

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-2' NEW DELHI**

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 25/Del/2012  
AY: 2007-08**

**ICC India Pvt. Ltd.,  
(Now known as MPS Ltd.)  
NSIC/STP Complex,  
Okhla Industrial Estate,  
New Delhi.  
(PAN: AAACI1843G)  
(Appellant)**

**vs**

**DCIT,  
Circle -11(1),  
C.R. Building,  
New Delhi.  
  
(Respondent)**

**Appellant by:** Ms Vandana Bhandari, CA  
**Respondent by:** Shri S.R. Senapati, Sr. DR

**Date of hearing: 30.03.2016  
Date of pronouncement:**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

The present appeal has been preferred by the assessee subsequent to the directions dated 03.09.2011 of the DRP and the consequential orders dated 28.10.2011 passed by the TPO/AO. The relevant year is assessment year 2007-08. The facts of the case are as under:-

2. ICC India (ICCI), the assessee, was incorporated as an Indian Company on June 13, 1994 under the Indian Companies Act, 1956 as a wholly owned subsidiary of Interactive

Composition Corporation (ICC) of USA. ICC is a book, journal and multimedia publishing services company and provides a range of services related to the publishing industry. ICCI provides valuable software services to ICC in the area of data processing, data archiving, coding etc. For this purpose, ICCI has obtained the permission for setting up a new undertaking in a Software Technology Park (STP) for the development of software. As per the STP regulations, the entire production of ICCI is exported against hard currency except the permitted sales in the domestic tariff area. Interactive Composition Corporation, USA (ICC USA), the AE, is a 30-year-old book, journal, and multimedia publishing services company specializing in technical and scientific material. Now headquartered in Portland, Oregon, ICC USA has maintained a reputation as a high-quality vendor for educational and technical publishers. With offices in Portland and India, the company has staff strength of more than 300 full-time employees. ICC USA is responsible for sales, business development, client relationship and corporate management matters. The overall corporate management, tax and treasury functions are the responsibility of ICC USA. ICC USA solicits, bids and negotiates with clients and procures the projects. It

enters into contracts with clients for providing the services. It then enters into a sub-contract with ICC India for rendering the said services. In other words, all the functions relating to the marketing of services is carried on by ISS USA and ICCI is in no way responsible for marketing. ICC USA is responsible for finishing and final processing of the coded electronic files sent by ICC India. ICC USA is responsible for negotiating and drafting legal contracts with clients, and for putting in place relevant sub-contracts with ICC India. ICC USA also evaluates the skill sets required for providing the services and monitors the activities of ICC India. For the client, ICC USA is the front end and is responsible for the services performed by ICC India.

3. ICC India provides IT-enabled services including data processing, data archiving, coding, Comp setting for Internet, etc. ICC India handles everything from LaTeX, Quark and FrameMaker composition to technical illustration and eBook conversion. The process involved in execution of various businesses undertaken by ICC India is as below:

- Receives electronic files or manuscripts from ICC USA
- Evaluates files or manuscripts received
- Codes the data received

- Performs data entry and structuring of coded files
- Ships the processed file to ICC USA for finishing and final processing.

When ICC India receives these electronic files, it first analyses them and then sends a pro-forma invoice for approval to ICC USA. Once it is approved by ICC USA, it starts the actual work and then bills this on a monthly basis to ICC USA. Usually to finish the above-mentioned process, ICC India takes between one to three months. The price depends on the schedule time given, complexity of the job, technical input required and level of quality assurance required. ICC India maintains and deploys necessary human resources and infrastructure for provision of services. However, ICC India does not own any valuable non-routine intangibles. Further, all intangibles including discoveries, improvements, inventions and trade secrets are the sole and exclusive property of ICC USA.

4. During the FY 2006-07, ICCI has exported ITES to its AE amounting to Rs. 15,69,11,499/- . In the TP study, the assessee has adopted the TNMM as the most appropriate method for

determining the ALP of the international transactions relating to the provision of IT Enabled Services (ITES). For the purpose of applying TNMM, the assessee has used operating profit/total cost (OP/TC) as the profit level indicator (PLI). For the year under consideration, the assessee filed its Income Tax return on 27.11.2007 declaring a total income of Rs. 1,31,87,570/-. Subsequently, during the course of assessment proceedings, the AO made a reference u/s 92CA(3) to the TPO and the TPO subsequently passed an order on 26.10.2010 making a TP adjustment of Rs. 38,098,238/- by holding that the international transaction of provision of ITES entered into by ICC (India) with its AE does not satisfy the arm's length principle.

5. Aggrieved, the assessee approached the DRP and primarily objected to the Transfer Pricing Adjustment of Rs. 38,98,238/- and also objected to other additions aggregating to Rs. 99,18,986/-. Some of the objections of the assessee were accepted while some were overruled by the DRP and now the assessee has approached the Tribunal subsequent to the TPO having given effect to the directions of the DRP and after having calculated the revised transfer pricing adjustments at Rs.

