

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH, BANGALORE**

**BEFORE SHRI. SUNIL KUMAR YADAV, JUDICIAL MEMBER AND  
SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER**

<b>IT(TP)A Nos. &amp; Assessment Year</b>	<b>Appellant</b>	<b>Respondent</b>
426/Bang/2015 2010-11	Assistant Commissioner of Income Tax, Circle 12(1), Bengaluru	Mindteck (India) Ltd., Prestige Atlanta, No.10, Industrial Layout, 7 <sup>th</sup> Main, 80 Ft. Road, 3 <sup>rd</sup> Block, Bengaluru-560034. <b>PAN : AAACH1072Q</b>
50/Bang/2015 2010-11	Mindteck (India) Ltd., Bengaluru. <b>PAN : AAACH1072Q</b>	Assistant Commissioner of Income Tax, Circle 4(1)(2), No.14/3, 4 <sup>th</sup> Floor, Rastrohana Bhavan, (Opp RBI), Nrupathunga Road, Bengaluru-560001.

<b>C.O. No. &amp; Assessment Year</b>	<b>Appellant</b>	<b>Respondent</b>
37/Bang/2016 2010-11 [in IT(TP)A No.426/Bang/2016]	M/s. Mindteck (India) Ltd., Bengaluru <b>PAN : AAACH1072Q</b>	Assistant Commissioner of Income Tax, Circle 12(1), Bengaluru.

Assessee/C.O. by : Shri. Sampath Raghunathan, Advocate  
Revenue by : Shri. G. R. Reddy, CIT-DR-I

Date of hearing : 31/08/2017  
Date of pronouncement : 27/09/2017

**ORDER**

***Per Sunil Kumar Yadav, JM :***

These cross appeals are preferred by the assessee as well as Revenue against the assessment order passed consequent to the direction of DRP. The assessee has also filed the cross objection against the said order. Since appeals and the C.Os were heard together, they have been disposed off through this consolidated order. We however prefer to adjudicate them one after the other.

**2. IT(TP)A No.426/Bang/2015**

Through this appeal, the Revenue has assailed the order of the AO passed consequent to the order of the DRP, *inter alia*, on the following grounds:

*“On the facts and in the circumstances of the case the Learned Dispute Resolution Panel erred in relying on the decision of Hon'ble High Court of Karnataka in the case of CIT Vs. M/s. Tata Elxsi Ltd, wherein, the legislature intentionally included the definition of Export Turn Over and did not include definition of Total Turn Over for the purpose of computation of deduction u/s 10A. Moreover, the decision of the Hon'ble High Court has not been accepted by the department and further appeal before Hon'ble Supreme Court has been filed, which is pending for decision.*

*2. The Learned DRP erred in holding that the size and turnover of the company are deciding factors for treating the company as a comparable and accordingly erred in excluding M/s. Tata Elxsi Ltd, M/s Sasken Communication Technologies Ltd, M/s. Persistent Systems Ltd., M/s. LGS Global Ltd, M/s. Mindtree Ltd, M/s. L&T Infotech and M/s. Infosys Ltd as comparables.*

*3. The Ld. DRP erred in excluding uncontrolled comparables having turnover more than Rs.200 crores in the absence of turnover criterion prescribed in Rule 10B of Income Tax Rules and also there being no correlation between turnover and profit margin.*

*4. The Ld. DRP erred in excluding M/s Accentia Technologies Ltd, M/s ECLERX Services Ltd on the basis of different function, while the comparable is qualifying all the qualitative and quantitative filters applied by the TPO.*

3. Ground No.1 is stated to be covered by the jurisdictional High Court in the case of Tata Elxsi Ltd., Vs. DCIT 349 ITR 98. Moreover, the DRP had adjudicated this ground in the light of judgment of jurisdictional High Court in the case of Tata Elxsi

and the AO has passed the consequential order. Therefore, no interference in this assessment order is called for. Accordingly, we reject this ground of the Revenue.

4. So far as other ground Nos. 2, 3 and 4 are concerned, these grounds are related to the exclusion of the comparables of M/s.Tata Elxsi, M/s.Sasken Communication Technologies Ltd., M/s.Persistent systems Ltd., M/s.LGS Global Ltd., M/s.Mindtree Ltd., M/s.L&T Infotech and M/s.Infosys Ltd., on the ground that these comparables have turnover of more than 200 crores. On this issue, the learned counsel for the assessee has contended that in the assessee's appeal, having applied turnover filter, the DRP has excluded certain comparables in IT Segment. Therefore, the grounds 2, 3, 4 and the grounds raised in assessee's appeal with regard to IT segment should be adjudicated together. During the course of hearing, both the parties have agreed that in the light of the judgment of Delhi High Court in the case of Chryscapital Investment Vs. DCIT (2015) 56 Taxmann.com 417, the turnover filter should not be applied unless and until it is established that it effects the profitability of the comparables. In the light of these facts, we are of the view that let the TPO/AO determine the ALP in IT segment without invoking the turnover filter. Therefore, we set aside the order of the AO passed consequent to direction of DRP for determining the ALP in IT segment in the light of comparables referred in the order of the DRP and direct AO/TPO to recompute the ALP in accordance with law without being influenced by the applicability of the turnover filter. Therefore, the issue of computation of ALP in IT segment is restored to AO/TPO for fresh adjudication after affording an opportunity of being heard to the assessee. Accordingly, the Revenue's appeal is disposed off along with I.T. segment of the assessee's appeal.

**5. IT(TP)A No.50/Bang/2015**

Through this appeal, the assessee has assailed the order of the AO, passed consequent to the directions of DRP, *inter alia*, on following grounds:

***“ 1 Assessment and reference to Transfer Pricing Officer are bad in law-***

*1.1 The final order issued by the Asst Commissioner of Income-tax Circle -4(1)(2) ['ACIT' or 'AO'], is bad on facts and in law, and is in violation of the principles of natural justice.*

*1.2 The AO has erred in making a reference to the Transfer Pricing Officer [TPO], inter alia, since he has not recorded an opinion that any of the conditions in section 92C(3) of the Act, have been satisfied in the instant case. Accordingly, the order passed by the TPO is without jurisdiction.*

*1.3 On the facts and in the circumstances of the case and in law, the learned TPO erred in not demonstrating that the motive of the Assessee was to shift profits outside of India by manipulating the prices charged in its international transactions, which is a prerequisite condition to make any adjustment under the provision of Chapter X of the Act.*

*1.4 The TPO totally ignored and not made any comments with respect to Appellant's submission that 'transfer pricing adjustment cannot exceed the absolute amount of Revenue realized by the associated enterprise from the third party'.*

*1.5 The Dispute Resolution Panel (DRP) omitted to address certain key submissions made with respect to draft order issued by AO is bad in law.*

*1.6 The order passed by the AO is without jurisdiction, inter alia, insofar as it purports to give effect to an invalid order of the TPO.*

*1.7 The TPO erred on facts and in law in conducting a fresh benchmarking analysis using non-contemporaneous data and substituting the Appellant's analysis with fresh benchmarking analysis on his own conjectures and surmises. Thus, the Appellant prays that the fresh benchmarking analysis conducted by the learned TPO is liable to be quashed.*

*1.8 The TPO erred on facts and in law in conducting a fresh benchmarking analysis using non contemporaneous data.*

**Page 5 of 18**

*1.9 The TPO erred in law in applying arbitrary filters to arrive at a fresh set of companies as comparables to the Assessee, without establishing functional comparability.*

*1.10 The TPO also erred on facts in arbitrarily rejecting companies based on their financial results without considering the functional comparability.*

*1.11 The TPO also erred on facts and in law in excluding the foreign exchange gain or loss while calculating the net margins of the comparable companies.*

*1.12 The TPO has erred on facts and in law in rejecting the TP Study using arbitrary filters, in its order para 3.2 for 'Software Development Services' and in Para 4.3.2 came with fresh set of comparables in the final Order vide para 3.5 for 'Software Development Services' and vide para 4.5.3 for 'IT Enabled Services', rejecting the objections raised by the Assessee on the comparables listed in the 'show cause notice'.*

