

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI NARENDRA KUMAR CHOUDHURY, JUDICIAL MEMBER

IT(TP)A No.1036/Bang/2011
Assessment year : 2007-08

AOL Online India Private Limited, RMZ EcoSpace Campus 1A, Outer Ring Road, Bellandur, Bangalore PAN: AABCN2578G	Vs.	Deputy Commissioner of Income Tax, Circle-11(1), Bangalore
APPELLANT		RESPONDENT

Assessee by	:	Shri Raghunathan S.
Revenue by	:	Ms. Neera Malhotra, CIT-II

Date of hearing	:	14-03-2016
Date of Pronouncement	:	18-03-2016

ORDER

Per B. Ramakotiah, Accountant Member

This appeal is against the order of the Assessing Officer (AO) u/s. 143(3) r.w.s. 144C of the Act, consequent to the directions of the Dispute Resolution Panel [DRP] dated 19-08-2011.

2. Briefly stated, assessee, AOL Online India Private Limited was incorporated on 8th November, 2000 as Net Scape Communications India Pvt. Ltd., and subsequently changed by way of series of name changes, to the present. Assessee is engaged in providing software development and

call centre services only to its Associated Enterprise [AE]. Being the captive service provider, it has remunerated for the services on the basis of cost + 15% mark up. During the year, assessee had provided software development services to an extent of Rs. 50.20 Crores and provision for call centre services to an extent of Rs. 161 Crores. AO referred the matter to the Transfer Pricing Officer [TPO]. In the software development services segment, assessee has selected a set of 17 comparable companies with an average of 10.86% and justified the Arm's Length Price [ALP] of 15.35% of assessee. In the call centre service agreement, assessee selected set of 22 comparable companies with the margin of 13.30% viz-a-viz that of 15.46% of assessee. Since both the TP studies indicate that assessee's receipts are above the average mean, assessee justified its receipts. However, TPO did not accept assessee's TP study and proposed to reject 13 out of 17 comparable companies in the software development services and selected new companies. In the call centre service segment also, TPO accepted six comparables and proposed 25 new comparables. After accepting assessee's objections, TPO has finalized the order proposing the adjustments as under:

Particulars	Software development services segment	Call Centre services segment
Arithmetical mean of the NCP margin of comparables	25.14%	30.12%
Transfer Pricing adjustment	Rs. 3,21,70,813	Rs. 71,60,87,449

2.1. Since there is a mistake in computation of working under the call centre services, TPO rectified the same later and reduced the adjustment to 17.49 Crores. DRP rejected the contentions of assessee. Accordingly, AO made the following adjustments:

- a. TP adjustment of Rs. 20,71,18,264/-; and
- b. Adjustment of deduction u/s. 10A of the Act of Rs. 1,02,21,521/-;

Assessee aggrieved and raised various grounds.

3. In assessee's grounds, assessee has raised general grounds with reference to TP studies under two segments and various filters, rejection of its TP study. It also raised additional grounds with reference to individual comparable companies both under IT Sector and ITeS Sector and these additional grounds, after taking due objections from the DR, are admitted as they did not involve any fresh examination of facts.

TP adjustment in software development sector:

4. Final selection of comparable companies in software development segment is as under:

Sl. No. as per TP order	Name of the company	Turnover (INR Crores)	NCP computed by TPO (%)
1.	Accel Transmatic Ltd.,	9.68	21.11
2.	Avani Cimcon Technologies Ltd.,	3.55	52.59
3.	Celestial Labs Ltd.,	14.13	58.35

4.	Datamatics Ltd., (Merged)	54.51	1.38
5.	E-Zest Solutions Ltd.,	6.26	36.12
6.	Flextronics Software Systems Ltd., (Merged)	848.66	25.31
7.	Geometric Ltd.,	158.38	10.71
8.	Helios & Matheson Information Technology Ltd.,	178.63	36.63
9.	Igate Global Solutions Ltd.,	747.27	7.49
10.	Infosys Technologies Ltd.,	13,149	40.30
11.	Ishir Infotech Ltd.,	7.42	30.12
12.	KALS Information Systems Ltd.,	2.00	30.55
13.	LGS Global Ltd.,	45.39	15.75
14.	Lucid Software Ltd.,	1.70	19.37
15.	Mediasoft Solutions Pvt. Ltd.,	1.85	3.66
16.	Megasoft Ltd.,	139.33	60.23
17.	Mindtree Ltd.,	590.35	16.90
18.	Persistent Systems Ltd.,	293.75	24.52
19.	Quintegra Solutions Ltd.,	62.72	12.56
20.	RS Software (India) Ltd.,	101.04	13.47
21.	R Systems International Ltd.,	112.01	15.07
22.	Sasken Communication Technologies Ltd.,	343.57	22.16
23.	SIP Technologies & Exports Ltd.,	3.8	13.90
24.	Tata Elxsi Ltd.,	262.58	26.51
25.	Thirdware Solution Ltd.,	36.08	25.12
26.	Wipro Ltd.,	9,616.09	33.65

