

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
DELHI BENCH 'I-1, NEW DELHI**

**BEFORE : SHRI I.C. SUDHIR, JUDICIAL MEMBER &  
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 6175/Del./2015  
Asstt. Year : 2011-12**

Actis Global Services Private Limited,  
MIRA, The Corporate Suites, Block D,  
Ground Floor, 1 & 2, Ishwar Nagar,  
New Delhi (PAN:AAMFA2371E).  
(Appellant)

vs. Income-tax Officer,  
Ward 1(3), New Delhi.  
  
(Respondent)

Appellant by	:	Sh. Atul Jain, C.A. & Sh. Aditya Loonkar, C.A.
Respondent by	:	Sh. Amrendra Kumar, CIT/DR
Date of hearing	:	01.07.2016
Date of pronouncement	:	29.07.2016

**ORDER**

Per L.P. Sahu, Accountant Member:

This is an appeal filed by the assessee against the order u/s. 143(3) read with section 144C of the Income-tax Act, 1961 (in short 'the Act') and the order of the Assessing Officer, Ward 1(3) dated 29.10.2015 incorporating the directions of learned Dispute Resolution Panel (DRP) on the order of Transfer Pricing Officer (TPO) passed u/s. 92CA(3) dated 07.01.2015 after directions of

ld. DRP u/s. 144C(5) of the Act. The appellant has raised in all 13 grounds of appeal as under :

1. *“The assessment order passed by the Income Tax Officer, Ward 1(3), New Delhi [Learned Assessing Officer (‘Ld. AO’)] pursuant to directions of the Hon’ble Dispute Resolution Panel (‘Hon’ble DRP’) is bad in law.*
2. *The Hon’ble DRP, the Ld. AO and the Learned Transfer Pricing Officer-1(1)(1) (hereinafter referred to as ‘Ld. TPO’) erred both on the facts and in law, in confirming the addition to the extent of Rs. 23,348,693 to the income of the Appellant by holding that its international transaction pertaining to provision of information technology enabled services does not satisfy the arm’s length principle prescribed under the Income-tax Act, 1961 (‘the Act’).*
3. *On facts and in law, the Hon’ble DRP, Ld. AO and Ld. TPO erred in disregarding the Assessee’s use of multiple year/ prior years’ data in contravention of the provision of section 92C of the Act read with Rule 10B and Rule 10D(4) of the Income-tax Rules, 1962 (‘the Rules’).*
4. *On facts and in law, the Hon’ble DRP, Ld. AO and Ld. TPO erred in disregarding the doctrine of impossibility of performance in contravening section 92D of the Act read with Rule 10D(4) of the Rules, which mandate the use of contemporaneous data for the determination of arm’s length price (‘ALP’) of international transactions.*
5. *On facts and in law, the Hon’ble DRP erred in confirming the action of the Ld. AO and the Ld. TPO of modifying/ adding the selection filters, disregarding the functional profile of the Appellant, and consequently rejecting the comparable companies identified by the Appellant in the Transfer Pricing (‘TP’) documentation and thus, ignoring the provisions of Rule 10B(2).*
6. *On facts and in law, the Hon’ble DRP erred in ignoring the annual report of Techprocess Solutions Ltd. duly furnished by the Appellant before them and consequently confirming the action of the Ld. TPO of rejecting this company on ground of non-availability of financial data/ annual report.*
7. *On facts and in law, the Hon’ble DRP erred in disregarding the computation of operating profit margins for financial year 2010-11 of R*

- Systems International Ltd., as furnished by the Appellant and consequently confirming the action of the Ld. TPO of rejecting this company on account of having different financial year ending. By doing so, the Hon'ble DRP erred in disregarding various judicial pronouncements in this regard.*
8. *On facts and in law, the Hon'ble DRP, Ld. AO and Ld. TPO erred in selection of companies which are not comparable to the Assessee in terms of functions performed, assets employed and risk assumed and by doing so contravened section 92C(3) of the Act read with Rule 10B(2) of the Rules.*
  9. *On facts and in law, the Hon'ble DRP erred in ignoring the incorrect margins of the comparable companies selected by the Ld. TPO.*
  10. *On facts and in law, the Hon'ble DRP, Ld. AO and Ld. TPO erred in not allowing a risk adjustment under Rule 10B(1)(e) and Rule 10B(3) for determination of the ALP to account for the difference in the risk profile of the Appellant, a low-risk service provider, and of the comparable companies, that are full-fledged risk bearing entrepreneurs.*
  11. *On facts and in law, the Hon'ble DRP, Ld. AO and Ld. TPO erred in treating the delay in outstanding receivables from associated enterprise as an international transaction under section 92B of the Act by classifying it as a deemed intra group loan and further benchmarking the deemed loan by imputing interest on it at the rate of 6 months US\$ LIBOR plus 400 basis points. By doing so, the Hon'ble DRP, Ld. AO and Ld. TPO erred in disregarding various judicial pronouncements in this regard.*
  12. *On the facts and in the circumstances of the case, the Ld. AO erred in initiating penalty proceedings under section 271(1)(c) of the Act.*
  13. *On facts and in law the Ld. AO made computational errors in calculating the tax demand alongwith interest under section 234B of the Act."*
2. The assessee filed its return of income on 29.11.2011 showing an income of Rs.23,19,782/- which was subsequently revised on 27.04.2012 to Rs.24,72,931/-. During the course of assessment proceedings, the Assessing Officer found that the assessee has entered into international transactions

with its Associate Enterprise (AE) for provision of back office support services/IT enabled services (ITES) amounting to Rs.17,02,10,918/- and reimbursement of expenses of Rs.1,28,706/- and therefore, reference u/s. 92CA of the Act was made by the ld. Assessing Officer for determination of Arm's Length Price (ALP) for the international transactions undertaken by the assessee. The ld. TPO passed an order u/s. 92CA(3) vide order dated 07.01.2015 proposing an adjustment on account of ITES of Rs.2,72,34,266/- and on account of receivables of Rs.18,61,066/- totaling to Rs.2,90,95,332/-. Based on this, the ld. Assessing Officer passed a draft assessment order on 02.02.2015 wherein in the normal computation of income, addition of Rs.2,90,95,332/- was proposed and determined the taxable income at Rs.3,15,68,262/- and further, on the book profit declared by the assessee u/s. 115JB of the Act, computed by the assessee of Rs.2,05,21,759/-, made an adjustment on account of transfer pricing adjustment of Rs.2,90,95,332/- and determined the taxable book profit u/s. 115JB of the Act of Rs.4,96,17,091/-. Subsequently, the income was assessed at Rs.3,15,68,262/-. The appellant further filed its objections against the transfer pricing adjustment proposed in draft assessment order before the ld. DRP and the ld. DRP vide its directions dated 31.08.2015 disposed of the objections of the assessee. Consequently, in the final assessment order, transfer pricing adjustments were made of

Rs.2,33,48,693/- in the normal computation of total income assessing the total income of the assessee at Rs.2,58,21,623/-. Further, the book profit was increased by TP adjustment of Rs.2,33,48,693/- against the book profit declared by the assessee of Rs.2,05,21,759/-, assessing the book profit at Rs.4,38,70,452/-. This order of the Id. Assessing Officer is in challenge before us on several grounds.

3. The assessee is engaged in providing ITES such as back office, financial and fund accounting services to its AE. The assessee further leverages on IPR and other commercial or granting intangibles owned by the group and therefore, it is characterized as routine IT enabled service provider which is exposed to less than normal risk in the business since it does not own any interest for the intangibles.

4. The assessee in its TP documentation, i.e., T.P. study report has used transaction net margin method (TNMM) as the most appropriate method and used operating profit (OP) / total cost (TC) as the profit level indicator (PLI). The assessee has used 12 comparables with an average margin of 12.37% using the multiple year data and compared it with margin of the assessee at 12.01% and has submitted that its international transactions are at arm's

length. The ld. TPO rejected the transfer pricing documentation of the assessee and applying its own filter, selected 9 comparables with an average PLI of 28.30% and taking into consideration the PLI of OP/OC, i.e., operating profit/operating cost, determined the ALP of international transaction of Rs.18,72,10,918 at Rs.21,44,45,184/- and proposed an adjustment of Rs.2,72,34,266/-. Further, as stated by the assessee, the terms of payment is 60 days, the ld. TPO further computed the interest on outstanding period exceeding 60 days and applying the interest rate of 10.84%, made an adjustment on account of receivables of Rs.18,61,066/-, making total adjustment of Rs.2,90,95,332/-. On objection before the DRP, 8 comparables remained where the arithmetic mean of PLI taking OP/TC of 25.51% and final adjustment of Rs.2,33,48,693/-. Further, the assessee filed rectification application before the ld. DRP on 20.10.2015 which is pending for adjudication.

5. Ground No. 1 of appeal is general in nature and no specific arguments were advanced on that. Therefore, the same is dismissed. Similarly, before us, grounds Nos. 1 to 5 are stated to be covered and general and, therefore, they are not adjudicated separately but are considered as redundant and hence, dismissed.

6. Ground No. 6 of appeal is specifically raised against rejection of comparable of Techprocess Solutions Ltd., where the ld. TPO rejected this company on the ground of non-availability of financial data and annual report. The assessee has pointed out that application dated 20.10.2015 filed before the ld. DRP u/r 13 of IT DRP Rules that the ld. TPO has rejected the comparables selected by the assessee holding that data of the company for the relevant financial year was not available in the public domain, however, the assessee has submitted the annual report of that company for F.Y. 2010-11. On objection before the ld. DRP, the stand of the TPO was upheld without considering the annual report submitted by the assessee. This application is pending adjudication. However, as the annual report of the company is available and the same is also submitted in paper book before us, we set aside this ground of appeal to the file of ld. TPO to consider this company for comparability analysis. In the result, ground No. 6 of the appeal is allowed for statistical purposes.

7. Ground No. 7 of appeal is against rejecting R. Systems International Ltd., which found to be though functionally comparable, but as it flows different financial year, it was rejected by the TPO. At page No. 7 of the order of the TPO

in para No. 4, he has rejected this company, as it follows December ending. On objection before the DRP, the assessee submitted the comparable derived financial data of the company based on the information available in public domain for comparable 12 months for F.Y. 2010-11. This data was also submitted in ground No. 5 before the Id. DRP which vide para No. 3.5 stated that the use of same financial year as transaction has support of IT Act, Rules and jurisprudence and when adequate number of comparables are available why comparables without reliable data should be considered and for this, it has relied on some decisions of co-ordinate Bench.

8. Before us, the Id. AR contended that when derived profitability is available and when this company is found to be functionally comparable by the TPO, the same should have been considered. For this he relied on the following decisions of coordinate bench wherein it is held that if otherwise, the comparable company is found to be functionally comparable, it should not be excluded solely on the ground of having different financial year :

- (i). Mercer Consulting (India) P. Ltd., ITA No. 966/Del./2014.
- (ii). DCIT vs. Mc Kinsey Knowledge Centre, ITA No. 2195/Del./2011
- (iii). Vodafone India Services (P) Ltd. ITA No. 7140 & 7097/Mum/12

9. The Id. DR relied on the orders of the Id. DRP and the Id. TPO. He further submitted that when the data of different financial year are available than

accounting year of the appellant company, it may not be considered as comparable.

10. We have carefully considered the rival contentions. Before us, the Id. AR has submitted that before the Id. DRP, it has provided the comparable financial data of the same financial year in case of this comparable as compared to the appellant company based on the information available in the public domain, then same should have been considered. These data are available at page 220 of the appeal set filed before us. On perusal of that statement, it is apparent that R. Systems International Ltd. is flowing January to December as financial year and based on that the assessee has derived three months data of January to March, 2011 and thereafter worked out comparable data for financial year from April to March, 2011. In our view, the arguments of the assessee merit consideration. Our view is further supported by the decision of coordinate Bench in the case of Mercer consulting (India) Pvt. Ltd. vs. DCIT (supra) for the assessment year 2009-10 wherein on the identical facts, on the same comparable of R. System International Ltd., the coordinate Bench has held as under :

*“R. Systems International Limited*

*11.1. The assessee included this case in a list of comparables. The TPO applied a filter of excluding companies whose data for the financial year 2008-09 was not available. As the data considered by R. Systems International Ltd.*

was for the year ending other than March, the TPO held that this case was not comparable. The assessee is contesting the exclusion of this case.

11.2. The ld. AR fairly conceded that R. Systems was following calendar year for maintaining its annual accounts and, as such, the assessee adopted data for 31.12.08 for including it in the list of comparables. It was, however, stressed that this case ought not to have been excluded on this count alone, when it was otherwise comparable. The ld. DR opposed this contention by placing reliance on certain decisions in which it has been held that if the data for the financial year of the comparable case similar to that of the tested party is not available, then, such case should be expunged from the list of comparables.

11.3. In order to appreciate the rival submissions on this issue, it would be apt to note the relevant part of sub-rule (4) of Rule 10B which is as under:-

‘(4) The data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which the international transaction has been entered into’

11.4. On circumspection of the above part of this sub-rule, it comes to fore that the comparability of an uncontrolled transaction can be analysed with the ‘data relating to the financial year’ in which the transaction has been entered into. As per this mandate, it is clear that if the tested party has March ending, then the comparables must also have the data relating to the financial year ending on 31st March itself. If such a data is not available, then the case should be disqualified from the list of comparables.

11.5. Turning to the facts of the instant case, we find that the assessee has adopted the figures of this company for the calendar year ending 31.12.2008. Since the assessee is closing its accounts as on 31.3.2009, naturally, the data of R. Systems does not pass the test laid down in sub-rule (4) of Rule 10B. The ld. AR invited our attention towards the Annual accounts of R. Systems available at page 144 of the assessee’s paper book. It can be seen from the audited accounts of R. Systems that the data for year ending 31.12.08 has been given under one column and the data for quarter ending 31.3.09 and 31.3.08 (both audited) has been given in the other two columns. This shows that if we take up the yearly data ending 31.12.08 and exclude the results of quarter ending 31.3.08 and include the results of quarter ending 31.3.09, what we get is the data for the financial year ending 31.3.09, being the same financial year in which the instant international transactions were entered into by the assessee.

11.6. The ld. DR relied on an order passed by the Mumbai Bench of the Tribunal in ACIT vs. Hapag Lloyd Global Services Ltd. 2013- TII-68-ITAT-MUM-TP (authored by one of us, namely, the AM) in which it has been held that a company with a different financial year ending cannot be compared and is likely to be excluded. There is not and cannot be any dispute over this proposition that

*an otherwise comparable company having a different financial year cannot be considered as comparable. But if the data relating to the financial year in which the international transaction has been entered into is directly available from the annual accounts of that comparable, then it cannot be held as not passing the test given under sub-rule (4) of rule 10B. In the case under consideration before the Mumbai Bench, there is no mention of the audited quarterly data of such comparable being available for consideration. It is quite natural that if the data of the financial year is not available or not capable of being directly deduced from the annual accounts of such company, then such case deserves to be excluded. If, however, the audited accounts of such comparable directly give the figures in such a manner that the data of the financial year in which the assessee has entered into an international transaction can be easily deduced, then there is no reason for excluding such an otherwise comparable case.*

*11.7. We find that R. Systems International Ltd. has been excluded by the TPO solely for the reason that its financial year is different without considering that the data for the financial year adopted by the assessee can be easily compiled from the audited statements of such company. We, therefore, set aside the impugned order on this issue and remit the matter to the TPO/AO for including the case of R. Systems International Ltd. in the list of comparables by working out the figures relevant to the financial year ending 31.3.09 from the audited accounts of R. Systems International Ltd.”*

11. In view of this, we set aside the impugned order on this limited issue and remit the matter to the Id.TPO for including R. Systems International Ltd. in the list of comparables for working out the PLI of the assessee. We also make it absolutely clear that it would be the duty of the assessee to substantiate the financial information with respect to R Systems International with authentic and reliable data. The Id. TPO or the Assessing Officer are also directed to verify and assure them about the reliability of the information. After this verification, the above company may be treated as proper

comparable if found proper on such examination. In the result, ground No. 7 of the appeal of the assessee is allowed accordingly.

12. Ground No. 8 is against selection of certain companies which are not comparable to the assessee as far analysis. The assessee has contested the following comparables included by the Id. TPO.

- (i). eClerx Services Private Limited;
  - (ii). Infosys BPO Limited;
  - (iii). TCS E-Serve Limited
- (i). eClerx Services Private Limited:

13. The Id. TPO included this company in the final set of comparables. The assessee objected to the inclusion of this company before the TPO stating that this company is functionally not comparable due to outsourcing of substantial amount of work to outsiders, presence of substantial intangible assets, absence of segmental data and abnormal profits. The Id. TPO rejected all these arguments stating that the company operates under single segment and outsourcing of the work cannot be a criterion for rejection of the comparable. He further stated that the intangible asset is the normal usage by every IT and ITES company. Therefore, he included it as comparable. The Id. DRP also rejected the objection of the assessee on this count vide para No. 3.6.1 of its order.

14. The learned AR of the assessee submitted before us that this comparable has been considered in appellant's own case for assessment year 2010-11 by the coordinate bench and following the decision of Hon'ble Delhi High Court in the case of Rampgreen Solutions, has held that it is functionally incomparable with the assessee. He further stated that there is no change in the data analysis of the assessee as compared to the previous year and therefore, this issue is covered so far as exclusion of this comparable in favour of the assessee is concerned. In spite of that he submitted in his synopsis, the functions performed by this company and demonstrated that it is full fledged entrepreneur carrying greater risk compared to the assessee. He further stated about the outsourcing model, substantial sealing in market expenses and also drawn our attention that there is extra ordinary event during the year. He further relied on the decisions of Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Limited vs. CIT and also Agnity India Technologies vs. ITO over and above assessee's own case for assessment year 2010-11.

15. The ld. DR relied on the order of the ld. DRP and reiterated the findings given at page No. 16 of the order of ld. DRP. He vehemently submitted that this comparable should not be excluded.

16. We have considered the rival submissions and also perused the orders of the coordinate Bench in the case of assessee itself for A.Y. 2010-11 wherein this comparable was considered. In para No. 44 to 47 of that order, the coordinate Bench has held that this company is functionally different after comparing the business profile of that company. The coordinate Bench has held as under :

*“44. The next ground no. 7, raised by ld. counsel for the assessee is regarding inclusion of eClerx Services Limited. Ld. counsel pointed out that this company is a data analytical knowledge process outsourcing service provider. It provides data analytics, data management and process improvement solutions to global enterprise clients, mainly in capital markets and financial services. Ld. counsel submitted that the company’s engagements are concerned of the two specializations, namely, capital market and financial services, wherein it provides model office and back office support to the capital market business and sales and marketing support.*

*45. Ld. counsel referred to the annual report of this comparable company, wherein it is stated as under:*

*“eClerx Services Limited (eClerx) is a knowledge process Outsourcing (KPO) Company providing data analytics, data management and process improvement solutions to global enterprise clients, eClerx supports its clients through two business units – Financial Services and Sales and Marketing Support.*

*x x x*

*x x x*

*x x x*

*In the Capital Markets division, the Company today provides end-to-end financial transaction support services such as trade booking, trade confirmation, asset servicing, cash settlements, client servicing, risk management and reference data integrity across all asset classes, and its services span both "sell-side" (the large banks) and "buy-side" (the funds and asset managers). Furthermore, the Company provides strategic and process consulting services, helping clients devise solutions to improve efficiency, reduce risk and meet regulatory and market demands.*

*Similarly in the Sales and Marketing Support division, the Company today supports clients in all elements of product and services marketing and sales-with a focus on online support to include content development and management, search engine management, web operations, pricing and customer analytics, product database management and catalog audits. The Company is also pursuing a strategy of creating a portfolio of platform attached services, by creating a suite of services that are complementary to industry standard IT platforms."*

*46. Ld. counsel further submitted that this comparable has to be excluded in view of the decision of Hon'ble Delhi High Court in the case of Rampgreen Solution (ITA no. 102/2015), wherein in para 31 it has been held as under:*

*31. In the present case, the Tribunal noted that Vishal and eClerx were both engaged in rendering ITeS. The Tribunal held that, "once a service falls under the category of ITeS, then there is no sub-classification of segment". Thus, according to the Tribunal, no differentiation could be made between the entities rendering ITeS. We find it difficult to accept this view as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel, involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice-based call centers that render routine customer support for their clients. Clearly,*

*characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would, in our opinion, be erroneous.”*

*47. After hearing both the parties, we direct the ld. TPO to exclude this comparable from the list of comparables in view of decision of Hon’ble Delhi High Court as this company is functionally different, which is evident from the business profile of eClerix, reproduced earlier from Annual Report.”*

Therefore, following the order of coordinate Bench we also hold that eClerx Services Private Limited being functionally different as per its business profile which remains uncontroverted by the Revenue, requires to be excluded.

(ii). Infosys BPO Limited:

17. This comparable is selected by the learned TPO after rejecting the contentions of the assessee regarding functional non-comparability, incomparable scale, brand profits, presence of intangibles, extra ordinary events etc. The learned TPO held that this company operates primarily into business process Management Services and taxpayer has not shown how

brand and ownership of intangibles is leading to high profit margin. The ld. DRP also rejected the objection of the assessee.

18. The learned AR of the assessee submitted before us that this comparable has been considered in appellant's own case for assessment year 2010-11 by the coordinate bench and following the decision of Hon'ble Delhi High Court in the case of Rampgreen Solutions, has held that it is functionally incomparable with the assessee. He further stated that there is no change in the data analysis of the assessee as compared to the previous year and therefore, this issue is covered so far as exclusion of this comparable in favour of the assessee is concerned. In spite of that he submitted in his synopsis, the functions performed by this company and demonstrated that it is full fledged entrepreneur carrying greater risk compared to the assessee. He further stated about the outsourcing model, substantial sealing in market expenses and also drawn our attention that there is extra ordinary event during the year. He further relied on the decisions of Hon'ble Delhi High Court in the case of Rampgreen Solutions Pvt. Limited vs. CIT and also Agnity India Technologies vs. ITO over and above assessee's own case for assessment year 2010-11. He also submitted that Hon'ble Bombay High court in the case of

Pantaire Water India Pvt. Ltd. has excluded this company on account of wide difference in turnover.

19. The ld. DR relied on the orders of the ld. DRP and submitted that high turnover cannot be a criteria for comparability analysis.

20. We have carefully considered the rival contentions. The coordinate Bench in assessee's own case for assessment year 2010-11 in ITA No. 30/Del./2015 at para 38 to 43 has excluded Infosys BPO Limited as comparable observing as under :

*38. We have considered the submissions of both the parties and have perused the record of the case. There is no denying of the fact that Infosys BPO operates on a large scale and caters to wide variety of customers operating in different industries. Ld. counsel has filed before us extracts from the annual reports and white paper issued by Infosys in regard to 'Process Progression Model ( "PPM"), a holistic model to transform business processes'.*

*39. A birds' eye view of the said model makes it clear that it involves various processes which are aimed at coping with various challenges which impede the business strategy. On the other hand, the assessee's business profile is quite limited and not at all comparable to the optimistic business model of Infosys. The turnover of Infosys was Rs. 1127 crores during the FY 2009-10 as compared to the assessee's turn over of Rs. 18.04 crores. This huge difference in the turnover itself makes it clear that the margins achieved by Infosys BPO being a service sector company, are much higher than that of assessee. In service sector higher turnover reflects higher margin because it is primarily the customer's satisfaction which is relevant in selecting the service provider even at the payment of higher margins.*

40. In *Merker equitable service centre India Pvt. Ltd.* 133 ITD 543, it was held that *Infosys BPO* cannot be considered as a comparable to a captive service provider, like assessee.

41. *Ld. DR* has submitted that *Actis* is also a brand and, therefore, adjustment should be made for the difference. We are unable to accept this contention particularly because the department has not brought on record any brand value of *Actis* on record. Moreover, the wide difference in turnover makes it clear that there is wide difference in the brand value of the two companies and, therefore, without quantification of the same, effect on turnover cannot be ascertained. We further find that the *Infosys BPO* has not been taken as comparable in detailed list annexed to synopsis filed by assessee including the following cases: - “

- *Zavata India Pvt. Ltd. Vs. DCIT* (ItA no. 1781/Hyd/2011)  
 - *Capital IQW Information Systems (India) Pvt. Ltd. Vs. DCIT (Int. Taxation)* (ITA no. 1961/Hyd/2011) 26 ITA 30/Del/2015  
 - *Triniti Advanced Software Labs (P) Ltd.* (2011-TII-92-ItAT-Hyd-TP).  
*Agnity India Technologies Vs. ITO* ITA 1204/2011 Delhi High Court – In this case it was emphasized that *Infosys Technologies Ltd.* could not be considered as a comparable being a giant company. The same principle is applicable to *Infosys BPO* also.

42. In view of above discussion, we direct *ld. TPO* to exclude *Infosys BPO*.

43. In the result, ground no. 6 is allowed.”

The *ld. DR* could not controvert how the facts of assessment year 2010-11 in the case of assessee and in the case of comparable are different and, therefore, following the decision of coordinate Bench we direct exclusion of *Infosys BPO Limited* from the comparability analysis.

(iii). TCS E-Serve Limited :

21. The TPO has selected this comparable after rejecting the arguments of the assessee regarding functional non-comparability, incomparable scale of operation, payment of brand equity and presence of intangibles and volatile profit margins. Further, the assessee contended that the TPO did not select the same comparable last year. The Id. TPO held that it is an ITES company and therefore, functionally comparable. On objection before the Id. DRP, the objections were rejected.

22. Before us, the Id. AR submitted that this company is engaged in services like software testing, verification and validation and data centre management services which falls under software development services, different from low end, low risk ITES segment. He further hyped on absence of separate reportable segment and incomparable scale of operation. He further attacked the comparable citing data brand as one of the most valuable brand and also ownership of intangible. He further submitted that there are extraordinary events in the comparable in acquisition of CITI Group Global Services and therefore, he vehemently argued that this comparable should be excluded.

23. The ld. DR relied on the orders of the ld. DRP and further cited the reasons stated in para 3.6.3 of that order. He vehemently argued that this comparable is functional comparable and should not be excluded.

24. We have carefully considered the rival submissions and also referred to page No. 247 of the paper book filed before us wherein relevant extracts from annual reports shows that it includes technical services like software testing, verification and validation of software at the time of implementation and data center management activities. It is engaged in BPO segment to the banking and financial service industries. Therefore, it is apparent that the assessee is engaged in BPO services. The coordinate Bench in the case of Equant Solutions India Pvt. Ltd. vs. DCIT in ITA No. 1202/Del./2015 for A.Y. 2010-11 has held that it has used intangibles and use of data brand. Vide para No. 24 of that order, it was held to be excluded compared to low risk ITES company like appellant. Further, the decision of the coordinate Bench in the case of Ameriprise India Pvt. Ltd. has considered in ITA No. 7014/Del./2014 at para No. 12 has excluded this company as under :

*12. TCS e-Serve Ltd.*

*12.1 The assessee objected to its inclusion by contending that this is exceptional year of operation for this company as it is the first full year of operations after its takeover by TCS. It was also contended that this company is functionally dissimilar and the segmental information are*

*insufficient. The TPO repelled the assessee's objections and included it in the final set of comparables.*

*12.2. We have heard the rival submissions and perused the relevant material on record. A copy of the Annual report of this company is available on page 398 of the paper book. Ld. Counsel for the Assessee submitted that like TCS e-Serve International Limited, this Company is also engaged in providing 'Transaction processing' and 'Technical services'. By referring to Profit & Loss Account in standalone financials of the Company it was pointed out that during the relevant financial year, the Company has received Income of Rs. 1,35,94,110/- from Transaction Processing and Other Services. On referring to Schedule 'O' - Notes to Accounts it is given that -*

*"Background and principal activities*

*TCS e-Serve Limited is engaged in the business of providing Information Technology - Enables Services (ITES) / Business Process Outsourcing (BPO) services, primarily to Citigroup entities globally.*

*The Company's operations broadly comprise of transaction processing and technical services. Transaction processing includes the broad spectrum of activities involving the processing, collections, customer care and payments in relation to the services offered by Citigroup to its corporate and retail clients. Technical services involve software testing, verification and validation of software at the time of implementation and data centre management activities."*

*12.3 We also note that 'Segmental Information' given in Point No. 8 of Schedule 'O' - Notes to Accounts in standalone financials of the annual report shows that Company is engaged in Business Process Outsourcing (transaction processing) services to the Banking & Financial Services Industry (BFSI), which is considered as a single segment.*

*12.4 It was fairly conceded by Ld. AR that this company has been considered as Comparable by the Delhi Bench of Tribunal in Techbook International P. Ltd. (supra), by observing as follows :*

*“The company’s overview has been discussed on page 467 of the paper book, which divulges that this company : “is in the business of providing business process management services in the banking and financial services (BFSI), vertical ( i.e. industry vertical) to help its customers achieve their business objectives by providing innovative best-in-class services.” We find that this company is also providing ITES. **Unlike TCS e-Serve International Ltd., this company is not providing any technical services involving software testing, verification and validation of software etc.** Since the functional profile of this company on a broader basis is no different from that of the assessee, both being involved in rendering ITES, we are not inclined to treat this company as incomparable. The Id. AR argued that the nature of the ITES provided by this company is different from that of the assessee and hence the same be excluded. We are disinclined to sustain this objection. Matching of the exact functional similarity is dispensed with under the TNMM, which is not so under the Comparable uncontrolled price method. The TNMM approves comparability on the basis of broader overall similarity. When we consider the nature of services provided by this company, being the ITES, which is similar to that of those rendered by the assessee, again the ITES, we cannot order its exclusion simply for the reason that the verticals of ITES are somewhat different. If one goes to make a comparison in the way suggested by the Id. AR under the TNMM, then it will be very difficult, if not impossible, to find out a ditto comparable. A company which satisfies the broader parameters of comparability in the overall same segment, cannot be excluded due to somewhat different nature of such overall activity. An examination of the comparables chosen by the assessee, which have been accepted by the TPO, also satisfy only the test of overall similarity and not the peculiar similarity, as has been now contrastly contended for the exclusion of this company. This argument, therefore, fails.”*

*12.5 We have gone through the annual report of Company and have carefully considered the reasoning given by coordinate Bench in the case of Techbook International P. Ltd. (supra). On perusal of Schedule ‘O’ – Notes to Accounts of the Standalone financials of the Company, it is clear that the Company is engaged in “transaction processing” and “technical services” activities. No separate segmental details are available. On a careful reading of the decision of coordinate Bench in Techbook*

*International P. Ltd. (supra) it is clear that Schedule 'O' – Notes to Accounts in respect to carried out by Company and relevant segmental details were never brought to the attention of the Bench. We find that in the absence of the availability of any such segregation of the total revenue of this company, it is not possible to separately consider its profitability from rendering of 'Transaction processing services'. Thus, the entity level figures render this company as unfit for comparison. Following the above reasons also taken note in the case of TCS e-Serve International Limited, we order for the elimination of this company from the final set of comparables."*

Therefore, following the decision of the coordinate Bench, we direct exclusion of TCS E-Serve Limited from the final list of comparables.

25. In view of our above directions, we allow ground No. 8 of the appeal of the assessee for exclusion of eClerx Services Private Limited, Infosys BPO Limited and TCS E-Serve Limited from the final set of comparables. In the result, ground No. 8 of the assessee's appeal is allowed.

26. Ground No. 9 of the appeal of assessee is against incorrect margin of comparable companies selected by the ld. TPO. The ld. AR has drawn our attention to ground No. 7 of the objections raised by the assessee, which is subject matter of application under Rule 13 in rectification application dated 20.10.2015. According to that application, the assessee has pointed out that in case of six comparables, there is some error in computation of margins. This

issue has not been addressed by the ld. DRP despite there being an objection before it. The ld. DR did not have any objection if this factual aspect may be verified by the Assessing Officer and then if found correct, may be rectified. In view of this, we set aside ground No. 9 to the file of the Assessing Officer to consider the margin computation provided by the assessee. The reasons for difference are also stated in column No. 4 of the below mentioned chart :

S.No.	Name of the company	Correct OP/TC as per Assessee (%)	OP/TC as per TPO (%)	Reasons for difference (Treatment by Ld. TPO)
1	Jindal Intellicom Ltd.	10.96	13.70	Miscellaneous balances written back, bad debts recovered, provision no longer required written back, provision for doubtful debts treated as non-operating
2	e4e Healthcare Business Services Private Ltd.	9.69	9.77	Provision no longer required written back and bank charges treated as non-operating
3	ICRA Techno Analytics Ltd. (Transaction Services - Processing Services)	24.83	25.24	Entity results considered instead of segment results
4	Infosys BPO Ltd.	17.73	17.86	Other income (nature unknown) treated as operating
5	Mastiff Tech Pvt Ltd.	5.77	24.34	Provision for doubtful debts treated as non-operating.

27. The learned TPO has further directed to consider whether the reasons for differences stated by the assessee are justifiable or not and if found in

accordance with law, the respective correction after proper verification may be allowed. Needless to say that in case of any difference of opinion between the Id. TPO and the submissions made by the assessee, reasonable opportunity of hearing may be granted to the assessee. In the result, ground No. 9 of appeal is allowed accordingly.

28. Ground No. 10 of appeal is against the risk adjustment claimed by the assessee rejected. The assessee claimed before the Id. TPO that the assessee is a low risk service provider and therefore, the risk adjustment may be provided. The Id. TPO rejected the claim of the assessee stating that the assessee could not demonstrate as to how the risk is divided between the AE and the assessee. He also relied on the OECD guidelines. The Id. DRP also rejected the claim of the appellant. The Id. AR reiterated the same arguments before us and the Id. DR relied on the orders of the lower authorities.

29. We have carefully considered the rival submissions and also perused the OECD guidelines relied upon by the Id. TPO. The OECD guidelines state that no adjustment can be allowed in absence of any reliable data. However, in the present case, the assessee has submitted the claim at page No. 280, risk adjustment computation with respect to set of comparables. We do not find

any sound reasoning given by the ld. TPO, who did not state how the data submitted by the assessee is not reliable. Therefore, in the interest of justice, we set aside this matter to the file of the ld. TPO to verify the computation of risk adjustment submitted by the assessee and to allow the same after proper verification and if found in accordance with law. In the result, ground No. 10 of appeal is set aside to the file of the ld. TPO with the above directions and the same is accordingly allowed.

30. Ground No. 11 of appeal is against treating the delay in outstanding receivables from AE treating it as a loan and further benchmarking imputing interest thereon. The ld. TPO during the course of examination has held that overdue receivables constitute an international transaction and therefore, interest thereon needs to be imputed.

31. The ld. AR submitted that this issue is covered in favour of the assessee by the decision of coordinate Bench in assessee's own case in ITA No.30/Del./2015 for A.Y. 2010-11.

32. We have carefully considered the contention of the assessee and we agree with its arguments. The coordinate Bench in the assessee's own case in para No. 59 has held as under :

*"59. We have considered the submissions of both the panics and have perused the record of the case. As far as Id. counsel's plea based on the directions of DRP for AY 2009-10 is concerned, we find that in the said assessment year the assessee had objected to the TPO not allowing working capital adjustment-and since this adjustment was directed to be allowed by Id, DRP, therefore, a separate addition on this ground was not required. However, in the present assessment year, Id. TPO had denied the working capital adjustment and the same has not been assailed before us. Under such circumstances, the matter needs to be restored back to the Id. TPO to verify the assessee's contention regarding all the invoices outstanding being for less than six months and, if, the same is found to be correct, then no addition is called for in view of the IT AT decision in the case of M/s Logix Micro Systems Ltd. (supra). One of the plea of Id. counsel for the assessee was that the entire funds are received from parent company. However, this plea has been taken for the first time and was not taken before lower revenue authorities. Therefore, this aspect also needs to be considered by Id. TPO while deciding this issue de novo. In the result, ground no. 9 is allowed for statistical purposes."*

In view of the above finding, we set aside the issue back to the file of Id. TPO to decide the issue de novo as held in assessment year 2010-11 in assessee's own case because our observations may have an impact in the order passed by the Tribunal in earlier years. In the result, ground No. 11 is allowed for statistical purposes.

33. Ground No. 12 & 13 are with respect to initiation of penalty proceedings and interest u/s. 234B of the Act, which are consequential and premature in nature. Therefore, we refrain to adjudicate on them and dismiss the same.

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

Order pronounced in the open court on 29.07.2016.

Sd/-  
**(I.C. SUDHIR)**  
Judicial Member

Sd/-  
**(L.P. SAHU)**  
Accountant Member

Dated : 29.07.2016

\*aks/-

*Copy of order forwarded to:*

(1) *The appellant*  
(3) *Commissioner*  
(5) *Departmental Representative*

(2) *The respondent*  
(4) *CIT(A)*  
(6) *Guard File*

*By order*

*Assistant. Registrar*  
*Income Tax Appellate Tribunal*  
*Delhi Benches, New Delhi*