.890 of



2000. It is also his contention that the ITAT did not render any finding on whether the Cepha Imaging Pvt. Ltd. was functionally comparable with the assessee on the issue of functional dissimilarity as it is engaged in e-publishing service whereas the assessee is engaged in ITeS sector.

17. With regard to R-Systems International Ltd., Mr. Panda submitted that the ITAT has failed to consider the Rule 10B(4), which uses the word “relating to the financial year” and “current year” or “corresponding year”, as the Rule is clear and unambiguous and mandates that the data concerned must correspondence to the financial year in which international transaction occurred. This ensures comparability as the relevant financial year alliance with the same cycle. Any deviation in the accounting cycle would result in transactions from different periods when compared.

18. With regard to Allsec Technologies Ltd., Mr. Panda while referring to paragraph 21 of the impugned order submitted that the TPO rejected the comparable on the grounds that it is a loss making entity and it failed export earning filter. He also submitted that the finding of the ITAT was merely on the basis that the revenue has increased in the financial year 2008-09 from that of the previous year and it had failed to note the finding of the DRP and the companies with negative trajectory not par to market trend is not an appropriate comparable as it is his submitted that the assessee generates 100% of its revenue from export and any deviation from export filter of 75% is unwarranted and unjustified.

19. Mr. Panda submitted that as far as CG Vak Software & Exports Limited is concerned, the assessee company engaged in export of data



processing and office support services has a turnover of Rs.782,63,63,57,677/- in its ITeS segment while the comparable CG Vak has a turnover of only Rs.86,10,268/- from its ITeS segment out of its total turnover of Rs.7,23,39,181/-. Therefore, a company with a turnover of Rs.782 crores cannot be considered comparable with that of a company with Rs.86 lakhs and the ITAT gravely erred in failing to appreciate this significant difference.

20. He also submitted that the objection of the assessee against the application of qualitative approach for selection of comparable i.e. TNMM has been discussed by the TPO, and has stated that the said method is for reason of application of turnover filter of Rs.5 crores. Companies having turnover of less than Rs.5 crores are excluded because the margin earned by these companies fluctuate to extremes due to the narrow base. The TPO has also noted that the reliability of data in respect of small companies is not always very high. The TPO has also noted that the small companies with revenue less than Rs.5 crores are excluded from comparison because lack of competitive strength, lack of operation strength and also human resources. Even with the application of qualitative method such as extreme mismatch in turnover strikes at the very route of the compatibility exercise as the size and scale has a direct impact on operating cost and operating price of the companies.

21. Mr. Panda with regard to exclusion of comparables of Eclerx Services Limited, submitted that, ITAT failed to consider that the most appropriate method employed by both the TPO and the assessee for selection is the



TNMM which takes into account broad similarity of functions. He also submitted that the assessee is comparable with Eclerx Services Limited who is also in the ITeS business and under CBDT Notification SO 890(E) dated 26.09.2000 which had given a list of products and services that could be claimed under ITeS for the purpose of 10A and 10B of the Income Tax Rules, 1962 (“Rules”) includes KPO services.

22. With regard to exclusion of comparables of Coral Hub Limited (formerly known as Vishal Information Technologies Ltd.), he submitted that the ITAT has failed to establish how outsourcing costs would adversely affect the parameters of functional comparability when the comparable is functionally similar to the assessee. Coral Hub is engaged in the IT business and is functionally like the assessee.

23. In support of his submissions, he has relied upon the following judgments:-

- (i) ***CIT v. Agnity India Technologies (P. Ltd.), [2013] 219 Taxmann 26 (Del),***
- (ii) ***American Express Banking Corporation (India Branch) v. Assistant Director of Income Tax, Circle 1(1) International Taxation, New Delhi [ITA Nos. 6253/Del/2017 and ITA Nos. 6455/Del/2017],***
- (iii) ***American Express Banking Corporation (India Branch) v. Assistant Director of Income Tax, Circle 1(1) International Taxation, New Delhi [ITA 5/2025],***
- (iv) ***The Commissioner of Income Tax-II v. Mckinsey***