4.1. Out of this, assessee is accepting the comparables at Sr. No. 4, 7, 13, 15, 19, 20, 21 & 23

Sl. No. as per TP order	Name of the company	Turnover (INR Crores)	NCP computed by TPO (%)
4.	Datamatics Ltd., (Merged)	54.51	1.38
7.	Geometric Ltd.,	158.38	10.71
13.	LGS Global Ltd.,	45.39	15.75
15.	Mediasoft Solutions Pvt. Ltd.,	1.85	3.66
19.	Quintegra Solutions Ltd.,	62.72	12.56
20.	RS Software (India) Ltd.,	101.04	13.47
21.	R Systems International Ltd.,	112.01	15.07
23.	SIP Technologies & Exports Ltd.,	3.8	13.90

4.2. Assessee is objecting to the balance of the comparables and objections on each of the comparables are as under:

Sl. No. as per TP order	Name of the company	Turn over (INR Crores)	NCP computed by TPO (%)	Summary of Applicant's Objections & Relevant references to the paper-book filed by the appellant
1.	Accel Transmatic Ltd.,	9.68	21.11	Functionally not comparable – engaged in 2D/3D animation, embedded software, outsourced product development, manufacture of multi function kiosks etc.
2.	Avani Cimcon Technologies Ltd.,	3.55	52.59	1. Functionally Not comparable – offers software development services as well as products – Dxchange 2. Abnormal Financial Results – the operating revenues increased by 63.03%, which indicates that it was an extraordinary year for this company. Even the growth of software industry for the previous year as per NASSCOM was 32%. 3. Abnormally high profit margins (52.59%)
3.	Celestial Labs Ltd.,	14.13	58.35	1. Functionally Not Comparable – the company is engaged in Contract research –bioinformatics as well as development of molecules and enzymes. 2. The R&D expenses debited to P&L A/c of Celestial constitutes 8.28% of the revenue.
5.	E-Zest Solutions Ltd.,	6.26	36.12	1. Functionally Not Comparable – company engaged in providing KPO services as well development of software products.
8.	Helios & Matheson Information Technology Ltd.,	178.63	36.63	1. Functionally Not Comparable – is earning revenue from software sales and services. 2. Rejected as a comparable by the assessee in its TP study for AY. 2006-07 on functional comparability.
10.	Infosys Technologies Ltd.,	13,149	40.30	1. Company earning significant amount of brand profits. 2. Owns significant intangibles – had 44 global development centres of which 20 were located outside India. Also filed 38 patents and generated over 80 inventional disclosures during FY. 2006-07. 3. Company not comparable based on turnover criterion.
11.	Ishir Infotech Ltd.,	7.42	30.12	Fails employee cost filter – only