42,417,049/-. The following grounds of appeal have been raised:-

*“1. Ld Dispute Resolution Panel, Ld. AO and Ld. TPO erred in amending the list of comparables and in recomputing the margins of the comparables on separate grounds which are both bad in law and in facts and in doing so have erred further in completely ignoring the submissions made by the appellant. This has led to an addition of Rs 4,24,17,049 /-on account of difference in arm’s length price.*

*2. In arriving at the conclusion that the international transactions of the appellant are not valued at arms’ length price, the Ld. DRP has erred in both law and facts and in agreeing with the Ld. TPO / Ld. AO with the following conclusions drawn by them:*

*a) The Ld. AO/ Ld. TPO erred in enhancing the income of the appellant by Rs 4,24,17,049/- holding that the international related party transactions of the appellant do not satisfy the arm’s length principle envisaged under the Act and in doing so have grossly erred in not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the instant case.*

*b) not appreciating that the appellant had prepared the detailed contemporaneous Transfer Pricing documentation bona fide and in compliance with the Act and Income Tax Rules 1962 (“the Rules”).*

*c) not appreciating the fact that the appellant had selected uncontrolled comparable companies based on a detailed Functional Asset and Risk (‘FAR’) analysis following a methodical benchmarking process thereby rejecting the comparable company set/ data which had been provided by the appellant for benchmarking its transactions of provision of IT enabled services, without giving reasons that were cogent or backed by any sound evidence.*

- d) disregarding multiple year/ prior years' data as used by the appellant in its Transfer Pricing ('TP') documentation report and holding that current year (i.e.FY 2006-07) data for comparable companies should be used despite the fact that the same was not available to the appellant at the time of preparing its TP documentation, and in interpreting the requirement of 'contemporaneous' data in the Rules to necessarily imply only current/ single year (i.e. FY 2006-07) data.*
- e) not appropriately considering the functions, assets and risk profile of the companies used for comparison with the IT enabled services provided by the appellant.*
- f) by excluding certain companies on the basis of declining sales/ declining profitability.*
- g) by including certain companies which are not comparable to the appellant in terms of functions performed, assets employed and the risks assumed;*
- h) by including the segments of the companies despite knowing that margin calculations of such segments are subjective;*
- i) violating the principles of natural justice by not providing the appellant a reasonable opportunity of being heard while rejecting certain companies;*
- j) denying a risk adjustment to the operating profit margins of the comparables, and in doing so have grossly erred in:*
- i. stating that detailed working or formula applied for calculation of risk adjustment has not been provided by the appellant while also failing to clarify what would constitute the 'detailed working' for the purpose of undertaking a risk adjustment ;*
- ii. reaching a conclusion that risk adjustment is required but in the absence of the formula cannot be provided for*

- k) violating the principles of natural justice by not sharing with the appellant (despite having adequate time at their disposal to do so) the concerns/ issues in this regard (in terms of the alleged/ purported shortcomings/ deficiencies in the appellant's claim for a working capital adjustment) and thereby denying the appellant a reasonable opportunity to study/ examine the said basis and provide its comments/ objections thereto;*
- l) computing the profit margins of the appellant as well as the comaparable companies by taking arbitrary decisions in respect of inclusion / exclusion of certain items of cost/ revenue and in total disregard to established judicial precedents;*
- m) disregarding judicial pronouncements in India in making the TP adjustment; and*
- n) law by denying the benefit of (+/-) 5% mentioned in the proviso to section 92C(2) of the Act to the appellant.*
3. *That the dispute resolution panel has not given its directions on objections of the assessee w.r.t. the factual inaccuracies in the order of the transfer pricing officer while computing operating profit margin of the assessee. Ld-TPO /DRP/AO has erred in using the PLI (OP/TC) of assessee at 1.73% instead of 12.58% computed by the assessee without quoting any reasons to that effect.*
4. *That the revised order of TPO/AO passed on the directions of DRP is prejudicial to the assessee, the opportunity of hearing at the time of passing the revised order has not been given by the TPO; hence the principles of natural justice have been violated.*
5. *That the appellant reserves its rights to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”*

6. At the outset, the Ld. AR submitted that the assessee's operating mark-up has been wrongly taken at 1.73% instead of 12.58% by the TPO in the revised order. It was also submitted that the TPO has not given effect to the directions of the DRP to delete the addition of Rs. 89,74,100 made on account of prior period depreciation. The Ld. AR also submitted that the increase in stock of Rs. 38,80,875/- (i.e. work-in-progress) as well as Rs. 27,02,513/- on account of other income (provision written back) should be taken as operating income. The Ld. AR further submitted that in the revised order, the TPO has wrongly reduced the Working Capital Adjustment from 3.64% to 2.18% without providing any basis for the computation.

7. On comparables, the Ld. AR submitted at length as under:-

- (i) Accentia Technologies Ltd. (Seg) – Functionally dissimilar – Co. is into business of Healthcare Receivables Management which included developing of software products (Software as a service “SAAS”). The company follows the business model of inorganic growth through M&As. Mergers and amalgamation during the year – Geosoft Technologies (Trivandrum)

Ltd. & Iridium Technologies (India) Pvt. Ltd. amalgamated with Accentia during the year resulting into abnormal rise in profits. Acquired goodwill on amalgamation. It was also submitted that more than 68% of operating cost is towards overseas business expenses as against NIL of the assessee and hence is a different business model. Further, there were substantial marketing expenses to the extent of 28% of sales as against almost NIL of assessee. It was also submitted that the assessee gets assured business from its AE. Further, the assets-base of Accentia Technologies Ltd. has risen from 2.4 cr to 12.7 cr and, therefore, the company was not comparable.

- (ii) Apollo Healthstreet Ltd. – It was submitted that ESOP expenses of Rs. 31,57,324/- should be treated as operating expenses as they are part of employee cost i.e. salary in non-cash form.

- (iii) Bodhtree (Seg) - It was submitted that the company is Functionally dissimilar as the Co. is into software development and data cleansing segment is Software As A Service (SAAS). It was further submitted that in the revised order, the TPO has included foreign exchange earnings of the full entity amounting to Rs. 4,53.842/- instead of that of the segment only.
- (iv) Eclerx Services Ltd. - It was submitted that the company is functionally dissimilar. The Co. is mainly engaged in providing high-end services involving specialized knowledge and domain expertise. It is a leading provider of KPO services. It was further submitted that the Co. is engaged in providing high end data analytics, product life cycle management, statistical modelling, consulting services, and process outsourcing services. It is recognised as pricing expert. The Co. designs and implements processes and technology platforms that drive clients' CRM, ERP, Product Data Management and Supply chain systems. It also provides trade portfolio management

and risk management services. It devises innovative solutions that help clients improve their processes and services and its scalable delivery model implements these solutions. The 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 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. It provides services in banking, finance, manufacturing, retail, travel and hospitality verticals. It provides pricing analytics, building optimisation, content operations management, revenue management services. To retail and

manufacturing clients it provides sales and marketing support, product data management, revenue management services. To financial services clients it provides real time capital markets, middle and back office support, portfolio risk management, various critical data management services. Solutions offered 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.

- (v) HCL Comnet Ltd (Seg) – It was submitted that the company is functionally dissimilar. The Co is into remote IT infrastructure Management services, Data centre management, end user computing services, managed security services, networking services, tools & process consulting services. It is a highly capital intensive industry. It operates 24/7 i.e. 3 shifts whereas the assessee operates only single shift. The

Co. is cited as 'Leader for Global delivery Infrastructure Management' by Foster Research Inc' and other magazines. There is significant brand value in the market of the company whereas assessee owns no intangibles/brand value. It was also submitted that the company has a huge asset base of 188.90 cr & ITES revenue of 260 cr. As against assessee which has turnover of merely 15.7 c. The Co. is a full risk bearing entrepreneur vis a vis assessee which is captive service provider to its AE. The functional, assets & Risk profile of co is completely different from that of the assessee.

- (vi) Vishal Information Technologies Ltd. - It is the AR's submission that the functional asset & risk profile is dissimilar. The Co. is working on outsourcing business model with a very low asset base. Employee cost is only 2% of turnover as against the assessee which is performing all functions in house and has employee cost/turnover ratio of apprx 62%. Major part of functions is outsourced by Vishal. It

was also submitted that in the next year, the CIT (A) rejected this company from the list of Comparables.

(vii) Wipro Ltd. (Seg) - The BPO segment of Wipro Co. covers wide spectrum of business process outsourcing services, which are high end in nature including process improvements, productised solutions such as "The Base" Integrated IT and BPO SLAs, Innovative pricing & Commercial models, Consulting services. The Base software supports 320 unique processes, process re-engineering, improving process efficiency, control and compliance, reconciliation engine, investment banking solutions, improving governance, end to end process automation, 24\*7 operations and support in all major languages. In Global IT Services and Products segment, the Co. derives revenue from Enterprise Solutions Business, Technology Business and Financials Business. WIPRO has revenue of Rs. 940 cr and operating assets employed in the BPO business is 781 cr. The co's heavy investments in

operating assets results into different functional and risk profile. It has incurred huge expenditure on Research & Development. During the year, its R&D efforts have contributed nearly 8.5% of total revenue. It was submitted that the BPO segment has employee base of 17,464 personnel. Wipro enjoys economies of scale due to huge capital investment, huge volume of business, diversified business functions and global client base. It is a giant in its area of business and has huge brand value and goodwill. It is one of the leading BPO service providers to giant corporations across the globe as acknowledged by it in its Annual report. It owns significant intangibles. Further intangibles are acquired through acquisitions in the year under consideration. It has presence across the globe and follows inorganic method of growth through which it acquires goodwill/ brand-value and presence in the global market. It was submitted that between Mar 2006 & Mar 2007, WIPRO acquired mPower services Inc. & subsidiaries, cMango, and 3D Network which have

resulted in expansion of BPO services. It was emphasised that Wipro is a full-fledged risk bearing service provider and that the nature of services of Wipro require employees with special domain experience and knowledge.

(viii) Infosys BPO Ltd. – It was submitted that Infosys BPO provides diversified business process management services which are high end in nature including end to end voice data, knowledge process outsourcing (KPO), customer relationship management, finance & accounting, knowledge services management, procurement and human resources in Banking & Capital Markets Communication Services Providers. High end Disorder Manufacturing Insurance & Healthcare, Retail, Energy, Utilities & Resources, Automotive & Aerospace, Transportation & Services. There is an increase in the mix of knowledge services in the mix of offerings and it provides end to end process solutions from Discovery, Transition and Steady State Operations. It was further submitted

that it also provides product based solutions such as Source to pay business platform, Hire to retire business platform, Order management business platform. Newspaper in a box, Integrated Date Lifecycle Management solution, etc. It was submitted that Infosys BPO is a giant and a top BPO services provider. It has turnover of 649 cr and total asset base of approx. 450 cr (Gross Fixed assets Rs. 116 cr). It has employee base of 11,226 personnel. It has incurred significant expenditure on selling & marketing (6% of turnover) resulting into substantial growth in business. It has clients across the Globe and it renders business process management services across diversified business verticals including Financial Services, Manufacturing, Telecom and Others. It has huge brand value and goodwill and owns significant intangibles. It was submitted that Infosys enjoys economies of scale due to huge capital investment, huge volume of business, diversified business functions and global client base. Infosys BPO Ltd. is a full-fledged risk bearing service

provider. The nature of services of Infosys requires employees with special domain experience and knowledge.

- (ix) Informed Technologies India Pvt. Ltd. – The Ld. AR submitted that the company is functionally dissimilar and that the employee cost/turnover ratio is only 22% whereas in the case of the assessee it is 68%.
- (x) Mold-tek – It was submitted that the company is functionally dissimilar. The Co. is into providing Structural Engineering design services to high rise buildings. It was further submitted that during the year there was a merger with Teck-men Tools Pvt. Ltd. and acquisition of Crossroads Inc, USA. It was also submitted that the accounts of company were revised for FY 2006-07 after amalgamation. During the year revenue and contracts of company have grown exponentially. The CIT (A) excluded this Co. from the list of comparables in AY 2008-09.

- (xi) Triton Corp. – It was submitted that the company is functionally different. The Co. is into call centre services, support services and trading in IT Peripherals. There were Mergers and Acquisitions during the year. Triton acquired 100% shares of E maple Solutions Ltd. Therefore, both Triton and Maple should be rejected due to peculiar economic circumstances. Promoters were involved in fraud for earlier years; therefore, financials of this Co. are distorted and unreliable. The CIT (A) excluded this Co. from the list of comparables in AY 2008-09.
- (xii) Maple Esolutions – It was submitted that there were Mergers and Acquisitions during the year. Triton acquired 100% shares of E maple Solutions Ltd. Promotes were involved in fraud for earlier years therefore, financials of this Co. are distorted and unreliable. Therefore, both Triton and Maple should be rejected due to peculiar economic circumstances. The CIT (A) has excluded this Co. from comparables' list in AY 2008-09.

- (xiii) R Systems International Ltd. – It was submitted that provision for doubtful debts of R.s 5.08 cr should be treated as operating expenses as debtors are operating item. Further, miscellaneous balance written off of Rs. 3.39 cr should be treated as an operating expense.
- (xiv) Flextronics Software Systems Ltd. – It has been submitted that in the revised order the TPO has included foreign exchange gain at entity level whereas segmental information has been used by the TPO which has resulted in a wrong increase in the OP/TC to 54.72% from 8.62%, the correct margin is 9.31%.
- (xv) Aditya Birla Minacs Worldwide Ltd. – It was submitted that the foreign exchange income on loan given/taken amounting to Rs. 119866000/-, is wrongly taken as operating income by the TPO in the revised order passed under the directions of DRP which is a non-operating item and therefore ought to have been excluded.

8. In response, the Ld. DR placed heavy reliance on the order of the DRP and submitted that the DRP has duly

considered all the objections of the assessee and has given a reasoned finding and hence the same should be upheld.

9. We have heard the rival submissions and carefully perused the relevant material placed on record. It is seen from the perusal of the DRP's order that it has accepted the assessee's contention that there were factual inaccuracies in the order of the TPO while computing the operating profit margin of the assessee. It has been noted by the DRP that the margin has been wrongly taken at 1.73% instead of 12.58%. However, the DRP has somehow omitted giving the directions to remove the inaccuracy. Accepting the assessee's plea we direct the TPO to recompute use the PLI of the assessee as discussed in detail in pages 21-23 of the DRP order after duly factoring the impact of prior period depreciation of Rs. 89,74,100/-, increase in stock of Rs. 38,80,875/- and Rs. 27,02,513/- on account of other income after affording a proper opportunity to the assessee to support its claim. It is also the assessee's contention that the working capital adjustment has been reduced from 3.64% to 2.18% without providing any details. In this regard also, the TPO is directed to re-compute the working capital adjustment after giving a proper opportunity to the assessee to submit its working and objections.

10. Coming to the objections of the assessee on the comparables, the same are disposed of as under:-

(i) Accentia Technologies Ltd. (Seg) : The assessee is objecting to the aforesaid company being treated as a comparable on the ground that during the year Geosoft Technologies (Trivandrum) Ltd. and Indian Technologies (India) Pvt. Ltd. amalgamated with Accentia during the year resulting in abnormal rise in profits. The Delhi Bench of the Tribunal in Cienna India (P) Ltd. vs DCIT 57 taxmann.com 329 ( Delhi-Trib) as well as the Mumbai Bench in Petro Araldite (P) Ltd Vs. DCIT 144 ITD 625 (Mumbai-Trib) have held that a company cannot be considered as comparable because of financial results become distorted due to mergers, demergers etc. Similar view has also been taken by the Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd vs ACIT in ITA No. 5654/Del/2011. As there were amalgamations in Accentia Technologies Ltd. during the financial year in question, this fact makes it incomparable with the assessee company. In view of the aforesaid, we direct to exclude Accentia Technologies Ltd. (Seg) from the list of comparables.

(ii) Apollo Health Street Ltd. : The assessee's plea is to treat the ESOP expenses of Rs. 31,57,324/- as part of the operating expenses being salary in non-cash form in the comparable. There cannot be any dispute that comparisons of margins between the assessee and the company has to be made under identical conditions. ESOP is an extraordinary item of expenditure and, therefore, in our view, for the purpose of making proper comparison of the margin, one time ESOP cost incurred by the comparable cannot be included as part of the operating expenses. We accordingly reject the assessee's contention on this issue.

(iii) Bodhtree (Seg.) : The assessee is objecting to the aforesaid company on the ground that the company is functionally different as it is into software development and data cleansing segment. It is also the assessee's objection that the TPO has included the foreign exchange earning of the entire entity amounting to Rs.4,53,842/- instead of the segment only. On both the counts, it appears that these facts were not properly considered by the TPO and, hence, we remit the matter back to the file of the TPO who shall consider the acceptability or

otherwise of the company after properly considering the objections of the assessee.

(iv). Eclex Services Ltd. : The assessee is objecting to the inclusion of the company on the ground that the company is functionally dissimilar as the company is engaged in providing high-level services involving specialized knowledge and domain expertise and is a leading provider of KPO services whereas the assessee provides only back-end services to ICC USA in the area of data processing, data archiving and data coding etc. The Delhi Bench of the ITAT in iQor India Services P. Ltd Vs. ITO in ITA Nos. 5934 and 6034/Del/2012 have held as under:-

*“Eclex Services Ltd.*

*Eclex is engaged in providing data analytics services with expertise in financial service and retail and manufacturing. The service provided by the company are high end in nature involving special knowledge and domain expertise and therefore, not functionally comparable with the assessee company which is engaged in providing low end ITES enabled call centre services to its AE. The fact Eclex Services Ltd. is providing high end services involving special knowledge and domain expertise is evident from the company's*

*own reply to the notice u/s 133(6) which is placed at pages 976 to 979 of the paper book filed by the assessee. The Hon'ble Special Bench of the Tribunal in case of Maersk Global Centre (India) (P.) Ltd. v. Asstt. CIT [2014] 147 ITD 83/43 taxmann.com 100 (Mum.) had excluded Eclerx Services Pvt. Ltd. from the list of comparables for the reason that it is providing high end services involving specialised knowledge and domain expertise and same cannot be compared with companies which are mainly engaged in providing low end services to group companies. The relevant finding of the Hon'ble Tribunal read as follows :—*

*"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.*

*For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tek Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP."*

The above ruling of the Special Bench is equally applicable to the facts of the assessee case as is evident from the functional profile of the assessee company. For the aforesaid reasons, we direct that Eclerx Services Ltd. be excluded from the final list of comparables.

(v). HCL Comnet Ltd. (Seg.). : The assessee has objected to the inclusion of this company on the ground that the company is into remote IT infrastructure management services, data centre management and user computing services, managed security services, networking services, tools and process consulting services and is therefore functionally dissimilar. The other objections to the inclusion are that the company runs a highly capital-intensive industry, it operates 24/7 in 3 shifts, it has a significant brand value and a huge assets base. It is also the assessee's plea that the company is a full risk bearing entrepreneur whereas the assessee is a Captive Service Provider to its AE. Having considered all the aspects, it is our considered opinion that the assessee's contention about being functionally dissimilar is correct. The Hon'ble Delhi High Court in Rampgreen Solutions (P) Ltd vs. CIT (A) (2015) 60 taxman.com 355 (Delhi) has opined as under:-

*"34. We have reservations as to the Tribunal's aforesaid view in Maersk Global Centers (India) Pvt. Ltd. {supra}. As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other*

*hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B (2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by*

*benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.*

*35. As pointed out by the Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. {supra}, there may be cases where an entity may be rendering a mix of services some of which may be functionally comparable to a KPO while other services may not. In such cases a classification of BPO and KPO may not be feasible. Clearly, no straitjacket formula can be applied. In cases where the categorization of services rendered cannot be defined with certainty, it would be apposite to employ the broad functionality test and then exclude uncontrolled entities, which are found to be materially dissimilar in aspects and features that have a bearing on the profitability of those entities. However, where the controlled transactions are clearly in the nature of lower-end ITeS such as Call Centers etc. for rendering data processing not involving domain knowledge, inclusion of any KPO service provider as a comparable would not be warranted and the transfer pricing study must take that into account at the threshold.*

*36. As pointed out earlier, the transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an ALP. The*

*methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as product/service characteristics, functions undertaken, assets used, risks assumed. This is essential to ensure the efficacy of the exercise. There is sufficient flexibility available within the statutory framework to ensure a fair ALP.”*

Accordingly, we direct for the exclusion of the company from the final list of comparables.

(vi). Vishal Information Technologies Ltd.- The assessee's objections are that the functional asset & risk profile is dissimilar. The Co. is working on outsourcing business model with a very low asset base. Employee cost is only 2% of turnover as against the assessee which is performing all functions in house and has employee cost/turnover ratio of approx 62%. Major part of functions is outsourced by Vishal. The Hon'ble Delhi High Court in Rampgreen Solutions (P) Ltd. (supra) had the occasion to consider Vishal Information Technologies Ltd. Paras 37 & 38 are the relevant paragraphs and they read as under:

*“37.Applying the aforesaid principles to the facts of the present case, it is once again clear that both Vishal and eClerx could not be taken as comparables for determining*

*the ALP. Vishal and eClerx, both are into KPO Services. In Maersk Global Centers (India) Pvt. Ltd. {supra}, the Special Bench of the Tribunal had noted that eClerx is engaged in data analytics, data processing services, pricing analytics, bundling optimization, content operation, sales and marketing support, product data management, revenue management. In addition, eClerx also offered financial services such as real-time capital markets, middle and back-office support, portfolio risk management services and various critical data management services. Clearly, the aforesaid services are not comparable with the services rendered by the Assessee. Further, the functions undertaken (i.e. the activities performed) are also not comparable with the Assessee. In our view, the Tribunal erred in holding that the functions performed by the Assessee were broadly similar to that of eClerx or Vishal. The operating margin of eClerx, thus, could not be included to arrive at an ALP of controlled transactions, which were materially different in its content and value. In Maersk Global Centers (India) Pvt. Ltd. {supra}, the Special Bench of the Tribunal had noted the same and had, thus, excluded eClerx as a comparable. It is further observed that the comparability of eClerx had also been examined by the Hyderabad Bench of the Tribunal in M/s Capital Iq Information Systems (India) (P.) Ltd. v. Additional Commissioner of Income-tax (supra), wherein, the Tribunal directed the exclusion of eClerx as a comparable for the reason that it was engaged in*

*providing KPO Services and further that it had also returned supernormal profits.*

*38. In our view, even Vishal could not be considered as a comparable, as admittedly, its business model was completely different. Admittedly, Vishal's expenditure on employment cost during the relevant period was a small fraction of the proportionate cost incurred by the Assessee, apparently, for the reason that most of its work was outsourced to other vendors/service providers. The DRP and the Tribunal erred in brushing aside this vital difference by observing that outsourcing was common in ITeS industry and the same would not have a bearing on profitability. Plainly, a business model where services are rendered by employing own employees and using one's own infrastructure would have a different cost structure as compared to a business model where services are outsourced. There was no material for the Tribunal to conclude that the outsourcing of services by Vishal would have no bearing on the profitability of the said entity.”*

Drawing strength from the ratio laid down by the Hon'ble Delhi High Court, we direct the exclusion of Vishal Information Technologies Ltd. from the final list of comparables.

(vii). Wipro Ltd. (Seg.) : The assessee's preliminary objection to the inclusion is on the ground of functional dissimilarity. Other

objections are on the grounds of capital employed, number of shifts/working hours, dissimilar asset base, expenditure on Research & Development, number of employees, brand value, ownership of intangibles, global presence, risk-bearing, employee skills etc. The Delhi Bench of the ITAT in *Calibrated Healthcare Systems India (P) Ltd vs. ACIT (OSD)* in (2015) 54 Taxmann.com 53 (Delhi-Trib.) excluded Wipro Ltd (Seg.) from the list of comparables by observing as under:-

*“6. After hearing both the sides, here again we find that the facts and circumstances of this company nowhere match with the assessee company. This company is also a giant entity in comparison with the assessee company with marked differences as regards risk profile, nature of services, ownership of IP rights, expenditure on R & D etc. Drawing the strength from the judgment of Agnity India Technologic (P.) Ltd. (supra), we hold this company to be incomparable with the assessee. The same is, ergo, directed to be not treated as comparable.”*

Here also we find that this company nowhere matches with the assessee company with marked differences as regards risk profile, nature of services, ownership of I.P rights, expenditure on R & D etc. Drawing strength from the judgment of *Calibrated Health Care Systems India (P) Ltd. (supra)*, we hold this company

to be incomparable with the assessee and direct its exclusion from the final set of comparables.

(viii). Infosys BPO Ltd. - The assessee's objections to this comparable are again manifold. However, the main objection is that Infosys provides high end knowledge process outsourcing services whereas the assessee is providing only captive back-end services. It is undisputed that Infosys BPO is a giant company in the area of development of software and it assumes all risks leading to higher profits whereas the assessee is a captive unit of the parent company and assumes only a limited risk. The Hon'ble Delhi High Court in the case of CIT vs Agnity India technologies Pvt. Ltd. In ITA No. 1204/2011 has upheld the view of the Tribunal to exclude Infosys Technologies Ltd. From the list of comparables and the case of the assessee is also similar in terms of functional dissimilarity as well as risk assumption. Drawing our strength from the above decision of the Hon'ble Delhi High Court, we direct that this company be excluded from the list of comparables.

(ix). Informed Technologies India (Pvt.) Ltd. - It is the assessee's objection that the company is functionally dissimilar. Another

objection is that there is a wide fluctuation in the margins on YOY basis and the same would lead to skewed results. ITAT Pune Bench in Cummins Turbo Technologies Ltd. Vs. DDIT (International Taxation) (2015) 53 taxman.com 492 (Pune-Trib) while adjudicating a similar issue referred to the decision of the Special Bench of the Tribunal in the case of Maersk Global Centers (India )(P) Ltd Vs. ACIT (2014) 147 ITD 83 as under:-

*“8. We have carefully considered the rival stands on this aspect. In the context of the controversy relating to the exclusion of abnormal profit making concerns, a reference has been made to the decision of the Special Bench of the Tribunal in the case of Maersk Global Centres (India) (P.) Ltd. v.-Asstt. C/7T20141 147 ITD 83/43 taxmann.com 100 (Mum. – Trib). The relevant observations of the Bench are as under:-*

*"In generality, we are of the view that the answer to this question will depend on the facts and circumstances of each case inasmuch as potential comparable earning abnormally high profit margin should trigger further investigation in order to establish whether it can be taken as comparable or not. Such investigation should be to ascertain as to whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the*

*relevant year. The profit margin earned by such entity in the immediately preceding year/s may also be taken into consideration to find out whether the high profit margin represents the normal business trend. The FAR analysis in such case may be reviewed to ensure that the potential comparable earning high profit satisfies the comparability conditions. If it is found on such investigation that the high margin profit making company does not satisfy the comparability analysis and or the high profit margin earned by it does not reflect the normal business condition, we are of the view that the high profit margin making entity should not be included in the list of comparable for the purpose of determining the arm's length price of an international transaction. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin."*

On the facts of the case, we restore this issue to the file of the TPO for analyzing the reasons for the fluctuation prior to the adjudication on the inclusion or otherwise of this comparable.

(x) Mold-tek : It was submitted that the company is functionally dissimilar. The Co. is into providing Structural Engineering design services to high rise buildings. It was further

submitted that during the year there was a merger with Teckmen Tools Pvt. Ltd. and acquisition of Crossroads Inc, USA. It was also submitted that the accounts of company were revised for FY 2006-07 after amalgamation. The Delhi Bench of the Tribunal in Cienna India (P) Ltd. vs DCIT 57 taxmann.com 329 (Delhi-Trib) as well as the Mumbai Bench in Petro Araldite (P) Ltd Vs. DCIT 144 ITD 625 (Mumbai-Trib) have held that a company cannot be considered as comparable because of financial results become distorted due to mergers, demergers etc. Similar view has also been taken by the Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd vs ACIT in ITA No. 5654/Del/2011. As there were amalgamations in Mold-tek during the financial year in question, this fact makes it incomparable with the assessee company. In view of the aforesaid, we direct to exclude this company from the list of comparables.

(xi) Trinton Corp. : The assessee's objections include that the company is functionally different. The Co. is into call centre services, support services and trading in IT Peripherals. There were Mergers and Acquisitions during the year. Triton acquired 100% shares of E maple Solutions Ltd. Therefore, both Triton and Maple should be rejected due to peculiar economic

circumstances. Promoters were involved in fraud for earlier years; therefore, financials of this Co. are distorted and unreliable.

(xii)- Maple Esolutions Ltd. : It was submitted that there were Mergers and Acquisitions during the year. Triton acquired 100% shares of E maple Solutions Ltd. Promotes were involved in fraud for earlier years therefore, financials of this Co. are distorted and unreliable. The Delhi Bench of the Tribunal in Cienna India (P) Ltd. vs DCIT 57 taxmann.com 329 ( Delhi-Trib) as well as the Mumbai Bench in Petro Araldite (P) Ltd Vs. DCIT 144 ITD 625 (Mumbai-Trib) have held that a company cannot be considered as comparable because of financial results become distorted due to mergers, demergers etc. Similar view has also been taken by the Delhi Bench of the Tribunal in the case of Toluna India Pvt. Ltd vs ACIT in ITA No. 5654/Del/2011. As there were amalgamations in the company during the financial year in question, this fact makes it incomparable with the assessee company. Further, the ITAT Delhi Bench has held in Calibrated Healthcare systems India (P) Ltd. Vs ACIT in ITA No. 5271/Del/2012 as under:

“9. We have heard both the sides and perused the relevant material on record. Both these companies are inter-related entities. During the year under consideration, there was acquisition of 100% shares of Maple Esolutions Ltd. by Triton Corp. Ltd and "thus Maple Esolutions Ltd. became a wholly owned subsidiary of Triton Corp. Ltd. w.e.f 01.01.2007. It can be seen that this merger/acquisition has taken place during the year under consideration, thereby shattering their comparability.

10. The Ld. AR also pointed out that both these companies are owned by Rastogi Group and the reputation of the Directors of these companies was having question-mark in earlier years. In support of the contention for the exclusion of these companies, the Id. AR relied on an order passed by Delhi Bench of the Tribunal in the case of ITO v. CRM Services India (P) Ltd. (2011) 14 taxmann.com 96/48 SOT 41 (Delhi) (URO), copy placed on pages 141 onwards of the paper book, in which Maple Esolutions Ltd. and Triton Corp. Ltd. were directed to be excluded by the Tribunal on this score. The Ld. DR, on the other hand, opposed this contention.

11. We find that there is a direct order by the Delhi Benches of the Tribunal in which these two companies have been excluded because of financial irregularities committed by their directors. In the absence of any contrary order brought on record by the Ld. DR permitting the inclusion of companies under cloud, in the list of comparables, respectfully following

*the precedent we direct the exclusion of these two companies from the list of comparables.”*

Accordingly, we also direct the exclusion of this comparable.

(xiii). R Systems International Ltd- The assessee's submission in this regard is to treat provision for doubtful debts of Rs. 5.08 crores and miscellaneous balances of Rs. 3.39 crores written off as operating expenses. It is seen that the assessee had not raised this particular issue before the DRP and is agitating the issue from the first time before us only. The ITAT Delhi Bench in *Sony India Pvt. Ltd vs DCIT* in ITA No. 1189/Del/2005, 819/Del/2007 and 820/Del/2007 has held that there is no justification for excluding provisions written back in the profit and loss account as not forming part of the operating profit of the tax payer. In the interest of justice we restore the issue of writing back of provision for doubtful debts to be verified and treated as an operating expense by the TPO after proper verification in this regard. As far as the issue of writing off of miscellaneous balances is concerned we restore the issue of adjudication itself to the file of TPO as the relevant details of the balances written off and their nature are not before us.

(xiv). Flextronics Software Systems Ltd (Seg). : It is the assessee's submission that in the revised order, the TPO has included 5.4 crores of foreign exchange gain at entity level whereas segment information has been used by the TPO. It is the assessee's contention that due to this anomaly the OP/TC has increased to 54.72% from 8.62% of whereas the correct computation of the mark-up would work out to 9.31%. We restore this comparable to the file of the TPO to re-compute the correct margins if so warranted, after due verification of the assessee's claim/computation.

(xvi) Aditya Birla Minaes Worldwide Ltd. : The assessee has submitted that the foreign exchange income on loan amounting to Rs.119866000/- has been wrongly taken as the operating income by the TPO in the revised order although it was a non-operating item. A perusal of the Annual Report of the comparable reveals that the company itself has treated the income under 'other income' and therefore agreeing with the contentions of the Ld. AR, we remit back this comparable to the file of the TPO for re-computing the margins after excluding foreign exchange income from its operating income.

11. The appeal is disposed of in terms of our observations as above.

12. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 30<sup>th</sup> June, 2016.

**Sd/-**

**(S.V. MEHROTRA)  
ACCOUNTANT MEMBER**

**Sd/-**

**(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER**

Dated: the 30<sup>th</sup> of June 2016  
'GS'

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By order

Asstt. Registrar