

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

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI G.MANJUNATHA, ACCOUNTANT MEMBER**

**IT(TP)A No.249/Bang/2015
(Assessment year: 2010-11)
and
Cross Objn.No.111/Bang/2015
(In IT(TP)A No.175/Bang/2015)
(Assessment year 2010-11)**

M/s.Alpha ITL Electro Optics(P) Ltd.,
No.9, Interface Accikade, Service Road,
HAL 2nd Stage, Indiranagar,
Bangalore-560008. ... Appellant
PAN:AAECA7856M

Vs.

Deputy Commissioner of Income-tax,
Circle 1(1)(1),
Bangalore. ... Respondent

AND

IT(TP)A No.175/Bang/2015
(Assessment year: 2010-11)
(By the Department)

Assessee by: Shri C.Prashanth, C.A.
Respondent by: Shri Harishkumar CIT(DR).

Date of hearing : 15/10/2015.
Date of pronouncement: 27/11/2015.

O R D E R

Per Bench :

These cross appeals and the cross objections by the assessee are directed against the assessment order dated

30/12/2014 passed u/s 143(3) r.w.s.144C of the Income-tax Act,1961 [‘the Act’ for short] in pursuance to the directions of the DRP dated 25/11/2014 for the assessment year 2010-11.

2. The assessee is a joint venture company promoted by M/s.Alpha Design Technologies Pvt.Ltd., and M/s.ITL Optronics Ltd. of Israel. The main objective and activity of the assessee is manufacturing, assembling and testing of opto-electronic equipment. It is stated that the company operates in the opto-electronic industry. It caters to the security agency and defence establishments. The assessee imports various types of components and equipments for its operation from its associate enterprise (AE) in Israel. It also manufactures additional mechanical, electrical items assembly, tests and qualifies the product. Apart from making purchase from its AE, assessee also sells the assembled equipments to its AE at agreed rate in the purchase order. During the year under consideration, the assessee has undertaken DRUSHTI project for BSF where it has supplied 341 numbers of handheld image (HHI). The assessee has reported the financial results as per the audited financial accounts which are reproduced by the TPO in para.3 and 4 as under:

“3. Financials of the taxpayer based on the audited financials for FY 2009-10:

Operating revenue (sales includes excise duty, excluding other income)	52,96,44,913/-
Operating cost	58,54,31,153

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Operating Profit	(-) 5,57,86,240
OP/Sales	(-)10.53%
OP/Cost	(-) 9.52%

4. International transactions as per 3CEB Report:

The tax payer company has entered into the following international transactions with its Associated Enterprises (AEs) during the financial year 2008-09:

Descriptions of the international transaction	Amount (Rs.)
Purchase of Electro Optics Components	23,00,29,990
Sale of Mechanical Assembly	4,59,731

Thus, the assessee has carried out international transaction of purchase of electronic components from its AE as well as sale of mechanical assembly. The assessee claimed that its international transaction of purchase of Electro Optics components are at arms length in comparison to the purchase price from non-AE. Therefore, assessee applied internal CUP method for the purpose of bench marking its international transaction. The Transfer Pricing Officer (TPO) rejected the TP analysis of the assessee and adopted TNMM as the most appropriate method (MAM) for the purpose of determining the ALP. The TPO carried out a search and selected the set of 10 comparables as under:

Sl No	Company Name	Indl/Sales	OP	OC	OP/OC	OP/Sales
1	Opto Circuits (India) Ltd.	100.00%	199.54	271.96	73.37%	42.32%
2	Portescap India Pvt. Ltd.	100.00%	40.21	134.31	29.94%	23.04%
3	F C I Oen Connectors Ltd.	89.01%	37.31	243.82	15.30%	13.27%
4	Motherson Tradings Ltd.[Merged]	81.74%	0.15	1	15.00%	13.04%
5	Reed Relays & Electronics India Ltd.	100.00%	0.6	4.01	14.96%	13.02%
6	S P E L Semiconductor Ltd.	99.61%	11.27	76.02	14.83%	12.91%
7	Centum Rakon India Pvt. Ltd.	100.00%	2.63	48.24	5.45%	5.17%
8	Continental Device India Ltd.	99.98%	4.21	77.26	5.45%	5.17%
9	Moser Baer India Ltd.	97.41%	49.04	2057.33	2.38%	2.33%
10	Centum Electronics Ltd.	99.81%	1.99	109	1.83%	1.79%
					17.85%	13.21%

The TPO has proposed the upward adjustment on the basis of average PLI (OP / sales) of 13.21% in comparison to the assessee's PLI (OP / sales) of (-) 10.53%. Accordingly, an adjustment of Rs.12,57,52,333/- was proposed by the TPO on this account.

3. The assessee challenged the action of the TPO before the DRP by raising the issue of rejection of CUP method by the TPO as well as the comparability of the companies selected by the TPO for the purpose of determining ALP. The assessee's objections have been reproduced by the DRP in para.3.1 at page 4 & 5

<u>S.No</u>	<u>Name of the Companies</u>	<u>Assessee's contentions</u>
1	Opto Circuits (India) Ltd	Development, manufacturing, distribution & marketing of medical equipments and devices.
2	Portescap India Pvt Ltd	Deals in motor technologies like brushless DC, brush DC, can stack motors, disc magnet motors & stepper linear actuators.
3	FCI Oen Connectors Ltd	Manufacture of Rack & Panel Connectors, Terminal Connectors, Flat Cable Connectors, Circular Connectors, PCB Connectors, Heavy Duty Connectors, IC Sockets etc. and Copper and Fiber Optic Cable Assembly, backplanes and Value Added business.
4	Motherson Tradings Ltd (Merged)	Electrical Distribution System (EDS), Polymer Products and complete module solutions to the Indian automotive industry.
5	Reed Relays & Electronics India Ltd	Manufacture Ruthenium plated non-pressurized dry reed switches, SMD & PCB mountable Reed Sensors in various forms, screw-mountable and threaded proximity sensors and magnet sensors, thermal reed sensors, level switches, and other reed-based products.
6	S P E L Semiconductor Ltd	Semiconductor Assembly & Test facility providing high quality Integrated Circuits Packing solutions.
7	Centum Rakon India Pvt Ltd	Strategic electronics, communication and industrial segments-Mission critical and enterprise solutions with advanced tailor-made technologies. These range from Defense and Aerospace to industrial, communications, automotive and medical & wellness applications.
8	Continental Device India Ltd	Manufacturer of silicon Semiconductor Chips and Devices and LED Lighting products & display solutions.
9	Moser Baer India Ltd	Optical Storage media like CDs and DVD.
10	Centum Electronics Ltd	Customized product design & development, manufacturing services and turnkey solutions for mission-critical applications in the Defense, Aerospace, Space, Industrial, Medical and Communications markets.

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After considering the objections of the assessee, the DRP has directed to exclude 6 comparables from the set of comparables selected by the TPO and confirmed the functional comparability of the remaining 4 comparables.

4. As regards the objections raised against the rejection of CUP method and adopting TNMM method by the TPO, the DRP has confirmed the action of the TPO in adopting TNMM as most appropriate method. Thus both the assessee well as the revenue are aggrieved by the direction of the DRP and consequential assessment order and filed cross appeals as well as cross objections by the assessee.

5. The assessee has raised the grounds of appeal as under:

1. The final assessment order dated December 30, 2014 passed by the Assessing Officer pursuant to the directions of the Learned DRP, draft assessment order dated February 17, 2014 passed by the Assessing Officer and the order dated January 30, 2014 passed by the Transfer Pricing Officer, are unjustified and bad in law.
2. That on facts and in law, the Transfer Pricing Officer and Assessing Officer have erred in rejecting the economic analysis undertaken by the Appellant Company using the CUP method without giving cogent reasons and conducting a fresh search under TNMM to identify comparable companies to determine the ALP.

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3. That on facts and in law, the learned DRP has erred in upholding the TNMM method as the most appropriate method for determining the ALP of the international transactions of the Appellant Company adopted by the Transfer Pricing Officer and Assessing Officer, without giving due consideration to the specific facts and circumstances of the international transaction, as required by Rule 10C(1) and Rule 10C(2) of Income Tax Rules, 1962.
4. That on facts and in law, the Transfer Pricing Officer and Assessing Officer have erred by selecting companies as comparable under TNMM which are functionally different and had high turnover as compared to the Appellant Company. The learned DRP in this regard, has erred in rejecting only 6 out of such 10 companies for undertaking the benchmarking analysis to arrive at the ALP despite having made detailed submissions regarding differences in scale of operations and functions between the Appellant Company and such comparables.
5. The learned DRP and Transfer Pricing Officer have erred in neither discussing nor rejecting the submissions made by the Appellant Company to the show cause notice before the issue of order u/s 92CA.

For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered.

6. Ground Nos.1 to 3 are regarding the rejection CUP method and using TNMM as the MAM by the TPO for determining the ALP. The learned AR of the assessee has submitted that the authorities below without giving due consideration to the functional and economic analysis and submissions made by the assessee,

rejected CUP method as the MAM and employed TNMM for the purpose of determining ALP. He has further submitted that when CUP method is available to benchmark the international transaction then the TNMM being an indirect method, cannot be applied in the case of the assessee. It is submitted that the assessee has made purchases from AE as well as from non AE and therefore, purchases from AE has been bench marked on the basis of purchases from non AE. In support of his contention, he has relied upon the decision of the Delhi benches of the Tribunal in the case of Kailash Jewels (P)Ltd. vs. ITO (59 Taxman.com 473). Thus, the learned AR of the assessee has pleaded that in the present case, CUP method is the MAM for determination of the ALP.

7. On the other hand, learned Departmental Representative has submitted that the assessee has failed to establish that an identical item of goods has been purchased from non-AE as well as AE. He has referred to the TPO as well as DRP findings and submitted that both the TPO as well as DRP have given a categorical finding that the assessee failed to establish that an identical item has been purchased from non-AE as well as AE for the purpose of applying the CUP method.

8. We have considered the rival submissions as well as relevant material on record. The assessee claimed that CUP method is the MAM for the purpose of bench marking purchase transactions from AE as the assessee is also making purchases

from non-AE. However, we find that the TPO, while rejecting the CUP method has recorded the fact that the description of product in the invoice furnished by the assessee are not enough to prove that the item purchased from AE and non-AE are identical. Therefore, in the absence of the detail and specification of the product purchased, the TPO found it impossible to adopt CUP as the MAM. Before the DRP, the assessee raised objection against rejection of CUP method. However, the DRP found that the invoice supplied by the assessee does not give clear picture to determine the description of the products and to arrive at a conclusion whether the product purchased from the AE and non-AE are identical. The findings of the DRP on this issue are given in paras.2.3 and 2.4 as under:

"2.3 Having considered the arguments of the assessee we are in agreement with the findings of the TPO. The CUP method requires the use of specific data as observed by the TPO. From the invoices supplied it was not possible to determine the description of the products and arrive at a conclusion whether the products purchased from the AEs and no AE5 are identical. Assessee has also rebutted the findings of the TPO in this regard. In a recent decision of the Murnbai Tribunal in the case of Weispun Zucchi Textiles Ltd reported in 56 SOT 444(Mum) it has been held as follows.

"... in the absence of exact data made available by the assessee to compare the

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prices of similar products supplied to AEs and non- AEs,. CUP cannot be applied as most appropriate method for the transfer pricing exercise. Moreover, there was also a difference in geographical location and size of the markets also in as much as the AEs the assessee were in Italy whereas the non-AEs, i.e., Wal Mart was based in USA having much bigger market than Italy. Therefore, there is no infirmity in the impugned order of the learned CIT(Appeals) confirming the action of the AO in rejecting the CUP method for benchmarking and applying the TNMM and upholding the same, the appeal of the assessee is dismissed"

2.4 In our view the TPOs action of applying the TNMM method is to be upheld. These objections are rejected.

As it is clear from the findings of the TPO as well as the DRP that the assessee failed to establish that the purchases made from AE as well as non-AE are in respect of identical products/items. In the absence of similarity of product purchased from AE and non-AE, CUP method cannot be applied as MAP for determining the ALP. Accordingly, we do not find any error or illegality in the order of the authorities below in rejecting the CUP method and adopting the TNMM. We further note that the assessee has even not furnished any detail before us in support of

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its claim. Even the details of the ratio of purchases from AE and non-AE has also not been furnished by the assessee. It is a clear case where the necessary information was not furnished by the assessee and therefore, in these circumstances, CUP method cannot be adopted as the MAM.

9. Ground Nos.4 & 5 are regarding 4 comparables which were selected by the TPO and confirmed by the DRP for the purpose of determining ALP. The assessee has raised objections regarding 4 comparables viz., (i) S P E L Semiconductor Ltd., (ii) Centum Rakon India Pvt. Ltd., (iii) Continental Device India Ltd (iv) Centum Electronics Ltd.

9.1 We will deal with the comparability of these four companies one by one as under:

(i) **S P E L Semiconductor Ltd.:** The learned AR of the assessee has submitted that as per Annual Report of the company, this company in the semi conductor industry and is manufacturing integrated circuits whereas the assessee is merely in the assembly and supply of electro Optics electronic equipment to Defence security agency. Accordingly, the two companies are widely divergent industries and cannot be considered comparable. Apart from this, the learned AR of the assessee has submitted that this company has significant investment in fixed assets i.e. plant and machinery of Rs.66,63,00,000/- in comparison to the assessee's fixed assets of Rs.90.77 lakhs. Thus, the learned AR

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of the assessee has submitted that this company is in the core manufacturing operations whereas the assessee is involved in assembly of various components for making final product. Thus, the assessee does not require significant investment in fixed assets. He has pleaded that this company should be excluded from the set of comparables.

9.2 On the other hand, learned Departmental Representative has submitted that the assessee has not raised any objection regarding investment in fixed assets before the authorities below and taking this plea the first time before the Tribunal which cannot be accepted. Further, this company is in the identical activity of manufacturing of semi-conductor assembly and test facility providing integrated circuit packing solutions as recorded by the DRP in the assessee's own contention. Thus, learned Departmental Representative has submitted that this company is functionally comparable with the assessee.

9.3 We have considered the rival submissions as well as relevant material on record. The only objection taken by the assessee before authorities below against this company is that this company is in the different product of semi-conductor assembly and test facility. However, we find that the semi conductor assembly and test facility activity of the said company is comparable with the assessee's activity of opto-electronic equipment which is manufactured and assembled as well as tested by the assessee. It is pertinent to note that semi-

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conductor in itself is not a device but only a component to be used in various devices. The assessee is also manufacturing and assembly of opto-electronic equipments. Therefore, the activity of the assessee as well as this comparable company are functionally comparable. As regards the other objections raised by the assessee, we find that the assessee has first time raised this objection of difference in fixed assets. It is pertinent to note that even if there is difference in the fixed assets which is much high than the assessee, does not adversely affect the interest of the assessee but the cost of the fixed assets would rather reduce the operating margin of the comparable company. Further the cost of the fixed assets alone is not a determining factor for comparability if the corresponding turnover is also higher and therefore, the cost of fixed asset is diluted and not effecting the margin negatively due to the availability of economics of scale in the manufacturing industry. Therefore, we do not find any substance in the objection raised by the assessee on this account.

10. ii) Centum Electronics Ltd.

The learned AR of the assessee has submitted that this company is engaged in the business of manufacturing of frequency control products whereas the assessee is in the assembling activity which is quite different from the activity of this company. Apart from this, the learned AR of the assessee has submitted that the related party transactions (RPT) on

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account of sales and purchase of this company are nearly 91% and 51% of the total turnover respectively. Thus, learned AR of the assessee has submitted that this company cannot be considered as a good comparable due to very high related party transactions.

10.1 On the other hand, learned Departmental Representative has submitted that this objection was not raised by the assessee before the authorities below and therefore, this requires verification.

10.2 Having considered the rival submissions as well as the relevant material on record, we note that the objections of the RPT was not taken by the assessee before the authorities below and therefore, the AO as well as the DRP had no occasion to examine this fact of RPT in case of this company. Accordingly, we set aside the comparability of this company to the record of the TPO/AO for verification of the fact regarding RPT and decide the same as per law. Needless to say if it is found that the RPT of this company is more than 25% then this company cannot be considered as a good comparable.

11 Continental Device India Ltd:

The learned AR of the assessee has submitted that as per the annual report of this company, it is engaged in the business of manufacture of transistor and diodes which is significantly different from the business of the assessee. Further, this company is a pure manufacturer whereas the assessee was

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involved in assembly of various components to make the final product. Thus, the learned AR of the assessee has submitted that this company is functionally not comparable with the assessee. He has also referred to the fixed asset of this company which is 22 times more than the assessee.

11.1 On the other hand, learned Departmental Representative has submitted that this company is admittedly in the activity of manufacturing silicon semi-conductor chips and devices as well as LED lighting products and display solutions. Therefore, this company is functionally comparable with the assessee. The objection of the high fixed assets was not taken by the assessee before the authorities below and therefore, the assessee cannot take new objection which requires proper investigation and examination.

11.2 We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessee is also in the business of manufacturing and assembly of various types of components and equipments as well as testing of opto-electronic equipments. The assessee has not given the description as how the equipments manufactured and assembled by the assessee are different from the equipments manufactured by this company. It appears that the assessee was also manufacturing additional mechanical and electronic items during the year under consideration apart from the assessee has undertaken DRUSTI project of BSF which itself shows that the

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equipments supplied by the assessee to BSF and Defence establishments are related with the hand-held imager which is similar to the device used for better image facility of distance objects. In the absence of detailed product description, it is not possible to give a finding how the product manufactured/assembled by the assessee are different from the product of this company. Accordingly, we set aside this issue to the record of the TPO for proper verification and adjudication of the issue of comparability of the products manufactured/assembled by the assessee as well as this company. As regards the objection regarding high-fixed asset cost, we do not find any substance in this objection because of the fact that this is in any case going to reduce the operating margin of the comparable and therefore, the assessee is not adversely affected. Further, as we have considered this issue while deciding objection of the assessee in respect of SPEL Semiconductor Ltd., accordingly, this objection is rejected and the functional comparability of this company is remanded to the record of the TPO/AO.

12. Centrum Electronics: The learned AR of the assessee has submitted that as per the annual report of this company, it is engaged in the business of designing and manufacturing of electronic products. He has also taken objection of high fixed asset of this company in comparison to the assessee.

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12.1 On the other hand, learned Departmental Representative has submitted that this company is in similar activity of manufacturing as of the assessee. Therefore, this is a good comparable for the purpose of determining the ALP.

12.2 We have considered the rival submissions as well as relevant material on record. The DRP has recorded the finding at page 6 as under:

“10. Centum Electronics Ltd –

It is seen that this company designs and manufactures electronic products and caters to the defence and aero space industry. The field of operation of products are similar. In our view this is functionally comparable.”

As it is clear from the findings of the DRP that this company is in the activity of design and manufacturing of electronic products and caters to the Defence and aero space industry. Therefore, the DRP has considered only the field of operation of the product being Defence without giving finding of the similarity of the product itself. Defence and Aero space may be using a variety of products and all may not be identical and similar. Accordingly, we set aside this issue to the record of the TPO/AO for proper verification of the description of the product manufactured/assembled by the assessee as well as by this company and then decide the comparability of this company after considering the objections of the assessee.

13. Now, we take up the revenue's appeal where the revenue has raised the following grounds:

1. The order of the Dispute Resolution Panel is opposed to law and the facts and circumstances of the case.
2. The DRP erred in directing the AO to exclude M/s. Opto circuits (India) Ltd., M/s. Portescap India Pvt Ltd., M/s. FCI Oen connectors Ltd., M/s, Motherson Tradings Ltd (Merged), M/s. Reed Relays & Electronics India Ltd., M/s. Moser Baer India Ltd from the list of comparables as being functionally different without appreciating the fact that these companies qualify all the qualitative and quantitative filters applied by the TPO.
3. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the DRP be reversed and that of the Assessing Officer be restored.
4. The appellate craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal.

The revenue is aggrieved by the order of the DRP whereby 6 companies selected by the TPO as comparable are rejected by the DRP.

14. We have considered the rival submissions as well as relevant material on record. The DRP has discussed the comparability of 6 companies in para.3.4 as under:

1. Opto Circuits (India) Ltd:

It is seen that the company has a turnover of Rs.471 Crores . It is seen that the this company is in the manufacture of cardio vascular equipment and devices. It is therefore not functionally comparable and is directed to be excluded.

2.Portescap India Pvt Ltd:

This company manufactures high precision, special purpose motors for surgical and dental instrument. It is not functionally comparable.

3. FCI Oen Connectors Ltd

This company has a turnover of Rs.368.80 Crores. It manufactures electrical equipment and accessories . In our view it is not functionally comparable.

4. Motherson Tradings Ltd (Merged)

It is seen that this company manufactures fuse holders, blade fuses links, auto fuses and caters mainly to the auto motive and non automotive industries. In our view this is not functionally comparable.

5. Reed Relays & Electronics India Lid *This company manufactures reed relays and switches and keyboards whichare not comparable. In our view it is not functionally comparable.*

6. Reed Relays & Electronics India Lid *This company manufactures reed relays and switches and keyboards whichare not comparable. In our view it is not functionally comparable.*

14.1 It is clear that in case of **Opto Circuits (India) Ltd.** the said company was found engaged in the manufacture of cardio vascular equipment and devices. The revenue has not produced

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any record or fact before us to dispute the factual finding of the DRP that this company is in the activity of manufacturing of entirely different product which is used for medical and health care purpose. Therefore, we do not find any error or illegality in the finding of the DRP in rejecting this company being functionally not comparable with that of the assessee.

14.2 In case of **Portescap India Pvt. Ltd.**, the DRP has recorded the fact that this company manufactures high precision, special purpose motors for surgical and dental instrument. Therefore, the functions and the equipments of this company are entirely different from the product of the assessee. Accordingly, we do not find any reason to interfere with the finding of the DRP when the facts recorded by the DRP are not disputed by the revenue.

14.3 In case of **FCI Oen Connectors Ltd.**, this company manufactures electronic equipments and accessories. Since electrical equipments are different from the equipment manufactured by the assessee which are in the nature of image enhancement equipment, therefore, this company cannot be considered as functionally comparable with the assessee. Accordingly, we do not find any error in the order of Ld. DRP..

14.4 The next comparable is **Motherson Tradings Ltd.** DRP has recorded that this company manufactures fuse holders, blade fuses links, auto fuses and caters mainly to the auto motive and non automotive industries. As it is clear from the description of

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the product manufactured by this company the same cannot be compared with the product of the assessee. Accordingly, we do not find any error in the finding of the DRP.

14.5 **Reed Relays & Electronics India Ltd.,:** The DRP has recorded that this company manufactures reed relays and switches and keyboards which are not comparable with the products of the assessee. We find that these switches and key boards are not comparable with the product of the assessee and therefore, this company cannot be compared with that of the assessee for the purpose of determining the ALP.

14.6 The next comparable which is rejected by the DRP is **Moser Baer India Ltd.,**. There is no dispute that this company is in the business of manufacture of storage optical media which is entirely different product with that of the assessee. Therefore, we do not find any error or illegality in the finding of the DRP by holding that this company cannot be considered as functionally comparable with that of the assessee. The objections raised by the department are rejected.

15. In the cross objections the assessee has not raised any new issue but the grounds raised by the assessee are identical to that of the appeal. In view of our finding on the grounds of the assessee's appeal, the cross objection becomes infructuous and accordingly dismissed.

16. Since most of the comparables which were selected by the TPO are found to be non-comparable and some of the companies

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are now set aside for fresh verification, therefore, if in remand proceedings the TPO finds that original comparables selected by the TPO are not functionally comparable or good comparable for the purpose of ALP, then the assessee as well as the TPO are free to carry out the fresh search and bring the comparable companies for the purpose of determining the ALP.

17. In the result, the appeal of the assessee is partly allowed whereas the appeal of the revenue and the cross objections of the assessee are dismissed.

Pronounced in the open court on 27th November, 2015.

sd/-
(G.Manjunatha)
ACCOUNTANT MEMBER
eksrinivasulu,sps

sd/-
(Vijay Pal Rao)
JUDICIAL MEMBER

Copy to:

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore