



impugned order dated 18.12.2012 passed by Ld. Ld. CIT(A) XX, New Delhi qua the Assessment Year 2008-09 on the ground that:

*“On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of Rs.18,77,813/- made by the Assessing Officer on account of transfer pricing adjustment.”*

3. At the same time, appellant M/s. Tech Book Electronics Services Pvt. Ltd. (hereinafter referred to as ‘the assessee’) by filing the present appeal sought to set aside the impugned order dated 18.12.2012 passed by Ld. Ld. CIT(A) XX, New Delhi qua the Assessment Year 2008-09 on the grounds inter alia that:

*“1. That on facts and in law, the learned Commissioner of Income tax Appeals XX ("CITA) and the learned Addl Commissioner of Income tax, Transfer Pricing Officer - 11(3) and the learned Deputy Commissioner of Income tax, Circle 16, New Delhi ("AO") have erred in using single year data of companies without considering the fact that the same was not available to the Respondent at the time of complying with the transfer pricing documentation requirements and disregarding the Respondent's claim for use of multiple year data for computing the arm's length price.*

*2. That on facts and in law, the TPO/AO has cherry picked comparables and gave no cognizance to business profile of the Respondent and various comparability criteria before either. accepting or rejecting companies as comparable companies.*

*3. That on facts and in law, the TPO/AO have failed to make appropriate adjustments to account for varying risk profiles of the Respondent vis-a-vis the comparables and in the process also neglected the Indian transfer pricing regulations, OECD guidelines on transfer pricing and judicial precedence. .”*

4. The short question to be determined in the appeal preferred by the Revenue is, deletion of addition of Rs.18,77,813/- made by the Assessing Officer on account of Transfer Pricing Adjustment (TPA) in computation of Arm's Length Price (ALP) in the international transaction. On the other hand, the assessee, in the cross appeal, challenged the exclusion of e-Clrex Services Ltd. and sought inclusion of Cosmic Global Ltd. for the comparables chosen by the Transfer Pricing Officer (TPO) and accepted by the Ld. CIT(A).

5. Brief facts of this case are: Assessee Company is wholly owned subsidiary of Aptara. During the processing of return of income filed by the assessee for the Assessment Year 2008-09, the case was subjected to scrutiny and consequently, notices u/ss 143(2) and 142(1) of the Act along with questionnaire were served upon the assessee and in response thereto, Shri B. R. Mehra, FCA /AR appeared and the case was discussed with him.

6. During the year under assessment, the assessee company being into the business of software / I T enabled services, has entered into international transaction with associated enterprises (AE) and form 3CEB has been filled and consequently reference has been made to the TPO to determine the ALP of international transaction.

7. The assessee determined the Arm's Length Price of International Transaction of I T enabled services provided to its AE by using TNMM method. The operating profit to the total cost (OP/TC) ratio, taken as the profit level indicator (PLI) was computed at 15.50% which was shown as

at ALP by comparing with the similar PLI of 20.33% of 15 comparables taken at an average.

8. The TPO passed the order u/s 92CA(3) of the Act after making transfer pricing (TP) adjustment of Rs.18,77,813/- on account of ALP by determining arms length margin of comparables @ 23.29% on the ground that there is variation in the prices charged by the assessee by more than 5% for the value of international transaction, an adjustment of Rs.18,77,813/- for provisions of I T enabled services has been made to the income of the assessee for difference between ALP and price charged by the assessee from its AEs.

9. It is noticed that the comparable companies having worked out by adopted weighted average for the current year and the immediately preceding two years and thereafter, the arithmetic mean of weight average has been taken for computation of ALP. PLI and comparable has been arrived at by considering the data for the Assessment Years 2005-06, 2006-07 and 2007-08.

10. TPO after examining 15 comparables selected by the assessee as well as submissions made before him, found comparables in 8 companies out of 15 comparables taken by the assessee and finally selected 15 comparables tabulated at page 16 of his order by highlighting their OP/TC percentage. For ready reference, 15 finally selected comparables are tabulated as under:

S.No.	Name of the company	OP/TC %
1	Aditya Bila Minacs Worldwide Ltd.	0.55
2	BNR Udyog Ltd. (Seg)	39.22
3	Caliber Point Business Solutions Ltd.,	10.97

4	Cosmic Global Ltd.	24.3
5	Crossdomain Solutions Pvt. Ltd.,	26.96
6	Datamatix Financial Ltd. (BPO division)	34.87
7	Eclerx Services Ltd.	66.25
8	Genesys International Corporation Ltd.	51.91
9	ICRA Ltd. (seg)	11.22
10	I Service India Pvt. Ltd.	10.92
11	Maple E Solutions Ltd.	20.73
12	Mold Tek Technologies Ltd.	106.82
13	R Systems International Ltd. (seg)	4.3
14	Spanco Telesystems and Solutions Ltd.	8.94
15	Triton Corp. Ltd.	23.5
	Average	29.36

11. The TPO accepted the computation made by assessee of OP/TC @15% detailed as under:

Particulars	Amount
Income:	
I T Enabled Services	1,56,48,440
Interest received on bank deposits	
Total operating income	1,56,48,440
Expenses:	
Personal Expenses	34,99,923
Other operating and administrative expenses	99,61,905
Depreciation	45,248
Fringe Benefit Tax	41,357
Total Operating Cost	1,35,48,433
Operating profit	21,00,007
Operating profit/Operating cost (OP/OC)	15.50%

12. The TPO by considering the Arms Length Margin of the comparables @ 23.36% worked out the TP Adjustment to the tune of Rs.18,77,813/- and consequently, Assessing Officer made this addition by virtue of order dated 21.02.2012 u/s 143(3) of the Act.

13. The assessee carried the matter before Ld. CIT(A) by filing the appeal who has deleted the addition by excluding BNR Udyog Ltd. (Seg), Datamatics Financial Ltd. (BPO division), Genesis International Corporation Ltd., Maple E Solutions Ltd., Mould Tek Technologies Ltd. and Triton Corp. Ltd.

14. On the other hand, assessee by filing the cross appeal, sought exclusion of eClerx Services Ltd. from the list of final comparables and sought inclusion of Cosmic Global Ltd. and C G Glack Software.

15. We have heard both the Ld. Authorized Representatives, gone through the material placed on record in the light of facts and circumstances of the case and orders passed by lower authorities.

16. Undisputedly, though the assessee as well as TPO selected TNMM as most appropriate method for computation of TP adjustment of international transaction at assessee's own ALP with its OP/TC @ 15.50%. The revenue by filing the appeal challenged deletion of addition of Rs.18,77,813/- made by Ld. CIT(A) on account of TPA by excluding BNR Udyog Ltd. (Seg), Datamatics Financial Ltd. (BPO division), Genesis International Corporation Ltd., Maple E Solutions Ltd., Mould Tek Technologies Ltd. and Triton Corp. Ltd. On the other hand, assessee by filing cross objections sought exclusion of eClerx Services Ltd. and inclusion of Cosmic Global Ltd. and C G Glack Software.

17. The issue as to the comparability and disagreement between the parties is to be determined on the basis of TP study report of the assessee, available on the record, which has been incorporated in the TPO order. A perusal of the master service agreement dated 01.10.2003 valid for the year under assessment available at pages 263 to 276 of the Paper Book

shows that assessee company is engaged in **providing electronic publishing services for any media format, including web, online database, e-books or even wireless devices. TBES specializes in provision of technical servsics such as data conversion, web page construction, data entry / keyboarding New Delhi software development. TBES will provide such services to the Company, where and when requested. Under the agreement, the assessee has undertaken its stand and included services described in exhibit which statement of work embodying the terms and relationship between the assessee and Tech Enterprises Inc.** Para 2 of the Exhibit A clarifies that the assessee is responsible for providing services described in para 3 which reads as under:

*“The nature of work that Techbooks International Pvt. Ltd. performs is electronic publishing and pre press services including print ready files to printers and electronic deliverables for on-line publishing, in addition to serving the publishers, Techbooks also works with Corporate and information aggregators to convert data from one file format to another which include conversion of legacy material to electronic formats, conversion from one electronic to another for various needs of information processing, data management, storage, archival and re-purposing of information for various end uses as required by the customers.”*