				3.96% of the operating revenue of the company (schedule 15 on page 13 of the Annual Report and page 7 of the Annual Report for operating revenue) – Ishir is engaged in trading of services.
12.	KALS Information Systems Ltd.,	2.00	30.55	1. Functionally not comparable. -operates in two segments, namely (i) development of software and software products (ii) training services -The company is a product company – LV VISION & virtual insure -company has IP
14.	Lucid Software Ltd.,	1.70	19.37	1. Functionally not comparable – Engaged in software product development. Company has proprietary software product by the name Muulam. 2. Product development expenses constitutes 27.66% of the total operating revenue. Refer Balance Sheet (page 10 of the Annual Report) and P&L (page 19 of the Annual Report) of Annual Report & refer Schedule M point 1.4.1 of notes to accounts of Annual Report on page 22)
16.	Megasoft Ltd.,	139.33	60.23	1. Functionally Not Comparable – company has two segments – BLUEALLY and XIUS-BCGI. Under the XIUS-BCGI company carried out product development. Software development is carried out under BLUEAPPLY division. 2. the product segment has employee cost of 27.65% whereas software services segment has employee cost of 50%. Similarly profit margin on cost in product segment is 117.95% and in case of software services segment is 23.11%. Hence both the segments are substantially different.
18.	Persistent Systems Ltd.,	293.75	24.52	1. Functionally not comparable – the company is engaged in product development. Segmental information is not available. Application of Turnover Filter.
24.	Tata Elxsi Ltd.,	262.58	26.51	1. Functionally not comparable – The company is engaged in development of niche products. 2. Application of Turnover Filter of INR 200 Crores.
25.	Thirdware Solution Ltd.,	36.08	25.12	Functionally Not Comparable – company is engaged in trading in software products derives revenue from sale of licenses (refer to

				page no. 21 and 26 of the annual report).
26.	Wipro Ltd.,	9,616.0 9	33.65	<p>1. Functionally not comparable – Engaged in various activities including mini computers, ITeS, toilet soaps, lighting products and others. Software development revenue less than 75% of total revenue failing TPO's filter.</p> <p>2. Incurs R&D expenditure amounting to 8.50%.</p> <p>3. Owns significant intangibles – 4.1% of revenue generated by selling intellectual property products. Company filed 13 patents during FY 2006-07 with additional 11 patents in pipeline.</p> <p>4. Company not comparable on turnover criterion.</p>

It was admitted that these objections were considered in the Co-ordinate Bench decision in the case of Broadcom India Research Private Limited in IT(TP)A No. 1180/Bang/2011. Further, in the case of NXP Semiconductors India P. Ltd., Vs. ACIT in IT(TP)A No. 1174/Bang/2011 also examined the above comparables. Similarly in the case of Capgemini India P. Ltd., Vs. ACIT [46 SOT 195] (Mum) has also examined these comparables. In all these decision of the Co-ordinate Benches, the objections as stated in the above column were examined in detail and the above said companies were held to be not comparable to the functionality of the said assessee's company. Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables.

4.3. The assessee is also objecting to the comparables of Flextronics Software Systems Ltd., at Sr. No. 6, iGate Global Solutions Limited at Sr. No. 9, Mindtree Limited at Sr. No. 17, Sasken Communication Technologies Limited at Sr. No. 22 on a single argument of application of turnover filter. Admittedly, Co-ordinate Benches have been following and accepting turnover filter in some cases in the range of Rs. 1 Crore to 200 Crores, and in the above said Co-ordinate Bench decisions stated supra, these companies were excluded on turnover filter. However, assessee's turnover in the software development sector is itself was about 50.20 Crores. Consequently, in our view, the 200 Crores upper filter cannot be accepted to eliminate the companies only on turnover filter. As seen from Flextronics, the turnover is 848 Crores and iGate Solutions is about 747 Crores, Mindtree is about 590 Crores, Sasken Technologies is about 343 Crores. Considering the assessee's receipts, we are of the opinion that only Flextronics Software Solutions at Sr. No. 6 and iGate Global Solutions at Sr. No. 9 can be excluded, as these are exceeding the upper turnover filter of ten times the assessee's turnover. Mindtree is little marginally over the upper filter but considering the small margin, we are of the opinion that this comparable can be included in the list of comparables, as the company fulfils all other filters. Sasken Technologies is however, within the range and also fulfils the other comparability filters. In view of this, we direct the AO/TPO to exclude only the two companies i.e., Flextronics and iGate

Solutions from the list of comparables. The ground on this is partly allowed.

5. TPO is directed to rework out the Arithmetic Mean of the selected comparables and make the adjustment if any, after considering the proviso to Section 92C(2) of the I.T.Act. With these directions, the grounds and additional grounds raised by the assessee in this segment are considered partly allowed.

TP Analysis in ITeS Segment:

6. In this segment, final list of comparables are as under:

Sl. No. as per TP order	Name of the company	Turnover (INR Crores)	TPO margins (%) (Pre WC adj)
1.	Accentia Technologies Limited – Seg.	16.57	30.61
2.	Aditya Birla Minacs Worldwide Ltd., (earlier known as Transworks Information Services Ltd)	197.06	11.98
3.	Allsee Technologies Ltd.,	113.28	27.31
4.	Apex Knowledge Solutions Ltd.,	6.64	12.83
5.	Apollo Healthstreet Ltd.,	47.84	-13.55
6.	Asit C Mehta Financial Services Ltd.,	6.09	24.21
7.	Bodhtree Consulting Ltd.,	2.94	29.58
8.	Caliber Business Solutions Ltd.,	39.30	21.26
9.	Cosmic Global Ltd.,	4.28	12.40
10.	Datamatics Financial Services Ltd –Seg	2.92	5.07
11.	Eclerx Services Ltd.,	86.12	89.33
12.	Flextronics Software Systems Limited	12.93	8.62
13.	Genesys International Corporation	19.17	13.35
14.	HCL Comnet Systems & Services Ltd – Seg	260.18	44.99
15.	ICRA Techno Analytics Ltd.,	7.23	12.24
16.	Informed Technologies Ltd.,	4.08	35.56
17.	Infosys BPO Ltd.,	649.56	28.78
18.	I-Services India Pvt. Ltd.,	16.29	49.47
19.	Maple Esolutions Ltd.,	12.21	34.05

20.	Mold-Tek Technologies Ltd., - Seg	11.14	113.49
21.	R Systems International Ltd.,	17.34	20.18
22.	Spanco Ltd., - Seg	35	25.81
23.	Triton Corp. Ltd.,	53.37	34.93
24.	Vishal Information Technologies Ltd.,	30.6	51.19
25.	Wipro Limited – Seg	939.78	29.70
26.	Nittany Outsourcing Services Pvt Ltd.,	23.23	11.50
27.	Accurate Data Convertors Ltd.,	4.33	50.68

6.1. Out of this, assessee is accepting the comparables at Sr. No. 2, 4, 8, 9, 10, 12, 13, 15, 21 & 26

Sl. No. as per TP order	Name of the company	Turnover (INR Crores)	NCP computed by TPO (%)
2.	Aditya Birla Minacs Worldwide Ltd., (earlier known as Transworks Information Services Ltd)	197.06	11.98
4.	Apex Knowledge Solutions Ltd.,	6.64	12.83
8.	Caliber Business Solutions Ltd.,	39.30	21.26
9.	Cosmic Global Ltd.,	4.28	12.40
10.	Datamatics Financial Services Ltd –Seg	2.92	5.07
12.	Flextronics Software Systems Limited	12.93	8.62
13.	Genesys International Corporation	19.17	13.35
15.	ICRA Techno Analytics Ltd.,	7.23	12.24
21.	R Systems International Ltd.,	17.34	20.18
26.	Nittany Outsourcing Services Pvt Ltd.,	23.23	11.50

6.2. Assessee is objecting to the balance of the comparables and objections of each of the comparables are as under:

Sl. No. as per TP order	Name of the company	Turnover (INR Crores)	TPO margins (%) (Pre WC adj)	Summary of Applicant's Objections
1.	Accentia Technologies Limited – Seg.	16.57	30.61	1. Extraordinary Events during the year – Amalgamation of subsidiaries resulting in growth of revenues by 100683% (refer pg 48 of the Annual Report FY 06-07) – Amalgamated the company Iridium Technologies which is a software product company. 2. Functionally not comparable –

				<p>The activity of Medical transcription (considered by the TPO), Billing and coding and software development and implementation is not comparable to the services proved by the Appellant.</p> <p>3. The business promotion expenses constitute 28.34% of the total operating revenue earned by the company.</p>
6.	Asit C Mehta Financial Services Ltd.,	6.09	24.21	<p>1. Fails the RPT > 15% filter = 15.76% of sales</p> <p>2. Employees cost filter inconsistently applied – The TPO applied the filter of employee cost to operating revenue less than 25% for the IT segment but the same filter was not applied for the IT enabled services segment.</p> <p>3. Low employee cost = 24.79% of sales.</p> <p>4. Outsourcing of functions – 18.44% of total operating revenue.</p> <p>5. Functionally not comparable – engaged in portfolio management services and investment activities which is not comparable to the functions performed by the Appellant.</p> <p>6. Incurs marketing expenses – 5.34%.</p>
7.	Bodhtree Consulting Ltd.,	2.94	29.58	<p>1. Functionally not comparable – provides open and end to end web solutions, software consultancy, design and development of solutions which cannot be compared to a BPO company (refer Management Discussion Analysis on 133(6) and considered the data cleansing segment to be in the nature of IT enabled services. The company provides data cleansing services to those companies for which they have developed the software (as per reply u/s. 133(6)). Thus, the two segments are inextricably linked to each other since data cleansing also includes an element of software development in the upgradation process. Further the TPO had selected this company as comparable for the IT Segment in the Appellant's own case for AY. 2006-07. However for AY. 2007-08, the TPO rejected this company for the IT segment citing peculiar economic circumstances (appropriate adjustments cannot be made for</p>

