

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I', NEW DELHI)**

**BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No.481/Del/2014

(Assessment Year 2009-10)

OKS Span Tech. Pvt. Ltd., Vs. ITO, Ward 13(4),
220, Okhla Industrial Estate, New Delhi

Phase II, New Delhi-110 020

GIR / PAN :AABCO5682P

(Appellant)

(Respondent)

Appellant by :Shri Ved Jin, CA

Respondent by :Shri Amrendra Kumar, CIT DR

Date of hearing: 10.03.2016

Date of Pronouncement: 09/06/2016

ORDER

PER BEENA A. PILLAI, JM:

The present appeal of the assessee has been filed against the order of ITO, Ward 13 (4), New Delhi dated 27/11/2013 for assessment year 2009-10 on the following grounds of appeal:

“1.1 That on the facts and circumstances of the case and law on the point, the Learned Assessing Officer (Ld. A.O.)/ Transfer Pricing Officer (Ld. T.P.O.)/ Hon'ble Dispute Resolution Panel (Hon'ble DPR) has erred in making an adjustment of Rs. 6,93,66,342/- to the income of the Appellant on account of difference in Arm Length Price for transaction entered with its AEs.

1.2 That on the facts and circumstances of the case and law on the point, the Ld. Assessing Officer has erred in passing assessment order vide his order dated 27/11/2013 without giving effect of Hon'ble

DRP's directions. This makes order of the Ld. Assessing officer null and void.

1.3 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in selecting the companies as comparable company, which are functionally not comparable to Appellant Company using Transactional Net Margin Method & without understanding the business activity of the Appellant company.

1.4 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in considering foreign exchange gain as non operating item while calculating Operating Margin of Appellant Company.

1.5 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in applying turnover filter as "rejection of companies whose turnover is less than Rs. 5 Crores" instead of "rejection of companies whose turnover is less than Rs. 1 Crore".

1.6 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in selecting "Accentia Technologies Ltd." as comparable company which is engaged in different business and having high turnover. As held by Hon'ble ITAT, Delhi and confirmed by Hon'ble Delhi High Court in case of CIT Vs Agnity India Technologies Pvt. Ltd. (2013) ITA 1204/2011 dated 10th July 2013, "Companies having High Turnover cannot be considered as comparable."

1.7 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in selecting "e-Clerx Services Ltd." as comparable company which is engaged in KPO Sector, earning supernormal profits and having high Turnover. As held by Hon'ble ITAT, Delhi and confirmed by Hon'ble Delhi High Court in case of CIT Vs Agnity India Technologies Pvt. Ltd. (2013) ITA

1204/2011 dated 10th July 2013, "Companies having High Turnover cannot be considered as comparable."

1.8 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in rejecting Suntech Web Services Pvt. Ltd. as comparable company on the basis of incorrect/inappropriate reasons.

1.9 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in rejecting Allsec Technologies Ltd.", as comparable company.

1.10 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in computing Arm Length Price for transaction with AEs using total cost of the company instead of operating cost incurred in relation to transaction with AEs.

1.11 That on the facts and circumstances of the case and law on the point, the Ld. T.P.O/ Hon'ble DRP has erred in rejecting most appropriate method applied by Appellant Company.

1.12 The Appellant craves leave to add to, alter, modify, substantiate, delete and/or to rescind all or any of the grounds of objection on or before the final hearing, if necessity so arises.

For Domestic Transactions issue:

2.1 That on the facts and circumstances of the case and law on the point, the Ld. Assessing Officer has erred in making addition of Rs.3,51,102/- u/s 14A of the Income Tax Act, 1961.

2. 2 That on the facts and circumstances of the case and law on the point, the Ld. Assessing Officer has erred in making disallowance U/S 14A of the Act without giving clear finding of incurring of expenditure in relation to exempt income.

2.3 That on the facts and circumstances of the case and law on the point, the Hon'ble ORP has erred in ignoring the fact that recording of satisfaction by the Ld. Assessing Officer for rejecting appellant's claim of expenditure in relation to exempt income should have been with regard to the accounts of the appellant as required by Section 14A(2) of the Income Tax Act,1961. Therefore recording of satisfaction by Ld. Assessing Officer by simply stating that percentage method cannot be a method for disallowance is against the law and facts of the case and hence disputed.

2. 4 That on the facts and circumstances of the case and law on the point, the Ld. Assessing Officer has erred in calculating the disallowance at Rs.3,51,102/- by applying the provisions of Rule 8D of the Income Tax Rules, 1962 incorrectly.

2. 5 That on the facts and circumstances of the case and law on the point, the Ld. Assessing Officer has erred in ignoring the fact that alternative ground of appellant has been accepted by the Hon'ble DRP. Ld. Assessing Officer has not accepted the alternative plea of the appellant and has calculated the disallowance as per Rule 8D by including the unquoted investments for calculation of average value of investments on the plea that unquoted investments were made with the motive to earn dividend income.

2.6 The appellant craves leave to add to, alter, modify, substantiate delete and/or to rescind all or any of the grounds of appeal on or before the final hearing if necessity so arises.”

2. The brief facts of the case as recorded by the Ld.TPO are that the assessee company was established on 10/03/1995 as a limited company, which was converted into a private limited company on 21st December 2000.

The assessee is engaged in the business of providing low end data processing and retail marketing services to overseas affiliated and unrelated entities based on the specific requirements of the customers. From financial year 2007-08 onwards, the assessee has been also engaged in call centre service to its AE's.

2.1 The assessee filed its return of income for Rs.1,84,921/- on 30/09/2009. As there were international transactions, the Ld.AO, referred the issue to the ld.TPO, for determination of arm's length price.

2.2 During the year under consideration the assessee company had entered into international transactions with its associated enterprises (AE), the details of which were reported in form 3 CEB as under:

S.No.	Name and address of associated enterprises	Value (in Rs.)
1.	OKS Ltd. Address: 303, Parsons Avenue, Bala Cynwyd. PA, USA	13,45,46,027 26,12,645
2.	OKS Group Address: 303, Parsons Avenue, Bala Cynwyd. PA, USA	2,44,44,157
3.	OKS Ameridial Address: 4535, Straussar Street, North Canton OH 44720	1,68,69,379
	Total	17,84,72,208

2.3 The international transactions entered into by the assessee was in respect of data processing amounting to Rs.17,84,72,208/- rendered to its AE. The assessee has

benchmarked the international transaction of data processing, using Cost Plus Method (CPM) as the most appropriate method (MAM) to arrive at Arm's Length Price (ALP), and has shown operating profit margin at 32.03% with AE and at 36.27% with non-AE. The assessee has used an alternate analysis using transactional net method (TNMM). In the TNMM analysis, the assessee has calculated the operating profit to total cost (OP/TC) ratio as the profit level indicator (PLI). The assessee calculated the PLI at 9.17% on cost, whereas the average PLI of the comparables was calculated at 8.52%, in the TP documentation, the comparables used by the assessee are as under:

S.No.	Name of comparable	Operating Profit Margin
1.	Aditya Birla mean Minacs Worldwide Ltd.	2.55%
2.	Allsec Technologies Ltd.	8.81%
3.	Cosmic Global Ltd.	43.13%
4.	Microgenetics Systems Ltd.	1.28%
5.	Infosys BPO Ltd.	15.53%
6.	Suntech Webservices (P) Ltd	2.54%
	Average OP/OC	8.52%

2.4 After making certain exclusions from the list of comparables given by the assessee and including some new cases, the Ld.TPO shortlisted 7 companies with the profit margins as under:*

S.No.	Name of comparable	Operating Profit Margin
1.	Accentia Tech.	46.30%
2.	Cosmic global	48.12%

3.	Crossdomain	25.63%
4.	Infosys BPO	31.33%
5.	Eclerx Services Ltd.	47.00%
6.	Aditya Birla Minace worldwide Ltd	13.91%
7.	Coral hub	36.93%
	Average	

2.5 This led to the proposed transfer pricing adjustment, amounting to Rs.6,93,66,342/-. Thereafter the assessee carried the matter before the dispute resolution panel (DRP)-2, New Delhi. The DRP under section 144C (5) of the IT act, 1961 gave directions on 31/10/2013, determining the total income at Rs.24,78,38,550/-, inter alia making an adjustment of Rs.6,93,66,342/- to the arms length price. The DRP excluded one comparable being Coral hub and upheld the following 6 comparables:

S.No.	Name of the comparable	Operating profit margin
1.	Accentia Tech	52.52%
2.	Cosmic global	50.70%
3.	Crossdomain	25.63%
4.	Infosys BPO	24.28%
5.	Eclerx services Ltd	66.01%
6.	Aditya Birla Minacs Worldwide Ltd	11.95%
	AVERAGE	38.50%

2.6 Further, while giving effect to the DRP order, the Ld. A.O. disallowed the claim of deduction under section 14 A to an extent of Rs.3,51,102/- and passed the assessment order on 12/03/2013 making the impugned additions.

3. Aggrieved by the order of the Ld.AO the assessee is in appeal before us in respect of the adjustments made to

ALP and corporate issue being disallowance under section 14 A of the IT act, 1961.

4. We first take up the issue of adjustment to arms length price.

4.1 We have heard the rival contentions of both the sides, perused the orders passed by the authorities below, the paper books filed by the assessee and the case laws relied upon by both the sides.

4.2 At the outset it is submitted by the Ld.AR that the assessee is not seriously disputing the TNMM as the MAM adopted by the Ld. TPO. Thus the only dispute that arises is with respect to selection of the comparables. To be precise the controversy rotates around the exclusion of the following comparables:

S.No.	Name of the comparable	Operating profit margin
1.	Accentia Tech	52.52%
2.	Cosmic global	50.70%
3.	Crossdomain	25.63%
4.	Infosys BPO	24.28%

4.3 Apart from that, the assessee is insisting on inclusion of the following three comparables, which were not included by the DRP as well as the TPO:

S.No.	Name of the comparable	Operating profit margin
1.	Allsec Technologies Ltd	8.81%
2.	Microgenetic Systems Ltd.	1.28%
3.	Suntech Webservices (P) Ltd	2.54%

5. We will take up these companies one by one to ascertain their compatibility or otherwise with the assessee company before embarking upon this exercise it is *sine qua non* to precisely consider the functional profile of the assessee.

5.1 **OKS group** was founded in 1985 and its pioneering tradition in outsourcing combined with its skilled manpower and cutting-edge technology helps deliver outsourcing solution in a cost-effective and timely manner. This group provides a wide range of innovative outsourced solutions to suit the needs of every enterprise. OKS Span Tech Pvt. Ltd. (assessee company) was established on 10/03/1995 as a limited company, which was converted into a private Ltd. company on 21/12/2000. OKS is primarily engaged in data processing, which is rendered to overseas affiliated and unrelated entities based on the specific requirements of the customers. Further from the financial year 2007-08 onwards, the company has also engaged in the call centre services for its AE's. The services provided by assessee is characterised as BPO services in the TP study, presented at pages 713 to 762. It is categorically been submitted that, the assessee does not undertake any significant research and development on its operation. The main functions performed by the assessee are:

1. Corporate strategy determination
2. Marketing and sales function
3. Finance accounting Treasury and legal function

4. Human resource management function.

The price for the services rendered by the assessee to its AE is determined after considering various factors like:

- a) Time involved;
- b) level of software skills required;
- c) training of employees;
- d) hardware and technology specifications and
- e) complexities of the jobs in hand.

5.1.1 The company has characterised itself in the TP study as being engaged in data processing and voice processing which involves low skilled manpower, any graduate or undergraduate are employed to execute the projects. The assessee provides services to its AE's as well as non-AE's and the nature of services rendered to both are similar. However the assessee is mainly dependent on its AEs for its business. On perusal of the financial information placed at page 744 of the TP study, the main revenue is derived from activities of the data processing.

5.1.2 The Ld.TPO relied on the CBDT circular S. O. 890 (E) dated 26/09/2007, which provided a detailed list of products or services that can be claimed under ITES segment. The TPO on the basis of the circular came to the conclusion that the services offered by the assessee fell within the domain of ITES.

5.1.3 From the above description of the services rendered by the assessee, it can be seen that it is mainly providing support services to its AE's in the areas of marketing, sales accounts etc. When we consider the

nature of the services rendered by the assessee in the light of the above referred CBDT circular dated 26/09/2007, we can place the services rendered by the assessee on a macro level, under: (iv) data processing, with the understanding of the nature of services provided by the assessee to its AE's.

5.1.4 We will now proceed to examine the compatibility or otherwise of the companies disputed by the assessee to the extent.

5.2 Aditya Birla Minacs Worldwide Ltd:

5.2.1 At the outset the Id.AR submits that he does not have any objection for M/s. Aditya Birla Minacs Worldwide Ltd being included. Therefore we direct the Id.TPO to include this company as comparable.

5.3 Accentia Tech:

5.3.1 The assessee objected the inclusion of this company proposed to be used in the final set of comparables by the TPO, by contending that it was not functionally comparable. The Id.TPO included this company on the ground that it works in medical transcription services and qualifies all the filters applied by the TPO, which falls within the overall ambit of ITES and more than 95% of its revenue is derived from ITES activities.

5.3.2 The Id.AR contended that this company deserves to be excluded for 2 reasons 1st it being engaged in software products and 2nd as some acquisitions has

taken place which has increased the asset value of this comparable company. He further contended that this comparable company has got a very high goodwill in the market.

5.3.3 On the contrary the Ld. DR submitted that functionally this comparable as well as assessee are similar. He placed as reliance upon the decision of Hon'ble Delhi High Court in the case of Chrys Capital Investments Advisers India Ltd vs. DCIT, I.T.A.No. 417/2014 pronounced on 27.04.2015.

5.3.4 We have perused the annual report of this company, a copy of which is available at page 781 to 946.

5.3.5 We find that this company, apart from being engaged in the business of ITES, is also dealing with software products. As the segmental figures of this company are not available, the Ld. TPO has taken it at entity level. As regards the objection of the Ld.AR regarding the acquisition undertaken by this company, we find from the annual report that this comparable company is in the process of expansion strategy through amalgamation, acquisitions, mergers, joint ventures. The decision of coordinate bench of this tribunal in Macquaire global services (P) Ltd versus DCIT reported in (2015) 55 taxmann.com 259 has held that this company cannot be considered as a comparable because of exceptional financial results due to mergers/demergers etc. Similar view has been taken by other benches of this Tribunal, in

the case of Ameripraise India (P) Ltd vs. ACIT reported in (2015) 62 taxmann.com 237. From the financial study of this comparable company it is very much clear that the company is into acquisition of 5 more companies in USA and UK with operations in the areas of medical billing and coding and medical transcription, further the company has got a future plan to acquire 2 more companies in UK having the same functions. The decision relied upon by the Id.DR in the case of Chris capital (supra) has actually been misinterpreted by the Department, as the Hon'ble High Court has held that;

“.....firstly an enquiry has to be carried out by the DRP preceding the analysis under rule 10 B (3), as to its functional similarity with the assessee; thereafter the exercise of determining if there are material difference on account of exceptionally high profits which are capable of elimination has to be carried out.”

5.3.5 Applying the above to the facts of the present case, it has to be first ascertained regarding the functional similarity. It is an admitted position that this comparable company deals with software products whereas the assessee is into the activities of macro level data processing, which is carried on by low skilled, undergraduate employees. Thus, the comparable company is functionally dissimilar with that of the assessee. As the basic requirement of functional similarity has not been satisfied, there does not arise the question of comparing the profits earned by both companies.

5.3.6 We, therefore, on the basis of the above discussions and findings direct the Ld. TPO to exclude this company from the list of comparables.

5.4 **Cosmic global Ltd:**

5.4.1 The Ld. A.R. objected the inclusion of this company proposed to be used in the final set of comparables by the TPO by contending that it was not functionally comparable. The ld.AR submitted that the main revenue generation of this comparable is from medical transcription and consultancy services. Thus the ld.AR contended that this comparable is a high ended KPO.

5.4.2 On the contrary the ld. DR submitted that assessee had included this company is a comparable which was not objected by the Ld.TPO.

5.4.3 We have perused the annual report of this company a copy of which is available at pages 1936A to 1938. From the annual accounts of this comparable, it can be seen that its total revenue from operations amounts to Rs. 7.37 crore, which has been derived from medical transcription and Rs. 9.90 lakhs derived from consultancy services, translation charges amounting to Rs. 6.99 crores and accounts BPO amounting to Rs. 27.76 Lacs. It is apparent that this company outsourced its activities and the outsourcing expenses constitute 57% of the total expenses. The entire outsourcing is confined to translation charges paid at Rs. 3 crore, constitutes a large

chunk of this company's income, for which the services were mainly outsourced this company cannot be selected as a comparable on an entity level. The decision of coordinate bench of this tribunal in Macquaire global services (P) Ltd versus DCIT reported in (2015) 55 taxmann.com 259 has held that this company cannot be considered as a comparable because of exceptional financial results.

5.4.4 We therefore direct the ld.TPO to exclude this company as a comparable.

5.5 Crossdomain Solutions Private Limited:

5.5.1 The assessee objected the inclusion of this company proposed to be used in the final set of comparables by the TPO by contending that it was not functionally comparable. The TPO rejected the contentions by holding that it was also providing IT enabled services. The Ld.AR contended that this company is a high-end KPO. The ld.AR has placed reliance upon the decision of Hyderabad Tribunal in the case of Market Tools Research (P) Ltd VS. DCIT reported in (2014) 148 ITD 631 wherein it has been held that this company is providing services which are in the nature of KPO. Further it has been observed that this company is engaged in providing niche services as well as owns brand "Exdion" to target the insurance industry in US.

5.5.2 On the contrary the Ld.DR relied upon the decision of authorities below and prayed for inclusion of this company.

5.5.3 We have perused the annual report of this company a copy of which is available at page 1049 to 1068. This company is indulged in high skilled IT services, which is not comparable to routine IT enabled services. The Hyderabad Tribunal bench in case of Market Tools Research (P) Ltd Vs. DCIT, reported in (2014) 40 taxmann.com 390, has held that this company is providing services which are in the nature of KPO. Further the company is engaged in providing niche services as well as they lead its own brand "Exdion", to target the insurance industry in US. This Tribunal therein followed the findings of the Bangalore bench in the case of Symphony Marketing Solutions India (P) Ltd vs. ITO, reported in (2013) 38 taxmann.com 55 while rejecting this company from the final set of comparables.

Respectfully following the findings of the coordinate benches, we direct the learned TPO to exclude this company from the list of comparables.

5.6 Infosys BPO:

5.6.1 The assessee objected the inclusion of this company proposed to be used in the final set of comparables by the TPO by contending that it was not functionally comparable. The Ld. TPO rejected the

contentions of the assessee by holding that this company was providing IT enabled services.

5.6.2 We have perused the annual report of this company, a copy of which is available at page 1121 to 1178. It is found that this company is a subsidiary of Infosys technologies Ltd and as on today this company in India is among the top 10 BPO companies according to the National Association of software and service companies ranking. This company has earned a net profit of Rs. 273.81 crore during the year with approximately 17,934 employees. It is found that this company is partnering with one aim for imparting executive education program to build business competencies and provide comprehensive insights to management functions.

5.6.3 It is further observed that the turnover of this company is more than 5 crores. As held by this Tribunal in the case of CIT vs. Agnity India Technologies Private Ltd., in ITA no. 124/Del/2011, which has been confirmed by the Hon'ble Delhi High Court wide order dated 10/07/2013, the Hon'ble High Court has upheld the finding of this Tribunal that companies having high turnover cannot be considered as a comparable.

5.6.4 Respectfully following the ratio laid down by Hon'ble High Court, we direct the learned TPO to exclude this company from the final list of comparables.

5.7 e-Clerx services Ltd:

5.7.1 The assessee prays for exclusion of this company as comparable, as this company provides data analytics and customised process solution to a host of global clients. It is submitted that it delivers data solutions to complex business needs through cost-effective combination of people, process and technology. The ld.AR submitted that this Tribunal in assessee's own case for assessment year 2008-09 has excluded it from the comparables.

5.7.2 On the contrary the ld. DR submits that the company is engaged in similar functions of IT enabled services and the company passes all the filters.

5.7.3 We have perused the submissions made by both the parties and the order of assessee's own case for assessment year 2008-09 in I.T.A.No. 6541/Del/2012, order dated 07.08.2015. This Tribunal has held as under:

"5. We first take up the issue of case of eClerx Services Ltd. The assessee relied upon the decision of Special Bench of the Tribunal in Mearsk Global Service Centre (India) Pvt. Ltd. Vs ACIT I.T.A.No. 7466/Mum/2012 order dt. 07.03.2014 where it is held as under:

"82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to

be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals - financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality, Keeping in view the nature of services rendered by M/s. eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.”

5.7.4 Respectfully following the above decision of this Tribunal, we direct the Ld. TPO to exclude this company from the list of comparables.

5.8 Allsec Technologies Ltd.

5.8.1 The assessee is seeking to include this company as a comparable as it has been accepted by this Tribunal in assessee's own case for assessment year 2008-09 wide order dated 07/08/2015. He accordingly prayed for inclusion of this company to the final list of comparable following the rule of consistency. The Ld. A.R. relied upon the decision of Hon'ble Supreme Court in the case of Radha Swami Satsang versus CIT reported in (1992) 193 ITR 321.

5.8.2 On the contrary the ld. DR submitted that it is a functionally dissimilar company due to merger of this company with B2K Corpn. Pvt. Ltd. The ld. DR has submitted that the issue relating to the exclusion / inclusion of this company can be sent back to the learned TPO for verification.

5.8.3 We have perused the orders of the authorities below and the submissions advanced by both the parties. It is observed that this company has been accepted by this tribunal in assessee's own case for assessment year 2008-09, wherein this tribunal has held as under:

7.2 The merger of Allsec Technologies Ltd. with the B2K Corpn. Pvt. Ltd. has not adversely effected the profit of Allsec Technologies Ltd. At best, an adjustment of Rs.79,865/- can be made to the profits but this company cannot be rejected as a comparable. Hence, we direct the TPO to include this company as a comparable and to make an adjustment of Rs.79,865/- to the profits while computing the TNMM. Hence, this plea of the assessee is allowed in part.

5.8.4 Respectfully following the same we also direct the learner TPO to include this company in the list of comparables.

5.9 Microgenetics systems Ltd.

5.9.1 The assessee is seeking to include this company in the list of comparables as this company has a turnover of less than Rs.5 crores but more than one crore and it qualifies the turnover filter applied by the ld. TPO.

5.9.2 On the contrary the ld. DR submitted that it is a functionally similar company as its main income is generated from medical transcription. The ld. DR has submitted that the issue relating to exclusion / inclusion of this company can be sent back to the learner TPO for verification.

5.9.3 We have perused the financial statements of this comparable placed at page 1179 to 1196. It is true that this comparable has its main revenue from medical transcription. Merely because its turnover is less than Rs.5 crores it cannot be a reason to accept this as a comparable as contended by Ld. A.R. As this company is into activity of medical transcription, cannot be considered to be a low-end BPO as the activity involves a process of knowledge. In our view applying the functional tests as a primary requirement for consideration of a company as a comparable, this company cannot be

considered to be carrying out activity which is carried on by low skilled or undergraduates. We thus direct the Ld. TPO to exclude this company from the final list of comparables.

5.10 M/s.Suntec Web Services Pvt. Ltd.

5.10.1 The assessee is seeking to include this company in the list of comparables as this company has a turnover of less than Rs.5 crores but more than one crore and it qualifies the turnover filter applied by the ld. TPO. On the contrary, the ld. DR submitted that it is functionally not similar to assessee. The ld. DR has submitted that the issue relating to exclusion /f inclusion of this company can be sent back to the learned TPO for verification.

5.10.2 We have perused the financial accounts of this comparable placed at page 1197 to 1196 of the paper book. It is observed that the services from which income is generated of this company has not been clearly specified. The statement of accounts does not clearly enunciate the types of services rendered by this company.

5.10.3 We are, therefore, setting aside this comparable to the files of the ld.TPO for due verification and to consider the same afresh for inclusion or exclusion in the final list of comparables on the result of functional similarity.

5.11 Accordingly ground No. 1 of the assessee's appeal stands disposed off.

6. Ground No. 2

6.1 The assessee's has challenged the addition made by the ld.AO under section 14A of I.T. Act, 1961, read with Rule 8D of the I.T. Rules, 1962.

6.2 During the year under consideration the assessee had earned long-term capital gain of Rs.31,76,476/- and dividend income of Rs.9,30,583/-. While filing the return of income the assessee had *suo motu* disallowed an amount of Rs.13,115/- on account of demat charges as expenditure incurred in relation to exempt income. During the assessment proceedings the Ld. AO rejected the assessee's claim of expenditure and made addition of Rs.3,51,102 under section 14 A of the act by invoking rule 8D for the year under consideration.

6.3 Before the DRP the assessee had objected to the addition so made. It was contended by the assessee that Ld. AO has included those investments, which do not earn any exempt income. The assessee submitted before DRP that the investments, which do not earn any exempt income, must not be considered for the purposes of disallowance under section 14A of the act. The contention so raised by the assessee was accepted by the DRP. Accordingly the DRP directed the Ld. A.O. to re-compute the expenditure under section 14A, by excluding those investments, which do not earn any dividend/exempt

income. The Ld.AO ignoring the directions of the DRP made an addition of Rs.3,51,102/-.

At the outset, the ld.AR submits that this issue is covered in favour of assessee in its own case by an order of this Tribunal in ITA No. 6541/Del/2012 Vide order dated 07/08/2015, for assessment year 2008-09.

6.4 On the contrary the ld. DR supported the order passed by the Ld. AO.

6.5 We have perused the orders passed by the authorities below, the arguments submitted by both the parties. It is observed that primarily the ld.AO has not recorded a satisfaction, as required by law, before invoking section 14 A of the act. Further the ld. AO has also not justified the rejection of the *suo motu* disallowance made by the assessee under section 14 A of the act.

6.6 We have Perused the order of this Tribunal in assessee's own case for assessment year 2008-09 (supra).

This Tribunal held as under:

9.2 Ground No.3 is on the issue of disallowance u/s 14A. The A.O. has not recorded satisfaction as required by law, before invoking section 14A. It has not been pointed out by the A.O. as to how the computation of disallowance u/s 14A done by the assessee was not correct. No error or defect has been pointed out. Under these circumstances, we have to apply the proposition laid down by the jurisdictional High Court in the case of Maxopp Investments Ltd. 347 ITR 272 and delete the addition made by the A.O.

6.7 Respectfully following the decision of this tribunal in assessee's own case for assessment year 2008-09, we are inclined to delete the addition made by the ld.AO under section 14 A of the act. Accordingly this ground of assessee stands allowed.

7. In the result the appeal filed by the assessee stands partly allowed.

Order pronounced in open court on 09th June, 2016.

Sd./-
(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 09.06.2016

Sd./-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order
(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on			Sr. PS/PS
2	Draft placed before author			Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	9/6/16		Sr. PS/PS
6	Kept for pronouncement	9/6		Sr. PS/PS
7	File sent to Bench Clerk	13/6		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			