*(a) The TPO further erred in choosing comparables, by ignoring the decisions of tribunals and high courts in respect of many of these comparables.*

*(b) The TPO erred in picking up comparable companies with different functional profiles.*

*(c) The TPO erred in picking up high margin/fluctuating margin companies, contrary to the position held in tribunal decisions.*

**2 Comparability analysis adopted by the TPO for determination of arm's length price.**

*Without prejudice to our ground challenging the order of TPO as without jurisdiction and the action of AO referring the matter to TPO, we appeal that –*

**2.1 Erred in not considering the issue on overall profitability factor at the marketing subsidiary level.**

*2.1.1 the entire proceeding of TPO is violative of the provisions of Transfer Pricing, as per Income Tax Act.*

*2.1.2 the TPO and DRP failed to realize that the Appellant company operates under "back to back" service model with respect to the third party contracts and not under "captive service provider" model. Transfer Pricing Provision cannot lead to tax a profit which is unreal.*

*Such an approach would defeat the basis of the DTAA provisions and natural justice.*

*2.1.3 The TPO and DRP further erred in not considering the issue on overall profitability factor even considering the margins earned at the marketing subsidiary level.*

*2.1.4 The TPO and DRP erred in not considering the fact and submissions of the Assessee conducting alternative search treating the foreign subsidiary as tested party and compared margins made by 'Marketing and Distribution' company and demonstrated that the margin earned by the marketing subsidiary.*

*2.1.5 The Honorable DRP failed to consider the said principle with respect to overall profitability accepted by the honorable Bangalore ITAT in Assessee's own case for AY 2009-10. (IT(TP) —A No. 70/Bang/2014).*

*2.2 The TPO/DRP erred in not considering companies chosen by Appellant as comparables with respect to 'Software Development Services' which is detailed below:-*

- *Cethar Consultancy Services Ltd.*
- *Cressanda Solutions Ltd.*
- *Lucid Software Ltd.*
- *Tata Industries Ltd.*
- *V J I L Consulting Ltd.*
- *Ravichandra Systems & Computer Services Ltd.*

*2.3 The TPO/DRP erred in not considering companies chosen by Appellant as Comparables with respect to 'IT Enabled Services' which is detailed below:-*

- *Indian Express Online Media Pvt. Ltd.*
- *Suprawin Technologies Ltd.*

*2.4 The TPO/DRP erred in not considering other objections based on the financials of the companies/relevant case laws and information.*

*2.5 TPO not considered the adjustment towards bench cost made in the TP Study to the extent of Rs.26,597,933 to the tested party OPM Calculation in the IT Services segment.*

**Page 7 of 18**

2.6 *The TPO erred in not making proper adjustments relating to risks and functions and further erred in considering a complicated and irrelevant 'working capital adjustments'.*

3 *The TPO Erred in considering 'exchange fluctuation on foreign currency transaction' as part of the operating income/expense for the purpose of OPM calculation of tested party, on the other hand while considering the comparables, the TPO has adjusted the Forex fluctuation gain/expenses in the operating profit/loss/operating cost of the comparables.*

4 *TPO erred in considering certain adjustments which are not international transactions-such as 'Guarantee commission'.*

5 *The AO has calculated wrongly Sec. 234 A additionally in the final order.*

6 *The Appellant prays for Consequential relief of interest under section 234B and 234 C under the Act.*

**7 *Directions issued by the Honorable Dispute Resolution Panel***

6.1. *The Honorable DRP has erred in law and on facts in not taking cognizance of the objections filed by the Appellant mentioned above in relation to the draft assessment order/TP Order issued by the AO/ TPO in the proceedings before them.*

6.2. *The AO while giving effect to the findings and directions of the Hon'ble DRP failed to provide the final computation basis of the comparable companies and margins thereof, the accuracy of which was not clear."*

6. During the course of hearing, the learned counsel for the assessee filed a chart along with the brief note with the submission that determination of ALP for international transaction is to be done with respect to 2 segments, one is IT Segment and the other is ITeS Segment. With respect to IT segment, it is agreed for restoration of the issue to the AO/TPO for recomputation of the ALP without applying the turnover filter unless and until it effects profitability of the comparables. This issue has already been adjudicated by us in the Revenue's appeal. Therefore, this issue is disposed off accordingly and matter is restored to the AO/TPO for recomputation of

the ALP.

With regard to ITeS segment, the learned counsel for the assessee has contended that though he has raised various grounds of appeal under different heads, but he confined his argument with respect to exclusion of certain comparables and the non-adjudication of issue of charging of interest under section 234A, 234B, 234C of the Act. With respect to ITeS segment, the learned counsel for the assessee has contended that in ITeS segment the assessee company is engaged in providing equipment and training for development of personnels. The TPO has adopted TNMM as the most appropriate method. Assessee has selected 9 comparables from TP study whereas the TPO has taken 10 comparables out of which 8 comparables were finally taken by the DRP. Accordingly the proposed TP adjustment of INR 71,19,830/- was reduced by the DRP to INR 58,82,168/- as per the chart furnished by the assessee.

7. The TPO has taken the following comparables for determination of the ALP in ITeS segment:

- i. Accentai Technologies Ltd.,
- ii. Acropetal Technologies (Seg.)
- iii. Cosmic Global Ltd.,
- iv. E-Clerx Services Ltd.,
- v. Fortune Infotech Ltd.,
- vi. ICRA Online Ltd., (Seg)
- vii. Informed Technologies India Ltd.,
- viii. Infosys BPO
- ix. Jeevan Scientific Technology Ltd., (Seg.)
- x. Nittany Outsourcing Services Ltd.,

8. The DRP excluded 2 comparables i.e., Accentai Technologies Ltd., and E-Clerx Services Ltd. The exclusion of these comparables was challenged by the Revenue in their appeal whereas the assessee sought further exclusion of Fortune Infotech Ltd., ICRA Online Ltd., (Seg), Infosys BPO and Nittany Outsourcing Services Ltd. With regard to Accentai Technologies Ltd., the learned counsel for the assessee, beside supporting the order of the DRP, has contended that Accentai Technologies Ltd., is different from the assessee company. Therefore this company is functionally different

and was rightly excluded by the DRP. He further invited our attention that this company is engaged in product development company having extra ordinary events during the year and more over the exclusion of this comparable was examined by the Tribunal in the case of DCIT Vs. Tesco Hindustan Service Centre Pvt. Ltd., 79 Taxmann.com 259 of the Bangalore Bench of the Tribunal and also in the case of Equant Solutions India Pvt. Ltd., Vs. DCIT in IT(TP)A No.1202/Del/2015. Copy of the orders are available in the compilation.

9. The learned DR on the other hand has contended that the extra ordinary event of amalgamation during the year does not affect the profitability of the comparables. Besides there is no functional difference in this comparable. Therefore the DRP has wrongly excluded this comparable.

10. Having carefully examined the order of the lower authority in this regard, we find that Tribunal has examined this comparable in the case of DCIT Vs. Tesco Hindustan Services Centre Pvt. Ltd., in IT(TP)A Nos.191 & 569/Bang/2015. Copy of the order is placed on record in para No. 13 this company was discussed. Accordingly, the relevant observation of Tribunal is extracted hereunder for the sake of reference:

*“13. As regards Accentia Technologies Ltd., and ICRA Online Ltd., this Tribunal in the assessee’s own case for the Assessment Year 2008-09 has excluded these two companies from the set of comparables in para 5 as under:*

*5. Thereafter he submitted that the following companies should be excluded on the basis of functional dissimilarity and in support of his contention, he placed reliance on the Tribunal order rendered in the case of M/s. Flextronics Tech. (India) Pvt. Ltd., Vs. DCIT in IT(TP)A No.1559(B)/2012 dated 23.10.2015, copy available on page Nos. 17 to 38 of compilation of case laws submitted before the Tribunal.*

*a) Accential Tech. Ltd., (Seg.)*

*b) Acropetal Tech. Ltd., (Seg.)*

- c) Coral Hubs Ltd.
- d) Crossdomain Solutions Ltd.,
- e) Exlerx Services Ltd.
- f) Genesys International Corpn. Ltd.
- g) Mold TEk Technologies Ltd.

*We further note that the functional comparability has been examined in detailed by the co-ordinate bench of this Tribunal in the case of Equant Solutions India Pvt. Ltd., Vs. DCIT in IT(TP)A No.1202/Del/2015 as well as in the case of ITO Vs. Interwoven Software Services (India) Pvt. Ltd. in ITA No.461/Bang/2015. Further in the case of Acropetal Technologies Ltd. (Seg.), the co-ordinate bench of this Tribunal in the case of Kodiak Networks (India) Pvt. Ltd. Vs. DCIT in IT(TP)A No.1540/Bang/2012 has considered the functional comparability and found that this company is not comparable with a captive service provider. Accordingly, we direct the Assessing Officer/TPO to exclude these companies from set of comparables.”*

Since the profile of this company has been examined by the Tribunal in the aforesaid case in the same assessment year, we find no justification to take a contrary view in this appeal. Accordingly, following the same we hold that exclusion of this company by the DRP is proper and no interference in this appeal is called for.

**11. E-Clerx Services Ltd.**

With regard to E-Clerx Services Ltd., the learned counsel for the assessee has contended that this company is also excluded by the DRP having observed that this company is a KPO whereas the assessee is a BPO and was engaged in providing high end KPO services including data analytics, data management, etc. Extra ordinary events were also occurred during the impugned assessment year along with the abnormal growth which fluctuated the revenue as well as the margin. The exclusion of this comparable was also examined by the Tribunal in the aforesaid case of DCIT Vs. Tesco Hindustan Services Centre Ltd., and the exclusion was confirmed.

12. The learned DR placed reliance upon the order of the AO.

13. Having carefully examined the order of the lower authorities in the light of rival submissions, we find that the profile of this comparable was examined by this Tribunal in the case of DCIT Vs. Tesco Hindustan Services Centre Ltd., (Supra) in which the Tribunal has categorically held that the nature and different field of services provided by this company clearly shows it is functionally different with ITeS. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

*“14.1 We have considered the rival submissions and relevant record. At the outset, we note that the comparability of M/s. Eclerx Services Ltd. has been examined by the Special Bench of the Tribunal in the case of Maersk Global Centres (India) (P) (supra) in para 82 and 83 as under:*

*82. In so far as M/s. eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows tha the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals - financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and*

*reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.*

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

*14.2 As discussed by the Special Bench in the case of Maersk Global Centres (India) (P) Ltd (supra), this company provides data analysis, operating management, audits, reconciliation, metrics management and operating services. It has two business verticals – financial services, retail and manufacturing. It was found to have been providing complete business solutions in the nature of high end services. The nature and different field of services provided by this company clearly show that it is not functionally comparable with the ITES. Accordingly, we direct the TPO/AO to exclude this company from the set of comparables."*

14. Since the Tribunal has examined the profile of this company, we find no justification to take a contrary view in this appeal. Accordingly, following the same, we hold that DRP has rightly excluded this comparable. Similarly, exclusion of Infosys BPO is also sought by the assessee on the ground that Infosys BPO has its own brand value and it was examined by the Tribunal in the same case as DCIT Vs. Tesco Hindustan Service Centre Pvt. Ltd., in which it has been held that this comparable has different profile, therefore it should be excluded from the list of comparables. The relevant observation of the Tribunal is extracted hereunder for the sake of reference:

**15. Infosys BPO Ltd.,**

*"5.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the ITES segment.*

*15.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this*

*company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader with brand value, whereas the assessee is merely an ITES operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-*

*(i) the co-ordinate bench of this Tribunal in the case of 24/7 Customer.Com Pvt. Ltd. in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee;*

*(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;*

*(iii) the company has generated several inventions and filed for many patents in India and USA ;*

*(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;*

*(v) the company has incurred huge expenditure for research and development;*

*(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems.*

*In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.”*

*15.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability*

*cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.*

*15.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee has brought on record sufficient evidence to establish that this company is functionally dissimilar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd., (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys BPO Ltd., is not functionally comparable since it has the benefit of market value as well as brand value. This company enjoys the benefits of scale and market leadership. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly.”*

16. Though the Revenue has contended that since the assessee has the same profile, therefore the Infosys BPO cannot be excluded but we find that when Tribunal has taken a view that Infosys BPO has a brand value and is functionally different and it should be excluded, we find no justification to take a contrary view in the appeal. We, therefore, following the order of the Tribunal in the aforesaid case, hold that Infosys BPO is to be excluded. We therefore direct the AO/TPO to exclude the Infosys BPO from the list of comparables.

17. So far as Fortune Infotech Ltd., is concerned, the learned counsel for the assessee has contended that this comparable can be excluded by applying the RPT filter, as RPT in this case is around 25%, whereas the Tribunal has taken a view in different cases that RPT filter is bench marked at 15%. We do not find force in the contention of the assessee as the Tribunal has been taking RPT filter between 15-25% and moreover it is not a water tight compartment that if it crosses a little bit, it has to be excluded. It is only a criteria for elimination of comparables. Since

**Page 16 of 18**

RPT in the case of comparable has just crossed the limit, we find no justification for the exclusion of this comparable. Therefore, we agree with the order of the DRP who has rightly included this comparable in the list of comparables.

18. With regard to ICRA Online Ltd., though the assessee has taken a ground that it is a functionally different comparable but during the course of hearing, he could not demonstrate these facts. He however agreed that on account of error on margin of computation, this comparable can be excluded. But we do not find force in the contention of the assessee. If the comparable is a functionally similar and cannot be excluded by applying any other filter, the same cannot be excluded on account of error in margin of computation. If any error is there, it can be rectified by the AO/TPO by pointing out error. Therefore we approve the order of the DRP for its inclusion in the list of comparables.

19. So far as Nittany Outsourcing services Ltd., is concerned, the learned counsel for the assessee has contended that this company does not appear in the show cause notice but it was taken into list of comparables while finalizing the list of comparables for determination of the ALP. It was not contended by the learned counsel for the assessee that inclusion of this comparable is hit by applying certain other filters. The ground that it was not in the show cause notice but it appeared in the final list does not appear to us to be valid reason for the exclusion of the comparables. Accordingly, we find no justification to exclude this comparable from the list of comparables. Therefore, the order of the DRP is approved in this regard.

20. With regard to chargeability of interest under section 234A, 234B, 234C, the learned counsel for the assessee has contended that since the assessment order is passed in consequence to the direction of the DRP, the AO has charged the interest

under section 234A, 234B, 234C and assessee has no occasion to dispute the chargeability of interest as it was not a part of the draft assessment. We have carefully examined the orders of the lower authorities including the draft assessment as well as the TPO's order and the DRP's order and we find that no direction was given in this regard either by the DRP or by the TPO and interest was charged by the AO while passing assessment consequent to the directions of the DRP. Therefore, the objection of the assessee with regard to chargeability of interest requires proper adjudication. Since we have already restored the matter to the AO/TPO for recalculation of the ALP in terms indicated in the order of the Tribunal, the objection of the assessee in this regard can also be adjudicated by the AO. Accordingly, this issue is also restored to the AO/TPO for readjudication.

**21. C.O. No. 37/Bang/2016**

Through this C.O., the assessee has not raised any other ground except repetition of the grounds raised in its appeal and the contentions raised during the course of hearing. Therefore, we find no justification to deal with the C.O. independently. Accordingly, appeal of the Revenue as well as assessee and C.O. of the assessee are partly allowed for statistical purposes.

22. In the result, appeals of the Revenue and assessee and C.O. of the assessee are partly allowed for statistical purposes.

*Order pronounced in the open court on this 27<sup>th</sup> September, 2017.*

Sd/-  
**(J SUDHAKAR REDDY)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(SUNIL KUMAR YADAV)**  
**JUDICIAL MEMBER**

Place : Bangalore  
Dated : 27/09/2017  
/NShylu/\*

**Page 18 of 18**

**Copy to :**

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- 3 CIT(A)-II Bangalore
- 4 CIT
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By order

Senior Private Secretary  
Income-tax Appellate Tribunal  
Bangalore