				<p>the expenses transferred by Bodhtree to other companies which related to the entity as a whole and which resulted in the improved profitability for the company including the ITes Segment) (Pg 1162-1163 of PB 5). Thus, the TPO ought to have rejected Bodhtree as a comparable for AY. 2007-08 for the ITes segment as well.</p> <p>2. Peculiar circumstances – The company hived off certain business expenses without hiving off the revenue stream. The revenue of the company grew by 96.22% and the profitability of the company improved by 78.88% in AY. 2007-08 vis-à-vis AY. 2006-07.</p> <p>3. Segmental details not available in the Annual Report.</p> <p>4. Segmental Information Obtained u/s. 133(6) contrary to the Annual Report.</p> <p>5. Unique Intangibles (incurred trade mark expenses).</p> <p>6. The entity has fluctuating margins.</p>
11.	Eclerx Services Ltd.,	86.12	89.33	<p>1. Functionally not comparable – provides industry specialized services like Data Analytics, Operations Management and Audits & Reconciliation services which cannot be compared to a BPO or an IT offshoring company.</p> <p>2. Launched and IPO in Dec 2007 – Reported high profits for 3 years on account of booking building for its upcoming IPO in December 2007.</p> <p>3. Abnormal profits.</p> <p>4. Directors involved in legal and regulatory proceedings.</p> <p>5. Business promotion Expenses – 9.72% of sales.</p>
14.	HCL Comnet Systems & Services Ltd – Seg	260.18	44.99	<p>1. Fails the RPT > 15% filter = 21.52% of sales.</p> <p>2. Functionally not comparable – product and services in the area of connectivity services, security services and IT infrastructure management services.</p> <p>3. Different accounting year – June year ending.</p> <p>4. Enjoys unique position in the market – The company enjoys a leading position in the BPO segment on account of its brand and unique intangibles.</p> <p>5. Fails upper turnover filter –</p>

				260.19 Crores.
16.	Informed Technologies Ltd.,	4.08	35.56	<p>1. Employee cost filter inconsistently applied – The TPO applied the filter of employee cost to operating revenue less than 25% for the IT segment but the same filter was not applicable for the IT enabled services segment.</p> <p>2. Low employee cost = 21.77% of sales.</p> <p>3. Fails RPT>15% filter – 15.93% of sales.</p> <p>4. Functionally not comparable – The company is engaged in collecting and analyzing the data on financial fundamentals, corporate governance, director-executive compensation and capital market.</p> <p>5. The company earns fluctuating returns – FY 2006-2007 has been unique since it has made a margin of more than 35% in this year as compared to losses incurred in the previous years and marginal profit in the next year. (-44.51% in FY 2005-06 & 3.63% in FY. 2007-08).</p> <p>6. Abnormal Growth – 171% growth in sales over previous year.</p> <p>7. Business Promotion Expenses – 14.95% of sales.</p>
17.	Infosys BPO Ltd.,	649.56	28.78	<p>1. Market Leader – Infosys is a giant company with different risk profits and nature of services, has brand value and owns IPs.</p> <p>2. Significant brand – related profits (refer Schedule 12 – Selling & Marketing Expenses) to the P&L A/c for the FY. 2006-07.</p> <p>3. Significant benefits on account of intangibles.</p> <p>4. Incurs significant Marketing Expenses – 6.39% of sales.</p> <p>5. Fails upper turnover filter – 649.56 Crores.</p>
19.	Maple Esolutions Ltd.,	12.21	34.05	<p>1. Unreliable financials – The business reputation of Rastogi group, owning Maple E Solutions and Triton Corporation was under serious indictment. In view of a question mark on the reputation of the owner for earlier years, it would be unsafe to take their results for comparison of the profitability of the Appellant.</p> <p>2. Functionally not comparable – Voice – Outbound, Voice – Inbound, Data</p> <p>3. Peculiar economic circumstances – Merger with</p>

				Triton 4. Extraordinary growth – more than 64% growth in sales over previous year.
20.	Mold-Tek Technologies Ltd., - Seg	11.14	113.49	<p>1. Employee cost filter inconsistently applied – The TPO applied the filter of employee cost to operating revenue less than 25% for the IT Segment but the same filter was not applied for the IT enabled services segment.</p> <p>2. Low Employee cost -7.59% of sales.</p> <p>3. Functionally not comparable – provides engineering design services for construction of building by using design tools like CAD/CAM, stadd pro by employing highly skilled software engineers.</p> <p>4. Abnormal Growth – Growth of 204% in sales over previous year.</p> <p>5. Extraordinary Profits – 113.49% (The TPO had rejected Mold Tek for AY. 2006-07 in the Appellant's own case on account of having high profitability at 74.63% pg. 890 of PB 5 for AY. 2006-07), however he chose to retain the same comparable at 113.49% for AY. 2007-08).</p> <p>6. Incurs significant Marketing Expenses – 7.46% of sales.</p>
23.	Triton Corp. Ltd.,	53.37	34.93	<p>1. Unreliable financials – the business reputation of Rastogi group, owning Maple E Solutions and Triton Corporation was under serious indictment. In view of a question mark on the reputation of the owner for earlier years, it would be unsafe to take their results for comparison of the profitability of the Appellant.</p> <p>2. Functionally not comparable – Trading of IT Peripherals, providing of call centre services and support services; Absence of segmental information.</p>
24.	Vishal Information Technologies Ltd.,	30.6	51.19	<p>1. Employee cost filter inconsistently applied – The TPO applied the filter of employee cost to operating revenue less than 25% for the IT Segment but the same filter was not applied for the IT enabled services segment.</p> <p>2. Low employee cost = 2.30% of total sales.</p> <p>3. Outsourced substantial business to outside vendors – 42.88% of total operating income</p> <p>4. Functionally not comparable –</p>

				Engaged in providing solutions to the print production industry with services like e-publishing, e-book, print on demand, data and document management, data conversion, digital library management etc., 5. Abnormal profits.
25.	Wipro Limited – Seg	939.78	29.70	1. Market Leader – The company is a giant company with different risk profile and nature of services and also has brand value. 2. Extraordinary Event during the year – the company invested significantly in business acquisitions during the year (six companies and two joint ventures). 3. Owns significant intangibles – Filed over 13 patents FY. 2006-07 along with additional 11 patents in pipeline. 4. Incurs R&D expenses – 8.50% of total revenue. 5. Fails upper turnover filter - 939.78 Crs.

It was admitted that these objections were considered in the Co-ordinate Bench decision in the case of

- i. Stream International Services (P) Ltd., [53 taxmann.com 19 (Mumbai-Trib) ;
- ii. M/s. Capital IQ Information (Systems) India Pvt. Ltd., - Hyd Trib. (AY. 2007-08) (ITA No. 1961/Hyd/2011);
- iii. Avineon India (P) Ltd., Vs. DCIT – Hyd Trib (AY. 2007-08) (ITA No. 1989/Hyd/2011);
- iv. Zavata India (P) Ltd., Vs. DCIT – Hyd Trib (AY. 2007-08) (ITA No. 1781/Hyd/2011);

In all these decision of the Co-ordinate Benches, the objections as stated in the above column were examined in detail and the above said companies were held to be not comparable to the functionality of the said assessee's

company. Since the facts are similar and assessee's business is also similar and TPO has selected the same comparables, we are of the opinion that the said comparables listed above cannot be considered as suitable for inclusion in the list for TP analysis. AO/TPO is directed to exclude the above comparables.

6.3. The assessee is also objecting to the following comparables of

Allsec Technologies Ltd (Sr. No. 3):

Assessee has objected to the above comparable on the reason that it incurs marketing expenses, developed in-house software and sales and returns are fluctuating over a period of five to six years. It relied on the cases pertaining to AY. 2006-07 for exclusion of the same. However, after examining the TPO's report and the data available on record, we are of the opinion that assessee has not made out a case to exclude the above comparable. Hence, this comparable is directed to be retained.

Apollo Healthstreet Ltd (Sr. No. 5):

Assessee objects to the above comparable on the reason of RPT filter. Even though RPT filter at 15% is accepted in some of the cases by the Co-ordinate Benches, the RPT filter can be considered upto 25% depending on the facts of the case. As worked out by assessee, RPT filter is only 17.7%. How it is worked out is not available. Since TPO has given valid reasons to include the above comparable, we are of the opinion that

the same cannot be excluded. Moreover, as seen from the other orders also, no other assessee has objected to inclusion of the above company may be on the reason that its margin is a negative margin. Be that as it may, we are of the opinion that there is no need to exclude that comparable from the list of comparables selected by the TPO.

I-Services India Pvt. Ltd (Sr. No. 18):

Assessee objects to the above comparable on the reason that there were abnormal profits. As seen from the report of the TPO and objection of assessee, we are not convinced with the argument that the company may be excluded only on the basis of abnormal profits. As seen from the TPO's margin also it is not abnormal and therefore, we are of the opinion that there are no reasons to exclude the above comparable.

Spanco Ltd (Sr. No. 22):

The objections of assessee is about functionality of the above comparable. It fails employee cost filter, adopted by the TPO in IT segment but not in ITeS segment. It was submitted that employee cost of 7.20% of sales which indicate outsourcing of services. Moreover, the companies involved in telecom business, BPO services. It was submitted that principle of employee cost filter was upheld in Co-ordinate Bench decision in the case of First Advantage Offshore Services P. Ltd., Vs. DCIT in ITA No. 1086/Bang/2011. Considering that assessee is also having BPO services

and employee cost is very less when compared to similar businesses. We are of the opinion that this comparable can be excluded from the list of comparables.

Accurate Data Convertors Ltd (Sr. No. 27):

This comparable was objected to on the basis of employee cost filter as well as being in software development services. Considering the turnover of only Rs. 4.33 Crores, as compared to assessee's turnover of Rs. 161 Crores, we are of the opinion that this comparable is at the lower end of the turnover filter of ten times to assessee's turnover. In addition that considering the low employee's cost, we are of the opinion that this comparable can be excluded.

7. TPO is directed to rework out the Arithmetic Mean of the selected comparables and make the adjustment if any, after considering the proviso to Section 92C(2) of the I.T. Act. With these directions, the grounds and additional grounds raised by the assessee in this segment are considered partly allowed.

Corporate Tax:

8. Assessee is objecting to computation done by the AO u/s. 10A by excluding expenditure of travel expenses, telecommunication expenses from the definition of export turnover. There is no evidence on record that

travel expenses pertain to rendering of services. Travel expenses cannot be included in freight. Therefore, we are of the opinion that travel expenses incurred in foreign exchange alone cannot be disallowed from the export turnover. Therefore, we direct the AO to exclude this amount. Coming to the issue of telecommunication expenses, nothing was brought on record that the same was not incurred in connection with export of software or rendering of services. This expenditure can be attributable to the telecommunication expenses which the provisions require exclusion from export turnover. However, since the amount of Rs. 1,38,70,965/- was considered as 'telecommunication expenses', which are reduced from export turnover, we direct the AO/TPO to exclude the same from also the total turnover while computing the deduction u/s. 10A of the Act. The jurisdictional High Court in the case of CIT Vs. Tata Elxsi Ltd., [342 ITR 98] has held that whatever is excluded from export turnover should also be excluded from the total turnover. Consequently, AO is directed to exclude the same from total turnover as well. With this, Ground No. 7 is considered allowed.

9. Ground Nos. 8 & 9 pertain to levy of interest u/s. 234B & 234D of the Act: These are consequential in nature. However, AO is directed to give the working to assessee if any interests are being levied or charged while giving effect to this order. Assessee should be given an opportunity to

make its objections if any. With these directions, the grounds are considered partly allowed.

10. In the result, appeal is partly allowed.

Pronounced in the open court on this 18th day of March, 2016

Sd/-

(NARENDRA KUMAR CHOUDHURY)
Judicial Member

Sd/-

(B. RAMAKOTAIAH)
Accountant Member

Bangalore,
Dated, the 18th March, 2016.

TNMM

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.