

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, BANGALORE**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.1222/Bang/2013
(Assessment year: 2008-09)

Deputy Commissioner of Income-tax,
Circle 12(2),
Bangalore.

... Appellant

Vs.

M/s.Novo Nordisk India Pvt. Ltd.
Plot No.32, 47-50, EPIP Area,
Whitefield,
Bangalore-560066.
PA No.AAACN 7425 M

... Respondent

And

Cross Objn.No.165/Bang/2015
(In IT(TP)A No.1222/Bang/2013)
(Assessment year: 2008-09)
(By assessee)

Revenue by : Shri S.R.Kuruppusamy, JCIT(DR)
Respondent by : Shri Nageshwar Rao, Advocate.

Date of hearing : 30/05/2016
Date of pronouncement : 30/06/2016

O R D E R

Per INTURI RAMA RAO, AM :

The appeal filed by the revenue and the cross objections by the assessee are directed against the order of the CIT(A)-IV, Bangalore, dated 03/05/2013 for the assessment year 2008-09.

2. The revenue raised the following grounds of appeal:
 1. *“The order of the learned CIT(A) is opposed to law and facts of the case.*
 2. *On the facts and in the circumstances of the case the learned CIT(A) erred in holding that the size and turnover of the company are deciding factors for treating a company as a comparable, and accordingly erred in excluding M/s Aditya Birla Minacs Worldwide Ltd., M/s Coral Hubs Ltd., M/s Eclerx Services Ltd., M/s Infosys BPO Ltd., M/s Jindal Intellicom Pvt. Ltd., M/s Mold-tek Technologies Pvt. Ltd.. M/s Wipro Ltd. (seg) and M/s Allsec Technologies Pvt. Ltd. in ITES segment as comparables.*
 3. *On the facts and in the circumstances of the case the learned CIT(A) has erred in rejecting the diminishing revenue filter used by the TPO to exclude companies that do not reflect the normal industry trend.*
 4. *On the facts and in the circumstances of the case the learned CIT(A) failed to appreciate that the different year ending, filter applied by the TPO is necessary to exclude companies which do not have the same or comparable financial cycle as the tested party.*
 5. *On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s Accentia Technologies Ltd_ cannot be taken as comparable and rejecting the TPO's finding that there is no evidence on record to prove that events in the company had any bearing on the margins earned by the company.*
 6. *On the facts and in the circumstances of the case the learned CIT(A) has erred in holding that M/s Genesys International Corporation Ltd. beim', functionally different, cannot be taken as comparable even though he has held that the services are in the nature of ITES Services and it is not necessary for the TPO to go into the horizontal & vertical segments of the same sub segment, therefore no comparable can be eliminated on the basis of functional differences.*

7. *On the facts and in the circumstances of the case, the learned CIT(A) has erred in rejecting M/s Genesys International Corporation Ltd. as comparable without identifying any extraordinary variable which would distinguish this company from the assessee in terms of functions performed , assets used and risk undertaken i.e. quantitative and qualitative analysis.*
 8. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*
 9. *The appellant craves leave to add, alter, amend and/or delete any of the grounds mentioned above.”*
3. The assessee-company raised the following cross-objections:

“On the facts and circumstances of the case and in law:

The learned CIT(A) has erred, in law and in facts, by not accepting the Respondent's plea in entirety and confirming with the Learned Assessing Officer ("AO)/ Transfer Pricing Officer ("TPO") on not accepting the economic analysis undertaken by the Respondent! Assessee in accordance with the provisions of the Act read with the Income Tax Rules, 1962 and conducting a fresh economic analysis for the determination of the arm's length price in connection with the impugned international transaction and holding that the Respondent's international transaction is not at arm's length.

2. *The learned CIT(A) has erred, in law and in facts, in not accepting the Respondent's plea and confirming with the Learned AO/TPO by determining the arm's length margin/ price using financial year 2007-08 data only which was not available to the Respondent at the time of complying with the transfer pricing documentation requirements and ignoring the prior two years data also in the analysis.*