Knowledge Centre India Pvt Ltd, 2015 DHC:3029-DB,

- (v) ***Commissioner of Income Tax v. Mercer Consulting (India) P Ltd, (2017) 390 ITR 615,***
- (vi) ***Rampgreen Solutions P Ltd v. Commissioner of Income Tax, (2015) 377 ITR 533,***
- (vii) ***Chryscapital Investment Advisors (India) Pvt Limited v. Deputy Commissioner of Incometax, 2015 DHC:3776-DB,***
- (viii) ***American Express Banking Corporation (India Branch) v. Assistant Director Of Income Tax, Circle 1(1), International Taxation, New Delhi, 2025:DHC:3545-DB***
- (ix) ***CIT v. American Express India Pvt Ltd, ITA 691/2012 dated 15.01.2025.***

24. He seeks the prayers made in the appeal.

CASE OF THE RESPONDENT

25. Mr. Nageswar Rao, learned counsel appearing for the respondent would submit that that the request of appellant /Revenue that for Cepha Imaging Pvt. Ltd. the matter should be remanded back to TPO to determine the functional similarities with the assessee is arbitrary and contrary to the order of the TPO itself. The issue of functionality was raised by the TPO as a proposed result for rejection of Cepha Imaging Pvt. Ltd. and same is clear from paragraph 11 of the TPO's order wherein the TPO has given his finding /comment stating that the in the case of Cepha Imaging Pvt. Ltd. the company fails the export earning filter. The relevance of the filter has already been discussed in the order (TPO's) order. Therefore, the company



is not acceptable as a comparable.

26. He submitted that it is unambiguous that after considering the submission on functional dissimilarity the TPO had excluded Cepha Imaging Pvt. Ltd. solely on the ground that the company fails the export filter. However, it would be totally incorrect to interpret the sequence of the TPO's order and re write the TPO's order to claim that the TPO did not agree on functionality requiring a remand.

27. Mr. Rao would submit that Arm's Length Price under Section 92C of the Act prescribes; Functions, Assets and Risk (FAR) analysis as a basis for choice of comparable companies and determination of Arm's Length Price. The same was added in the Rules as additional factors for such determination. While relying upon the decision of this Court in *Chryscapital Investment Advisors (India) Pvt Limited v. DCIT, 2015 SCC Online Del 9065*, he submitted that turnover cannot be criteria for rejection of a company as comparable and stated that the said principle was applied by the ITAT to the facts of CG VAK Software and Export Limited to conclude that the said company cannot be rejected as not being comparable due to low turnover in ITeS segment.

28. Mr. Rao submitted that the filter and application on the data base is a statistical exercise to identify the comparable companies. The explanation given by the TPO for exclusion is without prejudice is to be applied at entry level companies having less than Rs.5 crore turnover, whereas, CG VAK Software and Export Limited was having more than Rs.5 crore turnover. He also submitted that, apart from the TPO's findings with regard to the



turnover of CG VAK Software and Export Limited and the assessee, the TPO has stated that it only considered ITeS segment for comparison, if that be so, discussion related to Software development services and non-comparability software segment to respondent / assessee's ITeS has no relevance.

29. He submitted that the Revenue in its submission has shown that Transfer Pricing Adjustment was made under two segments – ITeS and IGS. He submitted that the reliance placed by the appellant on ***American Express Banking Corp (India Branch) (supra)*** would show that the issues relating to ITeS were not in the appeal before this Court, because the TP additions issue relating to ITeS was resolved by the ITAT's order and that appellant in the said case, did not carry the findings of the ITAT on CG VAK Software and Export Limited in the appeal.

30. He submitted that the ITAT's order in ***American Express Banking Corp (India Branch) (supra)*** was decided on 07.08.2024, which is almost six years after the impugned order and it would render the Revenue's plea that the latter finding would further its case *per inquirim*.

31. During the course of the hearing, the Court *vide* order dated 15.01.2025 directed the parties to file an explanatory chart with respect to the comparables. Pursuant to the same, the respondent filed an explanatory chart of issues involved in the present appeal, as under:-

31.1. In Cepha Imaging Pvt. Ltd., the claim in ground J of the appeal that the TPO excluded this company due to functional dissimilarity is



misleading and false, that the TPO had discussed the functional comparability and has concluded that export earning filter is not satisfied;

31.2. In R Systems International Limited, the TPO noted that the financial year ending is different from the assessee, whereas the ITAT in its findings has concluded that it is AY 2007-08 in the assessee's own case, while following the decision of this Court in **McKinsey Knowledge Centre India Pvt. Ltd (supra)** and the Punjab and Haryana High Court's decision in **Mercer Consulting India Pvt. Ltd (supra)** which discussed Rule 10B(4) of the Rules;

31.3. E-Clerx Services Ltd is a knowledge process outsourcing (KPO) involved in multifarious activities and also objected on forward contract and abnormal profits. The ITAT while considering the decision of this Court in **Rampgreen Solutions Pvt. Ltd (supra)** has noted that this company was found to be not comparable in the assessee's own case in AY 2007-08, as this company is engaged in multifarious activities and held that activities of the assessee different from KPO. The appellant based its challenge on the fact that an SLP was filed against the decision in **Rampgreen Solutions Pvt. Ltd (supra)**. At no stage did the ITAT base its decision on super normal profits – the question itself is misconceived and does not arise when factual basis of the decision is not disputed.

31.4. In Vishal Information Technologies Ltd, the ITAT has held that the business model of the said company in as much as its outsourcing



charges are @90.57%, which reflects that there is a different business model and outsourcing model, which carries out its work through its own recourses as it reflects huge difference in employee cost ratio to turnover and, therefore, the said company is not comparable in view of the judgment of this Court in ***Rampgreen Solutions Pvt. Ltd (supra)*** and of the Punjab and Haryana/High Court in ***Mercer Consulting India Pvt. Ltd (supra)***.

31.5. In Allsec Technologies limited, the ITAT while considering the company as comparable has stated that on its perusal of the annual report it was found that the operating revenue has increased in the financial year 2008-09 from that of the previous year and there is no specific rule or mechanism for putting a ceiling or a limit in a particular filter. The TPO cannot *suo moto* apply the filter later on for selecting or rejecting the comparable of the assessee because that amounts to cheery picking. There is no dispute with regard to otherwise functional or FAR comparability with that of the assessee. The reason that difference in ceiling put by the TPO is 0.05% for exclusion of the said company cannot be upheld in view of the ***Mercer Consulting India Pvt. Ltd v. CIT in ITA No.966/Del/2014.***

32. In support of the respondent's case, Mr. Rao relied upon ***CIT v. American Express India Pvt Ltd, ITA 691/2012 dated 15.01.2025*** as well as ***CIT 1 v. American Express India Pvt Limited, ITA No.149/2013 dated 15.01.2025.***

33. He has sought dismissal of the appeal.



ANALYSIS AND CONCLUSION

34. Having heard the learned counsel for the parties and perused the records, at the outset, we may state that this appeal has been filed proposing substantial questions of law as reproduced above in paragraph no. 8.

35. Insofar as, the proposed substantial questions of law at B, C, D, E and G are concerned, it is the case of the appellant/Revenue that the said issues are covered against the Revenue in terms of the judgment as referred to in the following chart:-

Questions proposed		Remarks
B.	<i>Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving direction to the TPO for inclusion of comparable, M/s R System International Ltd. Without considering the Rule 10B(4) of the Income Tax Rules?</i>	<i>Covered by the decision of this Court in Commissioner of Income Tax II v. McKinsey Knowledge Centre India Pvt. Ltd. ITA No. 217/2014; 2015: DHC:3029:DB</i>
C.	<i>Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving directions to the TPO for exclusion of the comparable. M/s E-clerx Services Ltd. on account of largest brand and high-end ITES without considering the revised 2010 guidelines of OECD in which it is stated that 'super' normal profit making companies are also part of the industry and hence cannot be rejected merely because they have earned such profits.</i>	<i>Covered by the decision of this Court in Rampgreen Solutions Pvt. Ltd. CIT (2015) 377 ITR 533 against the Revenue.</i>
D.	<i>Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving direction to the TPO for exclusion of M/s Vishal Information Technology Ltd. on account of outsourcing cost without establishing as to how the outsourcing cost adversely affects the parameter of functional comparability.</i>	<i>Covered by the judgment of this Court in Rampgreen Solutions Pvt. Ltd. CIT (2015) 377 ITR 533 against the Revenue.</i>
E.	<i>Whether in the facts and circumstances of the case the Ld. ITAT has erred in giving direction</i>	<i>ITAT finds that operating revenue has "increased in</i>



	<i>to the TPO for inclusion of M/s Allsec Technology Ltd. as comparable without considering the fact that this comparable fails the diminishing revenue and export earning filter.</i>	<i>the financial year 2008-09 from the previous year” and consequently, this comparable is not a persistent loss-making entity, which is a finding of fact. On export earning filter, covered by the decision of Punjab & Haryana High Court in Commissioner of Income Tax v. Mercer Consulting India (P) Ltd 2016 SCC Online P&H 6546.</i>
G.	<i>Whether in the facts and circumstances of the case the Ld. ITAT is justified in allowing deduction u/s 10A of Rs. 58,93,05,999/- in respect of AEGC STP unit without considering the facts and circumstances of the case that the appeal of the revenue in previous years is pending before the Hon’ble High Court?</i>	<i>Covered in judgment dated 15.01.2025 of this Court in ITA 691/2012 titled CIT v/s American Express (India) Pvt. Ltd.</i>

36. So, we admit the appeal on the proposed substantial questions of law (A) & (F), which are re-numbered as (1) and (2). We have already noted the submissions made by the counsel for the parties. The substantial questions of law are as under:-

Question (1)

“Whether in the facts and circumstance of the case the Ld. ITAT erred in giving direction to the TPO for inclusion of comparable namely M/s Cepha Imaging Pvt. Ltd. on account of export earning filter without considering the TPO finding of functional dissimilarity between the assessee and the said comparable?”

Question (2)

“Whether in the facts and circumstances of the case the Ld. IT AT has erred in giving directions to the TPO



for inclusion of comparable M/s CG Vak Software & Exports Ltd. without considering the fact that this comparable failed the turnover filter applied by the TPO.”

Re. Question (1)

37. In so far as the substantial question of law (1), is concerned, the finding of the ITAT, can be seen from paragraphs no. 26 and 27 of the impugned order, which we reproduce as under:-

“26. This comparable have been rejected by the TPO on the ground that it fails the export turn over. Further there is no discussion by the DRP in the impugned order. Before us the Ld. Counsel pointed out that this company qualifies the export turnover, because during the year under consideration the export turnover of this company was 100% which is evident from the annual report of this company.

27. After considering the relevant finding and submissions made by the Ld. Counsel, we find that the only dispute is with regard to export filter. Once the export of the said company is stated to be 100%, then how the TPO has held that it fails export turn over and what is the source of information is not borne from the records. Ld. Counsel has drawn our attention to the annual report and pointed out that during the year all its revenues are from export only. Thus, the reason given by the TPO to reject this comparable is contrary to the facts and records; and accordingly, we deem it proper to direct the TPO to examine this aspect of export turnover and if the contention of the assessee is found to be correct then he must include this company as comparable.”

38. The only submission of Mr. Panda is that the ITAT does not render



any finding on whether Cepha Imaging Pvt. Ltd. was functionally comparable with the assessee. His submission is that the Cepha Imaging Pvt. Ltd. is not comparable as it is functionally dissimilar to the functions of the respondent/assessee as Cepha Imaging Pvt. Ltd. is engaged in e-publishing services whereas the assessee is engaged in the ITeS sector. In other words, it is his submission that as per the CBDT Notification No. 890/2000, e-publishing services are not ITeS. In this regard, he has relied upon the CBDT Notification No. 890/2000, which is in the following manner:-

“In exercise of the powers conferred by clause (b) of item (i) of Explanation 2 of section 10A, clause (b) of item (i) of Explanation 2 of section 10B and clause (b) of Explanation to section 80HE of the Income tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby specifies the following information technology enabled products or services, as the case may be, for the purpose of said clauses, namely:---

- (i) Back-office Operations ;*
- (ii) Call Centres ;*
- (iii) Content Development or Animation ;*
- (iv) Data Processing ;*
- (v) Engineering and Design ;*
- (vi) Geographic Information System Services ;*
- (vii) Human Resources Services ;*
- (viii) Insurance Claim Processing ;*
- (ix) Legal Databases ;*
- (x) Medical Transcription ;*
- (xi) Payroll ;*
- (xii) Remote Maintenance ;*
- (xiii) Revenue Accounting ;*
- (xiv) Support Centres, and ;*
- (xv) Web-site Services.*

[Notification No. 11521/F.No. 142/49/2000-TPL]”



39. We note that the ITAT has by not accepting the reasons given by the TPO (who rejected the comparable) held that the reasons of the TPO are contrary to the facts and record. In other words, the ITAT held that, when the export turnover of the said company is stated to be 100% then the TPO could not have held that it fails export turnover filter. The ITAT also stated that, it is not known as to what was the source of information for the TPO to draw such a conclusion.

40. Mr. Panda submitted that the services of Cepha Imaging Pvt. Ltd. are e-publishing services, which is not covered under the CBDT notification.

41. Suffice to state that the remarks of the TPO for not accepting Cepha Imaging Pvt. Ltd. as a comparable is because it is using computer-based technology for e-publishing activity. It is noted, the above notification does not include e-publishing services as product/services under the ITeS. The ITAT does not draw any finding on the functionality of Cepha Imaging Pvt. Ltd. *qua* the respondent/assessee while drawing its conclusion in paragraphs no. 26 and 27.

42. The ITAT should have remanded the mater on this aspect also, as the revenue is relying upon the CBDT Notification No. 890/2000. Hence, we direct the TPO to also look into the functional similarity of Cepha Imaging Pvt. Ltd. *qua* the assessee, particularly by taking into consideration the CBDT Notification No.890/2000 dated 08.09.2000.

43. Hence, the substantial question of law (1) is answered in favor of the appellant/Revenue and against the assessee.



Re. Question (2)

44. Insofar as, the substantial question of law (2), is concerned, Mr.Panda would submit that the assessee company is engaged in export of data processing and office support services with a turnover of Rs.782,63,63,57,677/- in its ITeS segment, while the comparable CG Vak Software & Exports Ltd. has a turnover of only Rs. 86,10,268/- from its ITeS segment out of its total turnover of Rs.7,23,39,181/-. A company with the export turnover of Rs.782,63,63,57,677/- cannot be considered comparable with a company having an export turnover of Rs.86,10,268/- and the ITAT gravely erred in appreciating this significant difference.

45. According to him even with the application of a qualitative method, such an extreme mismatch in turnover strikes at the very root of the comparability exercise, as size and scale have a direct impact on the operating cost and operating price of the companies. He has relied on the judgment in the case of *Agnity India Technologies (P. Ltd.) (supra)*, wherein, this Court has held that, a giant company like Infosys whose turnover is Rs.9,038 crores versus a small captive unit with turnover of Rs.16.09 crore is non-comparable.

46. It may be stated that the ITAT has held that the assessee has taken segmental details of the BPO services for the purpose of benchmarking the international transaction and moreover it is the assessee's own case that it has been held CG Vak Software & Exports Ltd. to be a good comparable in A.Y.s 2004-05, 2005-06 and 2006-07. By placing reliance upon the judgment of this Court in the case of *Chrys Capital Investment Advisors*



India Pvt. Ltd (supra), the ITAT held that the company cannot be held incomparable simply on the ground of low turnover, unless it is demonstrated that the assets and risk are completely different and are incomparable and directed the TPO to include CG Vak Software and Exports Ltd. as a comparable company.

47. Mr. Rao on the other hand submitted that the decision of this Court in *American Express Banking Corp. (India Branch) v. ADIT, ITA 5/2025*, would show that issues relating to ITeS were not in appeal before this Court because the TP addition issue relating to ITeS got resolved by the order of the ITAT. The appellant in that case did not carry the findings of ITAT on C.G. VAK Software & Exports Pvt. Ltd. in appeal for that reason. The ITAT in its later decision in *American Express Banking Corp. (India Branch) (supra)*, which the appellant seeks to rely upon to further its case is *per incuriam* and violates judicial propriety as it does not even discuss/distinguish the earlier coordinate bench decision before coming to a contrary conclusion. In any case, the appellant has not made any effort to point out even a single flaw in the detailed reasoning of the ITAT in the present case and its reliance on *Chryscapital (supra)*.

48. We are not in the agreement with the above submissions of Mr. Rao and with the findings of the ITAT, for the reason that the scale of operation of the comparable with the tested entity is a factor that requires to be kept in view. Huge differences between the tested party and the comparable would necessarily require the comparable to be excluded. This we say so for the reason that the assessee has a turnover of Rs.782,63,63,57,677/- from its



ITeS segment while the comparable CG Vak Software and Exports Ltd. has a total turnover of Rs. 7,23,39,181/- and ITeS export turnover is Rs.86,10,268/-. That means, the assessee has a turnover of 100 times than that of the comparable/C.G. Vak Software and Exports Ltd.

49. On an identical issue of comparability with respect to turnover, the High Court of Bombay in the case of ***The Commissioner of Income Tax-2, Pune v. Principal Global Services Pvt. Ltd., Pune, Income Tax Appeal No.57 of 2016***, has held as under:-

“(i) M/s. Infosys BPO Ltd., was excluded by the Tribunal from the list of comparable to determine ALP in respect of International Transaction of the Respondents activity of rendering of back office support services to its AE.

(ii) The impugned order of the Tribunal noted the facts that turnover of the comparable was to the tune of R.9028 Crores while the turnover of the Respondent-Assessee, as noted by the TPO was only Rs. 18 Crores.

*(iii) The impugned order further records that in view of the difference in turnover between M/s. Infosys BPO Ltd., and the Assessee, the two are not comparable. **In fact, the impugned order placed reliance upon the decision of the Delhi High Court in Commissioner of Income Tax vs. Agnity India Technologies (P) Ltd., (2013) 219 Taxman 26 [LO/DelHC/2013/1644] - wherein, it was held that the huge turnover difference between the comparable in that case, M/s. Infosys Technologies Ltd., with the Assessee therein, coupled with the fact that the Assessee therein was providing only services to its AE while M/s. Infosys Technologies (P) Ltd., provided services to out siders, make it not comparable. These facts are identical to the present facts and would make Infosys BPO Ltd.,***



not comparable. No difference is shown to us which would warrant a different view in the present facts. Moreover, this Court in Commissioner of Income Tax vs. Pentair Water India (P) Ltd., 381 ITR 216 [LQ/BomHC/2015/2425] has taken a view that huge difference in turnover between the tested party and the comparable would necessarily require the proposed comparable to be excluded from the list of comparables.

(iv) We find that the view taken on the aforesaid finding of fact is a possible view.

(v) Therefore, the question No.(b) as proposed does not give rise to any substantial question of law. Thus, not entertained.”

(Emphasis supplied)

50. In the case of ***M/s Avaya India Pvt. Ltd. V. ACIT, 2019:DHC:3563-DB***, this Court has held as under:-

“27. There is merit in the contention of the Assessee that the scale of operations of the comparables with the tested entity is a factor that requires to be kept in view. TCS E-Serve has a turnover of Rs.1359 crores and has no segmental revenue whereas the Assessee’s entire segmental revenue is a mere 24 crores. As observed by this Court in its decision dated 5th August 2016 in ITA 417/2016(PCIT v. Actis Global Services Private Limited) “Size and Scale of TCS’s operation makes it an inapposite comparable vis-avis the Petitioner.” As already pointed out earlier there is a closer comparison of TCS E-Serve Limited with Infosys BPO Limited with each of them employing 13,342 and 17,934 employees respectively and making Rs.37 crores and Rs.19 crores as contribution towards brand equity. When Rule 10(B) (2) is applied i.e. the FAR analysis, namely, functions performed, assets owned and risks assumed is deployed then brand and high



economic upscale would fall within the domain of “assets” and this also would make both these companies as unsuitable comparables.”

(Emphasis supplied)

51. In view of the above facts as narrated by us, the substantial question of law (2) is also answered in favor of the appellant/Revenue and against the assessee.

52. The appeal is disposed of.

V. KAMESWAR RAO, J

VINOD KUMAR, J

MAY 18, 2026

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