18. The services made available by the assessee's AE, and the list of the customers is given in para 3.2 of the agreement, which include Blackwell Publishing, John Willey and Sons Ltd., Elsevier Science, Cambridge University Press, Springer SBM, I Achieves and Pearson Education. Para 5 of the agreement explains the manner of remuneration to be paid to the assessee @ 100% of all costs and expenses incurred in the provisions of such services plus an appropriate amount of mark up on the utilized

capacity cost. The work carried out by the assessee is electronic publishing and pre-press service including print ready files to printers and electronic deliverables for online publishing by converting data from one file to another format and storing of such data for the ultimate use as required by the customers. In the backdrop of the aforesaid functional profile of the assessee, ground raised by the Revenue as to the deletion of addition of Rs.18,77,813/- on account of TPA by excluding BNR Udyog Ltd. (Seg), Datamatics Financial Ltd. (BPO division), Genesis International Corporation Ltd., Maple E Solutions Ltd., Mould Tek Technologies Ltd. and Triton Corp. Ltd. are taken for discussion as under:

A. **BNR Udyog Ltd. (seg):**

This comparable has been chosen by TPO but excluded by Ld. CIT(A) from the list of comparables to determine the Transfer Pricing Adjustment (TPA) of international transaction. The Revenue challenged exclusion of this comparable on the ground that this comparable has been excluded by Ld. CIT(A) arbitrarily and on the basis of related parties transaction (RPT) without making any investigation nor Ld. CIT(A) called any evidence to arrive at the impugned decision. The assessee has challenged this comparable on the ground that this comparable company has RPT of 75% and as such, is liable to be rejected.

TPO rejected the contentions raised by the assessee on the ground that as per annual report, the comparable company has total turnover of only Rs.1.98 crores, which includes Rs.1.33 crores in the segment of medical transcription. TPO further stated that as per AS-18 at page 33 of the Annual Report explaining the related party's transactions during the year under consideration. There were purchases, sales and services with

enterprises having common management personnel at Rs.14.97 crores and as such this is not a related party transaction. On the other hand, Ld. CIT(A) by giving general observations, without going into any evidence, relied upon by the TPO, held that in view of abnormal RPT, this company cannot be taken as a comparable company.

We are of the considered view that when the assessee has raised objection to the inclusion of this company as comparable company on the ground that it's RPT is 75%, which was required to be decided by examining the RPT percentage, which is undisputedly not available on record. CIT(A) has erred in excluding the same without examining the data. TPO as well as CIT(A) were empowered to call the data by exercising powers u/s 133(6) of the Act, which they have not exercised to decide the RPT of comparable company alleged to be @75% by the assessee on the basis of RPT percentage only. CIT(A) has failed to point out the material on the basis of which he has arrived at the conclusion as to RPT of 75% of the comparable company. So, we are of the considered view that when functional comparability of this company is not in dispute and RPT percentage is required to be determined on the basis of data, if available, the matter is required to be restored to the file of TPO to decide the issue afresh on the basis of RPT of BNR Udyog Ltd. as comparable company.

**B. Datamatix Financial Ltd. :**

TPO has chosen this company as comparable by making following observations:

*“This company can also be used as comparable. The services that it is providing are very much IT Enabled Services.”*

The assessee challenged the inclusion of this company as comparable company on the grounds inter-alia that this is a functionally different company; that its segmental information is not available and this company had shown 450% profits in its P & L account meaning thereby, it is highly profitable business; that assessee has not been provided with any opportunity to cross examine the evidence taken on record; that there is no material to reach out at the conclusion that as to how 34.8% profit has been computed by the TPO. Ld. CIT(A) by accepting the contention of the assessee, excluded this comparable company on account of functional disparity as well as on ground of non availability of the audited segmental information.

From the perusal of material available on record relied upon by the TPO in arriving at the decision to include the Datamatix Financial Services as comparable company, it is apparently clear that the TPO has chosen this comparable on the basis of assumptions and presumptions by ignoring the fact that the comparable company has shown 450% profit and falls in the category of highly profitable business and as such, is liable to be excluded from the list of comparable company. TPO in his analysis for finally choosing this company as comparable, has categorically taken Datamatix Financial Ltd. as BPO division. There is no segmental information available on the file to make out if this comparable company is a BPO division. This is a mystery as to how the TPO has shown OP/TC @ 34.87% of this comparable company as shown in para 3.7 of the order. Even Ld. D.R. has failed to answer as to how this figure has come out on record. When the segmental information regarding IT Enabled Service is

not available, it is beyond comprehension, as to how the TPO has chosen this company as comparable company. At the same time, CIT(A) has also summarily excluded this comparable as per contention of the assessee without examining if this company is a BPO division.

So, we are of the considered view that the matter is required to be restored to the TPO to verify if the figures relied upon by him are of BPO division. If the comparable company is not ascertained as BPO division then it is to be excluded and in case figures relied upon by TPO are of BPO division then it is to be included as a comparable company. In case, the figures are of entity level, it is to be excluded.

**C. Genesys International Corporation Ltd:**

This comparable is also chosen by TPO by taking OP/TC @51.91%. TPO has chosen this company as comparable on the basis of annual report by stating that the functions of this company is comparable to the assessee and it passes all the filters. Even otherwise, this comparable company is having OP/TC @ 51.91% and falling in the category of super profit making company. TPO rejected this argument of assessee by applying the logic that super normal profit making companies are also part of the industry and hence, cannot be rejected merely because they have earned such profit unless peculiar economic circumstances of such company are pointed out. It is settled principle that for TP adjustment, two companies can only be considered as comparables when both are having over all similar functions and their OP/TC margin is also near to each other.

However, Ld. CIT(A) by accepting the contention of the assessee, excluded this comparable from TP Study on the ground of functional

dissimilarity between the assessee company and comparable company. The comparable company, Genesys, has been using highly specialized work force comprising of **urban planner, cartographers, remote sensing scientists, photogrammetrists, civil engineers, field survey personnel and rocket scientists and related computer based services and it has been making substantial investment** in research and development. Even from the perusal of annual report of the comparable company for the year 2007-08 brought out on record by Ld. A.R., it is proved that skill and expertise of the employees of the comparable company i.e. Genesys is diametrically opposite to the skill and expertise of employees of the assessee company as the assessee company is primarily having graduates vis-à-vis the most skilled workforce with the comparable company. Annual report of Genesys for the Assessment Year 2007-0-8 describes it s workforce as under:

*“Talent eco system within Genesys include urban planners, cartographers, remote sensing scientists, photogrammetrists, civil engineers, field survey personnel and even rocket scientists, giving the company a unique and formidable set of skills in all kinds of land base work....”*

However, on the other hand, assessee company is into the business of electronic publishing services like data conversion and copying in different formats which are classified as I T enabled Services (ITES). From the bare perusal of functional profiles of the assessee company vis a vis comparable company it is proved that both are functionally dissimilar and as such, cannot be taken a comparable company for TPA. So, we hereby affirm the findings returned by Ld. CIT(A).

D. **Maple E Solutions Ltd.:**

TPO has chosen this comparable by making following observations:

*“The comparable has been rejected while providing the current year margins on the ground that it has nil service income during the year. However the annual report of the comparable shows that the functions of this company are comparable to the assessee. The company passes all the filters. It can be used as a comparable.”*

However, the assessee challenged the inclusion of this company on the grounds inter alia that this company does not qualify 75% service income filter and is performing non comparable services like trading in I T peripherals and I T software and distribution of wireless communication. Ld. CIT(A) by relying upon the order passed by ITAT in the case of **CRM Services India Pvt. Ltd. Vs ITO (I.T.A.No. 4796/Del/2010)**, rejected this comparable for the following reasons:

*“Further, the business reputation of Rastogi group, owning Maple E Solutions and Triton Corporation, is under serious indictment. They are also carrying on the businesses of data processing services and ITES services apart from BPO services. In view of a question mark on the reputation of the owner, albeit for earlier years, it would be unsafe to take their results for comparison of the profitability of the assessee.”*

We are of the view that this company has been rightly excluded as comparable company on the ground that this company is under severe indictment as has been held by the Coordinate Bench of ITAT in the judgement in case of **CRM Services India Pvt. Ltd. (supra)** and also on the ground that out of the total sale of 33.64 crores, Rs.13.66 crores is from I T peripherals and Rs.2.21 crores from IT software and its segmental profitability is not available in the annual report. So, keeping

in view the low credibility of the comparable company, which is under serious indictment, the same is functionally dissimilar to the assessee company, we hereby affirm the findings of Ld. CIT(A) to exclude this company as comparable company for TPA.

D. **Mold-Tek Technologies Ltd.:**

TPO has chosen this company as comparable by making following observations:

*“this company can also be used a comparable. The services that it is providing are very much I T Enabled services. The annual report of the comparable was analyzed and seen that it has service income of 95%, exports earning of 95.05% and RPT of 20.45%. As the company passes all the filter, it will be used as a comparable.”*

The assessee challenged this comparable on the grounds inter alia that the company is engaged in providing high end engineering consultancy services; that this company has also exceptional year of operation due to the acquisition of Crossroads Detailing Inc. USA and is earning super normal profits. But the TPO stated to have applied broader criteria while accepting or rejecting the company as comparable so far as functional comparability of the company is concerned.

Ld. CIT(A) has excluded this company from the list of comparables by making following observations:

*“This company as two segments, ITES and Plastic division. ITES is having 100% exemption whereas on the profits of plastic division the company' has to pay tax. It is not uncommon to see such financial results where the tax exempt unit has extraordinary profit while the taxpaying unit suffers losses under the same*

*management control. The extraordinary profit in the ITES segment reaching upto 106.82% for the FY 2007-08 is a pointer in this direction. In the subsequent audited accounts, this fact of ending the tax holiday for ITES segment is mentioned by the annual report and some corrective entries have been passed.*

*The employee cost filter might not have been used by the TPO but in the presence of extraordinary deviation from the ratio of employee cost to sales of the appellant's case cannot be simply brushed aside. In the case of Mold-Tek Technologies Ltd it is 7.6%. By implication, either Mold-Tek Technologies Ltd. has employed larger capital against the man power to get the kind of productivity to generate profit of 106.82% or the employees are so extraordinary that they have accepted the lower wages and still work so hard for the company to generate that kind of profitability. In either situation, the company becomes not comparable to the appellant. Even on functionality ground Mold-Tek Technologies Ltd. is not comparable because as compared to the appellant this comparable is mainly dealing in engineering design and detailing services, website design services, software testing, in-house software development etc.*

*- Therefore, I hold that this company should be excluded from the list of comparables.”*

When undisputedly, the comparable company has two segments one ITES and another Plastic Divisions and ITES division is having 100% exemption and the company has only to pay tax on the profits of its plastic division and thus earning profits @ 106.82% for the financial year 2007-08 it falls in the category of units earning extra ordinary profits. Even otherwise, comparable company is functionally dissimilar to the assessee company because comparable company is dealing in engineering designs and detailing services, web designing services, software testing, in house software development etc. whereas, functionally the assessee company is providing electronic publishing services such as computerized data

conversion, we page construction, data entry / key boarding, copy editing and CAD / civil mapping services to its AEs, which are diametrically dissimilar to each other.

So, we are of the considered view that this company cannot be taken as a comparable company, consequently findings returned by Ld. CIT(A) qua this company are hereby affirmed.

E. **Triton Corp. Ltd.:**

This is assessee's own comparable and the TPO has accepted it without assigning any reasons. However, Ld. CIT(A) excluded this comparable on the ground that the TPO without having any segment profitability considered that the comparable company sold I T Peripherals of Rs.61.578 crores and other at Rs.4.03 crores of the total sale of Rs.145.76 crores. Since the comparable company does not qualify for service income filter applied by the TPO, the Ld. CIT(A) has rightly considered the same as uncomparable company vis-à-vis assessee company. However apart from functional dissimilarity, this company is also liable to be excluded on the ground that this company is a fraud company as has been held by ITAT Delhi Bench 'B' New Delhi in case entitled **ITO Vs CRM Services India (P) Ltd in I.T.A.No. 4068/Del/2009**, operative part of which for ready reference, is reproduced as under:

*"17.2 In regard to Maple E Solutions & Triton Corporation, it is Rastogi family mentioned in the report of the TPO that the first named company is carrying on the business of rendering data process services and BPO services. Objection has been raised that the directors of the company were involved in a fraud. This company is a wholly owned subsidiary of Haryana Fibres Ltd., whose promoters were involved in fraud as per newspaper -*

*report and the CBI report. The TPO mentioned that according to CBI bulletin of December, 2008, it was reported that the cheated Government of India to the tune of Rs. 54.00 crore in late 1980s and mid 1990s. Rastogi brothers had floated 14 firms for the purpose of export of bicycle parts to Russia and Hong Kong. They were arrested by the FBI and U.K. authorities and sentenced to imprisonment for more than 9 years. However, the report nowhere contains the name of this company. According to the data available at Prowess Data Base, it is engaged in the business of call centre activities; it had set up 100% EOU and it holds registration under section 10-B. In regard to the second mentioned company, it was submitted that it is engaged in two activities i.e., telecom sector and BPO sector. It is also company of Rastogi group and, therefore, other objections are the same as in the case of first mentioned company. The TPO mentioned that the from ITES activities which are comparable.”*

So, we are of the considered view that this comparable company being a fraud company cannot be taken as comparable and as such, findings returned by Ld. CIT(A) are hereby affirmed.

19. The assessee, by filling the cross objections, sought exclusion of eClerx Services Ltd. and sought inclusion of Cosmic Global Ltd. from the final list of comparables. Now, in order to decide the cross objections filed by the assessee, we are to examine as to whether eClerx Services Ltd. is liable to be excluded from the list of comparable companies and Cosmic Global Ltd. and CG Glack Software are liable to be included in the list of comparables as contended by the assessee.

(i) **eClerx Services Ltd.:**

TPO chosen this company as comparable by making following observations:

*“The annual report of the comparable for F.Y. 2007-08 was analyzed and seen that it has service income of 94.76%, exports earning of 83.95% and RPT is 11.54%. As the company passes all the filters, it will be used as a comparable.”*

TPO by taking OP/TC ratio @ 66.25% chosen this company as comparable on the basis of annual report for the financial year 2007-08 showing service income @ 94.76% export earnings at 83.95% and RPT @ 11.84% and stated to have passed all the filters. The assessee sought to exclude this company from the list of comparables on the ground of amalgamation and on the ground that this is a company earning super normal profits @ 66.25%. But Ld. CIT(A) retained this company as comparable as the ground of functional difference pointed out by the assessee is not significant enough to reject this company as comparable.

Ld.A.R. relied upon the order passed by ITAT Delhi Bench ‘I’ in I.T.A.No.5207/Del/2013 order dated 10.06.2015, in case cited as **Xchanging Technology Services India Pvt. Ltd. Vs ACIT** and referred para 17 & 18, which is reproduced for ready reference as under:

*“17. In view of above, we are inclined to demolish contention of the Ld. DR that this company is includable as a suitable comparable because it was included by the assessee in its list placed before the TPO in the TP study. We are of the considered view that merely because the assessee company included this company in the list of comparables the functionally different company cannot be accepted at suitable comparables. When the assessee is claiming that the Cosmic Global Ltd. was included due to inadvertent mistake in the set of comparables proposed by the assessee then this bona fide act of the assessee cannot be a reason to prohibit the assessee from claiming and contending that it was included by mistake. In our considered opinion, the Revenue authorities and the Tribunal has to see that whether the company is, in fact, functionally comparable or not. We further make it clear*

*that the objection to the inclusion of a particular comparable cannot be rejected at threshold only because the same was included by the assessee under a bona fide mistake in the list of proposed comparable. On this issue, we respectfully follow the view taken by the ITAT Delhi in the case of Mercer Consulting (India) Pvt. Ltd. Vs. DCIT (Supra) wherein similar contention of the Revenue has been dismissed in Para 12.2, which reads as under:-*

*"12.2. We are disinclined to sustain the legal objection taken by the ld. DR that the assessee should be prohibited from taking a stand contrary to the one which was taken at the stage of the TP study or during the course of proceedings before the authorities below. It goes without saying that the object of assessment is to determine the income in respect of which the assessee is rightly chargeable to tax. As the income not originally offered for taxation, if otherwise chargeable, is required to be included in the total income, in the same breath, any income wrongly included in the total income, which is not otherwise chargeable, should be excluded. There can be no estoppel against the provisions of the Act. Extending this proposition further to the context of the transfer pricing, if the assessee fails to report an otherwise comparable case, then the TPO is obliged to include it in the list of comparables, and in the same manner, if the assessee wrongly reported an incomparable case as comparable in its TP study and then later on claims that it should be excluded then, there should be nothing to forbid the assessee from claiming so, provided the TPO is satisfied that the case so originally reported as comparable is, in fact, not comparable. The Special Bench of the Tribunal in DCIT vs. Quark Systems Pvt. Ltd. (2010) 132 TTJ (Chd) (SB) 1 has also held that a case which was included by the assessee and also by the TPO in the list of comparables at the time of computing ALP, can be excluded by the Tribunal if the assessee proves that the same was wrongly included. "*

18. While, we considered the functionally comparability issue of Cosmic Global services with the present assessee company then we find ourselves view taken by the Tribunal in its order in the case of

*United Health Group Information Services Pvt. Ltd. Vs. ACIT (Supra) wherein for the same A Y 2008-09 it was held that the major part of income from translation charges is amounting to Rs.5.59 crores out of total revenues of Rs.5.86 crore, which is totally dissimilar to that of the assessee of that case. In the present case, the DRP/AO has only disputed the International transaction of the present assessee only ITES segment whereas as per annual report of Cosmic Global Ltd. at page 578 of assessee paper book Vol.-II, we clearly note that the Revenue from ITES segment is very low which creates a great functional difference from present assessee as the present assessee is not indulged into translation segmental business. Hence, we are inclined to accept the contention of the assessee that the Cosmic Global Ltd. is functionally dissimilar to the present assessee and Cosmic Global Ltd. is not a suitable comparable to the present assessee for benchmarking and determining the arm's length price (ALP) of present assessee ITES segmental international transactions for A Y 2008-09. Accordingly, we hold that Cosmic Global Ltd. was wrongly included in the final set of comparables which deserves to be deleted. We ordered accordingly.*

In the case cited Exchanging Technology Services India Pvt. Ltd. (supra), the Tribunal relied upon the case cited as **Toluna India Pvt. Ltd. vs ACIT I.T.A.No. 5645/Del/20123 dated 26.08.2014**, wherein it was held that merger/demerger in a company makes such company as unfit for comparison and the same cannot be considered as suitable comparable because of the exceptional final result due to merger and demerger. Findings returned by the Tribunal in para 15 of the order in case entitled **Xchanging Technology Services India Pvt. Ltd. (supra)** are further reproduced as under:

*“14. On careful consideration of above, at the very outset, we respectfully take cognizance of the decision of the ITAT 'T' Bench New Delhi dated 28.08.2014 in the case of United Health Group Information Services Pvt. Ltd. Vs. ACIT (supra), wherein following*

*the view taken by the Tribunal in the case of Toluna India Pvt. Ltd. Vs. ACIT in ITA No. 5645/Del/2013 dated 26.08.2014 it was held that the mergers/demergers in a company make such order is unfit for comprising and the same cannot be considered as suitable comparable because of exceptional final result due to merger/demerger. The relevant operative part of the Tribunal (Supra) for the same A Y 2008-09 reads as under:-*

*"eClerx Services Ltd.*

*10.1. This company was included by the TPO in his list of comparables. The assessee objected to its inclusion by pointing out some functional differences. Not convinced, the TPO went ahead with its inclusion, which got the seal of approval from the DRP.*

*10.2. Having heard the rival submissions and perused the relevant material on record, it is observed that this company is engaged in providing data analytics and customized process solutions to a host of global clients. It provides services to the Banking, Manufacturing, Retail, Travel and Hospitality verticals. The solutions offered by it include data analytics, operation management, audit and reconciliation, metrics management and reporting services. This company also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. A look at the functional profile of this company from its Annual report, it can be seen that it is nowhere close to the assessee's instant segment of 'manual claim processing services '.*

*10.3. It is further relevant to note that this company acquired UK based Igenica and Travel Solutions Ltd. on 27.7.2007 and the financial results of that company are also included in its. Recently, the Delhi Bench of the Tribunal in Toluna India Pvt. Ltd. Vs ACIT (ITA No.5645/Del/2013) vide its order dated 26.8.2014 has held that the mergers/de-mergers in a company make such year as unfit for comparison. In reaching this conclusion, the Delhi Bench followed an order*

*passed by the Mumbai Bench of the Tribunal in Petro Araldite (P) Ltd. Vs DCIT (2013) 154 TTJ (Mum.) 176 in which it has been held that a company cannot be considered as comparable because of exceptional financial results due to merger/de-merger etc. In view of the foregoing discussion, we are of the considered opinion that this company cannot be included in the list of comparables. The assessee succeeds. "*

*15. In view of above, we note that the eClerx Services Ltd. is engaged in providing data analytics and customized process to its host of global clients which also provides services to the banking, manufacturing, retail, travel and hospitality business entities. Ld. DRP has not disputed this fact that the ITES segmental solutions offered by it also include data analytics operation management, audit and reconciliation, metrics management and reporting services. Apparently, this company provides tailored process outsourcing and management services in addition to multitude of the data aggregation, and mining and maintenance services from vigilant reading of annual report available at Page 659 to 738 of the assessee paper book Volume-II, it can be easily seen that it is not closed to the assessee ITES segmental services transaction which are impressed by the manual process ITES services. We are also not in agreement with the conclusion of the DRP that no comparable can be excluded on the ground of abnormal margin if its functionally comparable to the tested party because mergers/demergers brings exceptional financial result which make a such order as unfit for comparison. In view of our foregoing discussion, we reach to a logical conclusion that the eClerx Services Ltd. is not a suitable comparable to the assessee company for A Y 2008-09 due to high pitched financial result and the same deserve to be deleted from the final set of comparables. We ordered accordingly."*

So, in view of what has been discussed above and following the order passed by the coordinate Bench of ITAT, the eClerx Services Ltd. cannot be taken a comparable on the ground of issue of amalgamation and

on ground of earning super normal profit @ 66.25% as discussed by the Tribunal in the judgement cited as Exchanging Technology Services India Pvt. Ltd. (supra). So, we hereby reverse the findings returned by Ld. CIT(A) retaining this company as comparable and the same is ordered to be excluded from the list of comparables.

(ii) **Cosmic Global Ltd.:**

TPO by taking the OP/TC ratio @ 24.5%, chosen this comparable for TPA, but without disclosing any reason whatsoever. At the same time, neither assessee has challenged this comparable before Ld. CIT(A) nor Ld. CIT(A) himself evaluated the comparability of this company for TPA. So, without entering into merits of this comparable, we are of the considered view that to arrive at logical conclusion, this issue is required to be restored back to the TPO to decide the comparability of this company afresh by providing opportunity of being heard to the parties.

(iii) **C G Vok Software:**

This is assessee's own comparable, rejected by the TPO by making following observations:

*“The AR of the comparables shows that income in the ITES segment is Rs.93 lakhs during the year. As the filter of turnover more than Rs.1 crore has been considered appropriate, this will not be used as a comparable.”*

Assessee sought inclusion of this comparable for TP adjustment on the ground that he company has earned total revenue of Rs.,6,05,05,301/-

and under the relevant year, it meets Rs.1 crore turnover filter adopted by the TPO. Ld. CIT(A) without having any material on record, upheld the findings of TPO that this company has turnover of Rs.93,00,000/- from ITES segment. Even otherwise, this company has already been included in the list of comparables for T P adjustment in assessee's own case in I.T.A.No. 240/Del/2015 dated 06.07.2015.

In the aforesaid case (supra) the Tribunal has held that this company cannot be excluded from the list of comparables on the ground of its low turnover and is ordered to be included in the relevant segment of this company in the list of comparables.

20. In view of what has been discussed above, the impugned order passed by Ld. CIT(A) is hereby set aside and the issue as to the computation of ALP of international transaction is hereby restored to Assessing Officer/TPO to decide afresh in pursuance to the discussion made, after providing opportunity of being heard to the parties.

21. Consequently, appeal filed by the Revenue is partly allowed for statistical purposes. However, cross objections filed by the assessee are hereby allowed.

22. Order pronounced in the open court on 15<sup>th</sup> Feb., 2016.

Sd/-  
(R. S. SYAL)  
ACCOUNTANT MEMBER  
Date: 15.02. 2016  
Sp.

Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER

Copy forwarded to:-

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

True copy.

By Order  
(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	7/1,11/2		Sr. PS/PS
2	Draft placed before author	12/2		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			