Page 4 of 22

3. *The learned CIT(A) has erred, in law and in facts, by not accepting Respondent's plea and upholding the exercise of powers u/s 133(6) of the Act by the learned AO/TPO to obtain information and relying on the same for comparability analysis.*
4. *The learned CIT(A) has erred, in law and facts by accepting certain comparables considered by the AO/ TPO in the comparability analysis using unreasonable comparability criteria.*
5. *The learned CIT(A) has erred, in law and facts, by not making suitable adjustments to account for differences in the risk profile of the Respondent vis-à-vis the comparables.*
6. *The learned CIT(A) has erred, in law and facts by computing the arm's length price without giving benefit of +/- 5 percent under the proviso to section 92C of the Act.*
7. *The learned CIT(A) has erred, in law and facts in confirming interest of Rs. 226,506 computed by the AO u/s 234D of the Act and in not directing re-computation of such interest, which is consequential in nature.”*

4. Briefly, facts of the case are that the assessee is a company duly incorporated under the provisions of the Companies Act, 1956. The assessee-company is a wholly owned subsidiary of M/s.Novo Investments Pte.Ltd., Singapore, which, in turn, is a wholly owned subsidiary of M/s.Novo Nordisk A/S, Denmark. The assessee-company is engaged in (a) providing the services of distribution of insulin and other diabetic therapy products of its group companies (M/s.Novo Nordisk A/S, Denmark and M/s.Novo Nordisk Healthcare AG, Switzerland) through its supply chain of

distributors, wholesalers, stockists, carrying and forwarding agents and retailers, (b) provision of management, administrative and advisory functions including marketing and customer support services to its Regional Far East office and co-ordination of clinical trial activities of its parent company, Novo Nordisk A/S, and (c) provision as a contract service provider of IT enabled services (ITeS) in the nature of accounts payable and other financial back-office services such as registration of invoices, VAT coding, posting of invoices, creation of vendor master data and patent search.

5. Return of income for the assessment year 2008-09 was filed on 29/09/2008 declaring a total income of Rs.12,32,82,897/- .The assessee-company also reported the following international transactions with its Associated Enterprises (AE):

International Transaction	Type	Amount (Rs.)	TP adjustment (Rs.)
Subvention Fees	Receipt	73,11,00,000	Nil
Administrative Services	Receipt	21,05,79,184	Nil
IT Enabled services	Receipt	7,17,05,046	56,66,602
Reimbursements of Expenses Received	Receipt	6,02,59,154	Nil
Reimbursements of Expenses Received	Receipt	1,17,90,977	Nil
Purchase of Finished Goods	Payment	169,79,30,367	Nil
Purchase of Insulin Crystals and Excipients	Payment	121,98,80,143	Nil
Software License Fees	Payment	1,39,70,636	Nil
Quality Testing Fees	Payment	1,12,53,472	Nil
Reimbursements of Expenses Paid	Payment	74,93,543	Nil

6. The assessee-company sought to justify the consideration received for the international transaction entered with its AE to be at arm's length price [ALP]. The assessee-company had also submitted transfer pricing study report adopting TNMM as the most appropriate method and cost plus method as a profit level indicator for the transferring pricing study. The assessee-company applied Transactional Net Margin Method [TNMM] which was considered to be the most appropriate method for purposes of bench marking the international transactions. The assessee-company's profit margin was computed at 1.83% in respect of trading activity and 12.97% in respect of marketing support services and 13% in respect of ITeS. The assessee-company claimed that the same was comparable with other comparables. For the purpose of transfer pricing study, the assessee-company had chosen 14 companies as comparable entities in respect of ITeS segment and arithmetic average of operating profit margins of said comparables was computed at 15%. According to the assessee-company, its PLI was within the range of + or - 5% range of the arithmetic mean of the comparable entities. Hence, it was claimed that the transactions with its AE are at arm's length.

7. The Assessing Officer (AO) referred the matter to the Transfer Pricing Officer (TPO). The TPO, by order dated 31/10/2011 passed u/s 92CA of the IT Act, 1961 computed the transfer pricing adjustment at Rs.56,66,602/- in respect of ITeS

segment. However, the TPO accepted the contention of the assessee-company that the transaction in respect of trading, marketing support services and reimbursement of expenses are at arm's length. The TPO accepted TNMM adopted by the assessee-company as well as cost + margin as a profit level indicator but rejected the transfer pricing study report. The TPO proceeded to identify a different set of comparable entities for the purpose of determining the ALP. While doing so, the Id. TPO had applied the following filters in ITeS segment:

- Use of current year data only;
- Turnover filter i.e. excluding companies having income from *ITeS less than INR 1 crore.*
- foreign exchange earnings less than 75% of total revenue in respect of ITeS segment.

Applying the above filters, the TPO had proposed the following additional comparables:

<i>Sl. No.</i>	<i>Comparable</i>
1.	Accentia Technologies
2.	Acropetal Technologies Ltd.
3.	Caliber Point Business Solutions Ltd.(Business Process Outsourcing Segment)
4.	Coral Hub Ltd.
5.	Cosmic Global Ltd.
6.	Crossdomain Solutions Pvt. Ltd.
7.	Datamatics Financial Services Ltd.(ITES Segment)
8.	Eclerx Services Ltd.
9.	Genesys International Corporation Ltd.
10.	Infosys BPO Ltd.
11	Jindal Intellicom Pvt.Ltd.
12.	Mold Tek Technologies Ltd.
13.	R Systems Internatinal Ltd.(ITES Segment)
14.	Wipro Ltd. (BPO Division)

Thus, the TPO rejected 8 of 14 comparables selected by the assessee-company and introduced 14 comparables and finally selected the following 20 comparables.

Sl.No.	Name of the company	OP/TC %
1	Accentia Technologies Ltd (Seg.)	41.77
2	Acropetal Technologies Ltd (Seg.)	35.30
3	Aditya Birla Minacs Worldwide Limited (Earlier known as Transworks Information Services Ltd.)	-4.00
4	Asit C Mehta Financial Services Ltd (Seg.)	9.42
5	Caliber Point Business Solutions Ltd	10.97
6	Coral Hubs Ltd (Earlier known as Vishal Information Technologies Ltd)	50.68
7	Cosmic Global Ltd	23.30
8	Crossdomain Solutions Ltd	27.03
9	Datamatics Financial Services Ltd (Seg.)	29.11
10	e4e Healthcare Solutions Ltd (Formerly known as Nittany Outsourcing Services Pvt ltd)	18.54
11	Eclerx Services Ltd	58.80
12	Genesys International Corporation Ltd	47.40
13	Infosys BPO Ltd	19.66
14	IServices India Pvt Ltd	10.77
15	Jindal Intellicom Pvt Ltd	-10.29
16	Mold-Tek Technologies Ltd	96.66
17	R Systems International Ltd (Seg.)	4.30
18	Spanco Ltd (Seg.) (Earlier known as Spanco Telesystems & Solutions Ltd)	8.81
19	Wipro Ltd (Seg.)	30.05
20	Allsec Technologies Limited	-13.29
	AVERAGE	24.75

The TPO computed average profit margin of the comparables in respect of ITeS services at 24.75% and after giving working capital adjustment of 2.82%, adjusted arithmetical mean of PLI was determined at 21.93%. On the above basis, the TPO computed the transfer pricing adjustment in respect of ITeS as follows:

Arm's Length Mean Margin on cost	24.75%
Less: Working Capital Adjustment (as per Annexure-C)	2.82%
Adjusted mean margin of the comparables	21.93%
Operating Cost	6,34,55,793
Arms Length Price(ALP) 121.93% of Operating Cost	7,73,71,648
Price Received	7,17,05,046
Short fall being adjustment u/s.92CA	56,66,602

The AO passed the assessment order dated 09/02/2012 passed u/s 143(3) after making addition on account of adjustment u/s 92CA of Rs.56,66,602/-.

8. Being aggrieved, an appeal was filed before the Id.CIT(A) who, vide impugned order partly allowed the appeal. It was contended before the Id.CIT(A) *inter alia*, that the TPO was not correct in rejecting the TP study undertaken by the assessee-company and also not using the multiple years data for selecting or rejecting companies as comparables. The assessee-company also contended that the TPO ought not to have disregarded the R&D expenses filter and restricting the limit to 25% of related party transactions. All these contentions were overruled by the Id.CIT(A). However, the Id.CIT(A) held that while accepting the lower limit of turnover of Rs.1 crore, the Id.CIT(A) held that upper limit of turnover should also be applied following the decision of the Hon'ble ITAT in the case of *Genisys Integrating Systems (India) P Ltd. vs. DCIT (2012)(53 SOT 159)(Bang)*. Applying this filter the Id.CIT(A) held that the following 8 companies are incomparable:

<i>Sl.No.</i>	<i>Comparable company</i>
1	Aditya Birla Minacs Worldwild Ltd.
2	Coral Hubs Ltd.
3	Eclerx Services Ltd.
4	Infosys BPO Ltd.
5	Jindal Intellicom Pvt. Ltd.
6	Mold-Tek Technologies Ltd.
7	Wipro Ltd.(segment)
8	Allsec Technologies Ltd.

8.1 On the comparables selected by the TPO, the Id.CIT(A) held that the company M/s.Accentia Technologies Ltd., is incomparable as the extraordinary events like acquisition of new companies and merger taken place during the year under consideration. The company M/s.Genesys International Corporation Ltd., was held to be incomparable on account of functional dissimilarity, and abnormal growth in the revenue of the company. As regards M/s.Acropetal Technologies Ltd, M/s.Caliber Point Business Solutions Ltd., M/s.Cosmic Global Ltd., M/s.Crossdomain Solutions Pvt. Ltd. M/s.Datamatics Finaicial Services Ltd., and M/s.R Systems International Ltd., inclusion of these companies by the TPO in the list of comparables was upheld.

8.2 The Id.CIT(A) also denied the benefit of deduction under the proviso to sec.92C on the ground that the proviso to section 92C came into operation only from the assessment year 2009-10.

9. Being aggrieved by that part of the order of the Id.CIT(A), the revenue is in appeal and the assessee is also in cross objections aggrieved by that part of the order of the Id.CIT(A)

10. We shall first take up the revenue appeal. Before us, learned Departmental Representative argued that the Id.CIT(A) ought not to have applied the turnover filter and excluded the companies M/s.Aditya Birla Minacs Worldwide Ltd., M/s.Coral Hubs Ltd., M/s.Eclerx Services Ltd., M/s Infosys BPO Ltd., M/s Jindal Intellicom Pvt. Ltd., M/s.Mold-tek Technologies Pvt. Ltd., M/s.Wipro Ltd.(seg) and M/s.Allsec Technologies Pvt. Ltd., in ITES segment as comparables. The Learned DR argued that the turnover cannot be relevant criteria in the service segment. The turnover band of Rs.1 to Rs.200 crores is bereft of any rationality as the application of this rule does not enable comparison of a company with Rs.200 crores with another company having a turnover of Rs.201 crores. Learned DR relied on the decision of the Mumbai bench of the Tribunal in the case of *Willis Processing Services (I) (P) Ltd., vs. Dy.CIT (2013) 57 SOT 339* and the decision in the case of *Societe General Global Solution Centre (P) Ltd., vs. Dy.CIT (2016)(69 taxman.com 336)(Bang.)* [to which both of us are party].

11. On the other hand, learned counsel for assessee submitted that M/s.Coral Hubs Ltd., M/s.M/s.Eclerx Services Ltd., M/s.Infosys BPO Ltd., and M/s.Wipro Ltd.(seg.) are not

comparable even on the ground of functional dissimilarity. Learned counsel for assessee has no serious objection for inclusion of other comparables deleted by the Id.CIT(A) applying turnover filter. In support of this proposition, he relied on the following decisions:

- *M/s.Symphony Marketing Solutions India Pvt. Ltd. vs. ITO* (IT(TP)A No.1316/Bang/2012 dt.14/08/2013),
- *M/s.Logica Pvt. Ltd.*
- *Rampgreen Solutions Pvt. Ltd. vs. CIT* (ITA 102/2015)(Del.HC)

12. We heard rival submissions and perused material on record. In the case of M/s.Coral Hubs Ltd., formerly known as Vishal Information Technologies Ltd., this company was considered by the co-ordinate bench of Mumbai the case of *Symphony Marketing Solutions India Pvt. Ltd. vs. ITO* (TS-49-ITAT-2013(Mum) wherein the Tribunal held that since the company has very low salary cost and outsourced most of its work and therefore, was held to be incomparable. The Tribunal also relied on the decision of the co-ordinate bench in the case of *Mearsk Global Services (I) Pvt. Ltd.* in ITA No.3774/Mum/2011 dated 9/11/2011. It is also found that this company is engaged in the high-end services. Even the Hon'ble Delhi High Court in the case of *Rampgreen Solutions Pvt. Ltd.* (supra) held that this company cannot be compared with a company engaged in rendering of ITeS services. Respectfully following the decision of

the co-ordinate benches, in the cases cited supra and also the Hon'ble Delhi High Court decision, we direct the AO/TPO to exclude this company from the list of comparables.

12.1 M/s.Eclerx Services Ltd., was held to be incomparable by on the ground of functional dissimilarity by the co-ordinate bench in the case of *Symphony Marketing Solutions India Pvt. Ltd. vs. ITO* [IT(TP)A.1316/Bang/2012 dated 14/08/2013] wherein it was held as follows:

“20.....It is the stand of the assessee that this company offers solutions that include data analytics, operations management, audits and reconciliation and therefore has to be classified as high end KPO. In support of the stand of the assessee, extracts from the annual report of this company have been pointed out. It has further been submitted that extra ordinary events and peculiar circumstances prevail in the case of the assessee in as much as this company acquired a UK based company which has significantly contributed to the increase in the customer and revenue base of the company. This Tribunal in the case of Capital IQ Information Systems India Pvt. Ltd. (supra) had an occasion to deal with comparability of this company in the case of an ITES company such as the Assessee and the Tribunal held as follows:-

“14. The assessee has objected for this company being taken as comparable mainly on the ground that it was having a supernormal profit of 89%, and as such it cannot be taken as a comparable in view of the decision of the Mumbai Bench of the tribunal in the case M/s. Teva India Ltd. (supra). That apart, relying upon the annual report of the company, the learned Authorised Representative for the assessee has contended that that the concerned company is engaged in providing Knowledge Process Outsourcing(KPO) Services.

15. *On considering the objections of the assessee in relation to this company, we accept the contention of the assessee that this company cannot be taken as a comparable both for the reasons that it was having supernormal profit and it is engaged in providing KPO services, which is distinct from the nature of services provided by the assessee.”*

21. *We are of the view that in the light of the decision of the Hyderabad Bench referred to above, this company cannot be regarded as a comparable for the reason that it was functionally different.*

Respectfully following the decision of the co-ordinate benches, in the cases cited supra and also the Hon'ble Delhi High Court decision, we direct the AO/TPO to exclude this company from the list of comparables.

12.2 M/s.Infosys BPO Ltd., was held to be incomparable by on the ground of functional dissimilarity by the co-ordinate bench in the case of *Symphony Marketing Solutions India Pvt. Ltd. vs. ITO* [IT(TP)A.1316/Bang/2012 dated 14/08/2013] wherein it was held as follows:

24. . . .As far as this company is concerned, it is the submission of the Id. counsel for the assessee that this company has a brand value and therefore there would be significant influence in the pricing policy which will impact the margins. Schedule 13 to the profit & loss account of this company for the F.Y. 2007-08 shows that this company incurred huge selling and marketing expenses. Page 133 of the annual report of this company for the F.Y. 2007-08 shows that this company realizing its brand value has chosen to value the same on the basis of its earnings and that of Infosys. The brand value of the Assessee and Infosys has been valued at Rs.31,863 Crores. Infosys BPO, being a subsidiary of Infosys, has an element of brand value associated with it. This is also clear from the presence of brand related expenses incurred by this

Page 15 of 22

company. Presence of a brand commands premium price and the customers would be willing to pay, for the services/products of the company. Infosys BPO is an established player who is not only a market leader but also a company employing sheer breadth in terms of economies of scale and diversity and geographical dispersion of customers. The presence of the aforesaid factors will take this company out of the list of comparables. We therefore accept the contention of the assessee that this company cannot be regarded as a comparable. +

Respectfully following the decision of the co-ordinate benches, in the cases cited supra we direct the AO/TPO to exclude this company from the list of comparables.

12.3 M/s.Wipro Ltd., was held to be incomparable by on the ground of functional dissimilarity by the co-ordinate bench in the case of *Symphony Marketing Solutions India Pvt. Ltd. vs. ITO* [IT(TP)A.1316/Bang/2012 dated 14/08/2013] wherein it was held as follows:

26.As far as this company is concerned, the discussion made while deciding Infosys BPO Ltd. as a comparable will equally apply to this company also. This company owns substantial intellectual property on software products. This company cannot therefore be regarded as a comparable. For the reasons given while disregarding Infosys BPO Ltd. as a comparable, this company is also directed to be excluded from the list of comparables.

Respectfully following the decision of the co-ordinate benches, in the cases cited supra we direct the AO/TPO to exclude this company from the list of comparables.

13. The grounds No.3 and 4 raised by the revenue are not pressed by the revenue.

14. Ground No.5 deals with deletion of the company M/s.Accentia Technologies Ltd. The Id.CIT(A) has deleted this company on the ground that the extraordinary events like acquisitions and amalgamations had taken place during the year under consideration. The co-ordinate bench in the case of in the case of *Symphony Marketing Solutions India Pvt. Ltd.* (supra) had considered this company and held as follows:

%Accentia Technologies Ltd.

10.The Id. counsel for the assessee drew our attention to the fact that there are extra ordinary events that occurred during the previous year in this company. Our attention was draw to the annual report of this company for the A.Y. 2007-08 wherein the fact that this company had acquired Thunga Software Pvt. Ltd., GSR Physicians Billing Services Inc., GSR Systems Inc. and Denmed Inc. is mentioned. Our attention was also drawn to the decision of the Hyderabad ITAT Bench in the case of *Capital IQ Information Systems India Pvt. Ltd. v. DCIT [2013] 32 Taxman.com 21 (Hyd. Trib)*. In the aforesaid decision, the Hyderabad Bench of the Tribunal had to deal with a case of determination of ALP in the case of an assessee who was providing ITES business support services for the A.Y. 2007-08. The TPO had considered Accentia Technologies Ltd. as a comparable. The DRP however held that the said company cannot be compared as a comparable owing to extra ordinary events that took place during the previous year. The Tribunal upheld the order of the DRP observing as follows:-

“I. Accentia Technologies Ltd.

10. It is the submission of the assessee that this company cannot be treated as a comparable because of uncomparable financial results arising out of

Page 17 of 22

amalgamation in the company. In this regard, the assessee has relied upon the order of the DRP for the assessment year 2008-09 in assessee's own case. It is seen that the DRP while considering similar objection placed by the assessee in the case of another company, viz. Mold Tek Technologies Ltd., in the proceedings relating to the assessment year 2008-09, has observed in the following manner-

"17.5. In addition to the above, the Director's Report of the company for the FY 2007-08 revealed the merger and the demerger. A company known as Techmen Tools Pvt. Ltd. had amalgamated with Mold-tek Technologies Ltd. with effect from 1st October, 2006. There was a de-merger of Plastic Division of the company and the resulting company is known as Moldtek Plastics Limited. The de-merger from the Moldtek Technologies took place with effect from 1st April, 2007. The merger and the de-merger needed the approval of the Hon'ble High Court of Andhra Pradesh and also the approval of the shareholders. The shareholders of the company gave approval for the merger and the de-merger on 25.01.2008 and the Hon'ble High Court of Andhra Pradesh had approved the merger and de-merger on 25th July, 2008. Subsequently, the accounts of Moldtek Technologies for FY 2007-08 were revised. On a perusal of the annual report it is noticed that Teckmen Tools Pvt. Ltd. and the Plastic Division of the company were demerged and the resulting company was named as Moldtek Plastics Ltd. The KPO business remained with the company. A perusal of the Annual report revealed that to give effect to the merger and demerger, the financial statements were revised and restated after six months from the end of the financial year 31.3. 2008. The assessee filed Form No.21 under the Companies Act with the Registrar of Companies on 26th August, 2008. Thus the effective date of the scheme of merger and demerger was 26th August, 2008. The Annual Report supported the argument of the

assessee that there were merger and demerger in the financial year and it was an exceptional year of performance as financial statements were revised by this company much after the closure of the previous year. The Panel agrees with the contention of the assessee that it is an exceptional year having significant impact on the profitability arising out of merger and demerger."

11. On careful consideration of the matter, we also agree with the aforesaid view of the DRP that extraordinary event like merger and de-merger will have an effect on the profitability of the company in the financial year in which such event takes place. It is the contention of the assessee that in case of the aforesaid company, there is amalgamation in December, 2006, which has impacted the financial result. This fact has to be verified by the TPO. If it is found upon such verification that the amalgamation in fact has taken place, then the aforesaid comparable has to be excluded.ö

Respectfully following the decision of the co-ordinate bench in the case supra, we uphold the action of the Id.CIT(A) in excluding this company from the list of comparables. Hence, the ground of appeal raised by the revenue is dismissed.

15. Grounds No.6 and 7 challenge the decision of the Id.CIT(A) in deleting the company M/s.Genesys International Corporation Ltd. as a comparable The co-ordinate bench in the case of in the case of *Symphony Marketing Solutions India Pvt. Ltd.* (supra) had considered this company and held as follows:

%Genesys International Corporation Ltd.

22.This company is listed at Sl. No.12 in the list of comparable companies chosen by the TPO. As far as this company is concerned, the stand of the assessee has

Page 19 of 22

been that this company is functionally not comparable and that it has a different employee skill set and that this company performs R&D services and also owns intangibles. This company is a geospatial services content provider specialising in land based technologies. From the notes to accounts of this company, it is seen that this company is engaged in providing geographical information services comprising of photogrammetry, remote sensing cartography, data conversion related computed based services and other related services. Further the business of this company requires skilled manpower and scientists, civil engineers, etc. The assessee is a routine ITES provider who does not require such highly skilled employees. Besides the above, this company also carries out R&D services and own intangibles. The aforesaid facts, in our view, will take this company out of the list of comparables. We may also point out that the objection of the assessee in this regard has been disregarded by the TPO by mere observation that it cannot be rejected on the basis that it is into different functional line within ITES. In this regard, we may refer to the decision of the ITAT Bangalore Bench in the case of *First Advantage Offshore Services Ltd. (supra)*, wherein it was observed as under:-

õ39. Having heard both the parties and having considered their rival contentions, we find that the assessee had raised elaborate objections to each of the comparables in group 3 before the TPO. The TPO has also reproduced the said objection in his order para 6.5.1. of page 178 of his order. He has rejected the contention of the assessee by holding that every function within BPO sector can be from low end to high end and the activities of the assessee such as accounting, web management, network management are BPO services using technology but these services are not categorized as KPO. He held that a call centre may offer support services like telemarketing to high end services like technical support services, where not only the level of knowledge, skill required would be high, but the technical knowledge as well would be high. According to him, back office transaction process services may be as remarkable and as complicated as insurance/market transaction processing services. He, therefore, rejected the

contention of the assessee and treated the BPO as equivalent to KPO services.

40. We have to now consider whether a BPO and KPO are functionally similar and are comparable to each other. BPO is a sub-set of outsourcing and involves the contracting of the operations and responsibilities of specific business functions or process to a third party services provider. Often business processes outsourcing are information technology based and referred to as ITES-BPO. KPO is one of the sub-segment of the BPO industry. It involves outsourcing of core information related business activities which are competitively important or form an integral part of a company's value chain. It thus requires advanced analytical and technical skills as well as a high degree of specialist expertise. The KPO services include all kinds of research and information gathering. Thus it can be seen that even though both BPO and KPO are offering information Technology based services, the skill and expertise and may be even the tools required are different which may result in different economic results of both the segments. Thus, in such circumstances, we are of the opinion that they cannot be compared with each other and have to be excluded from the list of comparables.

23. It is thus clear from the aforesaid decision of the Tribunal that among the ITES companies there is a hierarchy in terms of skill required to provide services. It ranges from providing routine services where no skills and required and providing services where highly professionalized skills are required. Depending on the skills required to perform ITES the comparability has to be done. In view of the above, we are of the view that this company cannot be regarded as a comparable and deserves to be excluded from the list of comparables.+

Respectfully following the decision of the co-ordinate bench in the case supra, we uphold the action of the Id.CIT(A) in excluding this

company from the list of comparables. Hence, the grounds of appeal raised by the revenue are dismissed.

16. Ground No.8 is general in nature and does not require adjudication.

17. In the result, the revenue appeal is partly allowed.

18. Now let us take up the cross objections by the assessee-company. In the cross objections filed, the only objection pressed by the learned counsel for assessee is that the Id.CIT(A) ought to have granted the deduction of +/- 5% under proviso to Sec.92C of the Act. An Explanation was added to section 92C(2) with retrospective effect from 1/10/2009. This Explanation was considered by the Special Bench of Tribunal in the case of *High IT Services (India) Pvt. Ltd. vs. ITO* (33 taxmann.com 1 (Del.Trib.) wherein it was held that the benefit of 5% tolerance margin would be available only if the variation is within the tolerance margin. Once the variation exceeds the tolerance margin, then no benefit of tolerance margin would be available to the assessee. Respectfully following the decision of the Special Bench, we direct the AO/TPO to grant the benefit of tolerance limit of 5% if the variation after passing the consequential order to the Tribunal is less than 5% and accordingly, the issue is restored to the file of the AO.

19. In the result, the cross objections are partly allowed for statistical purposes

Order pronounced in the open court on 30th June, 2016

sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Place : Bangalore
D a t e d : 30/06/2016

srinivasulu, sps

Copy to :

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore