

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

IT(TP)A Nos. & Assessment Years	Appellant	Respondent
No.443/Bang/2016 2011-12	M/s. Outsource Partners International Pvt. Ltd., Tower 2D, Phase I, Vikas Telecom Ltd., Vrindavan Tech Village, Outer Ring Road, Devarabeesanahalli, Bangalore- 560087. PAN: AAACO5734C	Dy. Commissioner of Income-Tax, Circle-5(1)(2), Bangalore.
No. 526/Bang/2016 2011-12	Dy. Commissioner of Income-Tax, Circle-5(1)(2), Bangalore.	M/s. Outsource Partners International Pvt. Ltd., PAN: AAACO5734C
No.535/Bang/2017 2009-10	M/s. Outsource Partners International Pvt. Ltd., PAN: AAACO5734C	Assistant Commissioner of Income Tax, Circle-5(1)(2), Bangalore.

Assessee by	:	Shri. K. R. Vasudevan, Advocate
Revenue by	:	Shri. R. N. Parbat, CIT-III

Date of hearing	:	23.08.2017
Date of Pronouncement	:	31.10.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

These cross appeals are preferred by the assessee as well as the revenue against the respective orders of the AO passed consequent to the directions of DRP. Since all these appeals were heard together, these are being disposed off through this consolidated order. We however we prefer to adjudicate them one after the other.

2. IT(TP)A No. 443/Bang/2016

This appeal is preferred by the assessee against the assessment order passed consequent to the directions of DRP, *inter alia*, on following grounds:

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law.*
2. *The Ld. Dispute Resolution Panel ("DRP") erred in confirming the Ld. AO/ Ld. Transfer Pricing Officer's ("TPO") approach of enhancing the income of the Appellant by Rs.15,39,24,517/- holding that the international transactions pertaining to provision of Information Technology enabled services ("ITeS") do not satisfy the arm's length principle envisaged under the Act. In doing so, the Ld. AO/Ld. TPO have grossly erred in;*
 - 2.1. *rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant under section 92D of the Act and Rule 10D of the Income-tax Rules, 1962 ("Rules") and in doing so not appreciating that none of the conditions set out in section 92C(3) of the Act are satisfied in the present case;*
 - 2.2. *ignoring the fact that the Appellant is entitled to tax holiday under section 10A and 10AA of the Act on its profits and therefore would not have any untoward motive of deriving a tax advantage by manipulating transfer prices of its international transactions;*
 - 2.3. *disregarding the Arm's Length Price ("ALP") as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Rules as well as the fresh search and in particular modifying/ rejecting the filters applied by the Appellant;*
 - 2.4. *disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year [(i.e. Financial Year ("FY") 2010-11] data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation;*
 - 2.5. *rejecting the economic and comparability analysis in the TP documentation/ fresh search and in conducting a revised comparability analysis based on application of the following additional/ revised*

filters in determining the ALP:

- 2.5.1. exclusion of companies whose data for FY 2010-11 was not available;*
 - 2.5.2 exclusion of companies having different financial year ending (i.e., not March 31, 2011) (i.e., Caliber Point Business Solutions Ltd and R Systems International Limited);*
 - 2.6. not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, thereby including in the final comparable set certain companies with completely different functional profile (i.e., Accentia Technologies Ltd, Acropetal Technologies Limited. ICRA Online Limited, Jeevan Scientific Technology Ltd);,*
 - 2.7. excluding certain companies on arbitrary/frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*
 - 2.8. excluding provision for doubtful debts from the cost base in the computation of markup of certain comparable companies;*
 - 2.9. rejecting Appellant's claim of adjustment on account of accelerated depreciation (i.e. higher rate of depreciation charged vis-à-vis those of comparables) while computing Margin of comparables;*
 - 2.10. committing factual errors in the computation of working capital adjustment;*
 - 2.11. including companies having high margins/ volatile operating margins in the final comparables' set, that signify high element of entrepreneurial risk, thereby not appreciating the risk profile of the services rendered by the Appellant and restricting risk adjustment to 1% without giving appropriate/ due regard to economic considerations applicable in the instant case;*
- 3. The Ld. AO/ Ld. TPO erred in not sharing the basis of arriving at the revised TP adjustment while passing the final TP order*
 - 4. The reference made by the Ld. AO suffers from jurisdictional error as the Ld. AO has not recorded any reasons in the draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the ALP, as is required under section 92CA(1) of the Act.*
 - 5. The Ld. AO/ Ld. TPO has grossly erred on facts and in law by disregarding judicial pronouncements in India in undertaking the TP adjustment.*
 - 6. That on the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act mechanically without recording any adequate satisfaction for such initiation.*
 - 7. The Ld. AO has erred in law and on the facts of the case by charging and computing interest under section 234B of the Income tax Act, 1961.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised. The arguments taken hereinabove are without prejudice to each other.

3. During the course of assessment proceedings, the AO has noted that assessee had international transactions with its Associated Enterprises of more than Rs.15 crores. Accordingly, it was referred to TPO for determination of ALP. The TPO vide order dated 27.01.2015 determined the adjustment to ALP to the tune of Rs.12,09,08,993/- and the same was adopted in the draft assessment order dated 26.03.2015. Aggrieved with the said adjustment, the assessee approached the DRP and DRP vide its direction had directed the TPO to verify certain objections and recompute the ALP. The TPO vide its report dated 25.01.2016 had determined the ALP adjustment at Rs.15,39,24,517/- and the same was adopted by the AO and assessed the total income at Rs.20,07,42,914/-. Against the TP adjustment, assessee has filed this appeal before the Tribunal.

4. Assessee has also filed the brief synopsis along with the chart for inclusion/exclusion of certain comparables. According to the brief synopsis and the orders of the authorities below, the assessee is engaged in the business of providing business process outsourcing to its clients and its Service Provider is willing to provide the business process outsourcing services for appropriate consideration. The services that are provided by the service provider includes remote data entry services like general accounting, accounts payable and receivable, billing, banking reconciliation, financial reporting, documentary compliance and remote tax processing services like indexing of tax working documents, preparation of tax returns, quality checks on the returns prepared etc. The assessee is a part of BPO Group, Business Process Outsourcing Inc., Cayman Islands, which is a leading

offshore business process outsourcing service provider and headquartered in USA. In order to determine the ALP of the international transactions, the assessee has prepared the Transfer Pricing study and has taken 8 comparables whereas the TPO has finally taken 10 comparables for determining the ALP. The list of 10 comparables are as under:

1. Accentia Technologies Ltd.,
2. Acropetal Technologies Ltd.,
3. Cosmic Global Ltd.,
4. e4e Healthcare
5. ICRA Online Ltd.,
6. Jeevan Scientific Technology Ltd.,
7. Infosys BPO Ltd.,
8. Jindal Intellicom
9. Mindtree Ltd.,
10. iGate Global Solutions Ltd.,

5. On the basis of TPO's report, the draft order was prepared by the AO against which assessee has filed the objections before the DRP. DRP has re-examined the claim of the assessee and has finally taken 7 comparables after rejecting 3 comparables i.e., Infosys BPO Ltd., Mindtree Limited and iGate Global Solutions Limited.

6. Aggrieved with the findings of the DRP, assessee has preferred an appeal before the Tribunal and sought the exclusion of Accentia Technologies Ltd., Acropetal Technologies Ltd., ICRA Online Ltd., and Jeevan Scientific Technology Ltd. During the course of hearing, the learned counsel for the assessee, through the chart did not raise any objection with regard to the inclusion of ICRA Online Ltd. Therefore, we find no justification to exclude this comparable from the list of comparables. So far as exclusion of Accentia Technologies Ltd., Acropetal Ltd., and Jeevan Scientific Technology Ltd., are concerned, the learned counsel for the assessee has contended that these comparables are functionally different and no

segmental information is available with regard to Accentia Technology Ltd., and Jeevan Scientific Technology Ltd. The learned counsel for the assessee further contended that the issues of exclusion of these comparables are covered by the judgment of the Tribunal in the case of Swiss Re Shares Services (India) Pvt. Ltd., Vs. ACIT in IT(TP) A No.380/Bang/2016 reported at (2016) 76 taxmann.com 22 (Bangalore Trib.) for the assessment year 2011-12 in which the assessee is also engaged in the business of export of customized electronic data in the field of insurance. The learned counsel for the assessee further contended that exclusion of these 3 comparables were examined by the Tribunal in detail in its order. Therefore, for the same reasons, these comparables should be excluded from the list of comparables. The learned DR on the other hand has placed reliance upon the orders of the DRP.

7. Having carefully considered the orders of the authorities below and judgments referred to by the assessee, we find that exclusion of these 3 comparables were examined by the Tribunal in the case of Swiss Re Shares Services (India) Pvt. Ltd., where the assessee was also engaged in the similar type of activities. The Tribunal has held that all these 3 comparables are functionally different, therefore they are to be excluded from the list of comparables. For the sake of reference, we extract the relevant portion of the order of the Tribunal as under:

“Accentia Technologies Limited

12. As regards the selection of Accentia Technologies Limited as comparable, the learned counsel for the assessee has relied on the decisions of this Tribunal in the cases of Capital IQ Information Systems (India) Pvt. Ltd. v. Addl./Dy. Commissioner of Income-tax, Circle 1(2), Hyderabad and vice versa (ITA No.124 and 170/Hyd/2014 dated 31.7.2014); Excellence Data Research Pvt. Ltd., Hyderabad v. ITO Ward 2(1), Hyderabad (ITA No.159/Hyd/2014 dated 31.7.2014); and Hyundai Motors India Engineering P. Ltd., Hyderabad v. DCIT, Circle 2(2), Hyderabad (ITA NHO.255/Hyd/2014 dated 31.7.2014), wherein M/s. Accentia Technologies Limited(Seg) was excluded by the Tribunal from the list of comparables on the ground that it was a case of mergers and acquisition, and the company was also found to be functionally different. The relevant observations of the Tribunal as recorded in para 19.2 of

the order passed in the case of Excellence Data Research Pvt. Ltd., Hyderabad (supra), being relevant in this case, are reproduced below-

"19.2 We have considered the rival contentions and noticed that this company operates in a different business strategy of acquiring companies for inorganic growth as its strategy. In earlier years on the reason of acquisition of various companies, being an extraordinary event which had an impact on the profit, this company was excluded. As submitted by the learned counsel, this year also, the acquisition of some companies by that company may have impact on the profit. Considering the profit margins of the company and insufficient segmental data, we are of IT(TP)A No.146/Bang/2015 Page 42 of 52 the opinion that this company cannot be selected as a comparable. Moreover, this is also not a comparable in the case of M/s. Mercer Consulting (India) (P.) Ltd. (supra), which indicates that the TPO therein has excluded it at the outset. In view of this, we direct the Assessing Officer/TPO to exclude this comparable, from the list of comparables selected." 13. As pointed out by the learned counsel for the assessee, there was acquisition of a company by M/s. Accentia Technologies Limited during the relevant year, and the said company, therefore, cannot be considered as comparable due to this extraordinary event which occurred in the relevant year as rightly held by the Tribunal inter alia in the case of Excellence Data Research (P.) Ltd. (supra). Although the learned Departmental Representative has sought to contend that the acquisition of a company by M/s. Accentia Technologies Ltd. took place at the fag end of the year under consideration, the learned counsel for the assessee has pointed out that the process of acquisition had started on 15.5.2008 itself, i.e. in the earlier part of the year under consideration. We, therefore, follow the decision of the coordinate bench of this Tribunal in the case of Excellence Data Research Services Pvt. Ltd. (supra) and direct the AO/TPO to exclude the Accentia Technologies Limited from the list of comparables.

21. *Arguing for exclusion of Acropetal Technologies Ltd, (seg), Ld. AR submitted that Acropetal Technologies Ltd, was rendering service in the field of engineering design for health-care enterprise solutions and IT infrastructure solutions. As per the Ld. AR, AO took the engineering design services done by Acropetal Technologies Ltd, as a comparable segment with ITES services of the assessee. Ld. AR pointed out that engineering design services rendered by M/s. Acropetal was entirely different from the type of services done by the assessee. Further according to him Hyderabad bench of the Tribunal in the case of Excellence Data Research (P.) Ltd. v. ITO [\[2014\] 66 SOT 15/49 taxmann.com 409 \(Hyd. - Trib.\)](#) had held that Acropetal Technologies Ltd, was not a good comparable in the BPO segment. As per the Ld. AR M/s. Excellence Data Research P. Ltd, was rendering back office data creation, content development and support services which were not comparable to what assessee was doing. Though the decision of the Hyderabad Bench was for A. Y. 2009-10, as per the Ld. AR, M/s. Acropetal Technologies Ltd, was doing the very same business during the relevant previous year also and therefore it could be considered as a good precedent.*

22. *Per contra, Ld. DR submitted that TPO had considered the argument of the assessee that BPO and KPO had to be distinguished. According to him, Acropetal Technologies Ltd, was giving engineering design services and the assessee was rendering insurance support services. Though these services did not fit in the same mould, the level of expertise required stood more or less on the same pedestal. According to him, applying the yardsticks laid down by Hon'ble Delhi High Court in the judgment of Rampgreen Solutions (P.) Ltd. (supra), Acropetal Technologies Ltd, could be taken as a good comparable.*

23. *We have perused the orders and heard the rival contentions. There is no dispute that M/s. Acropetal was having at least three segments, namely, engineering design services, IT service and health care. TPO had taken engineering design service as a good comparable with that of the services done by the assessee. Engineering Design Services that were being rendered by Acropetal Technologies Ltd, appears at page 8 of its annual report. It comprised of architectural, structural, electrical, plumbing, steel detailing, and utilities designing. Its revenue model appears at page 9 of its annual report. It is mentioned that the said company was providing comprehensive offerings using its deep domain understanding of infrastructural healthcare, engineering design and enterprise solutions. In our opinion, the type of services that was being provided by Acropetal Technologies Ltd, was not at all comparable with the type of services that the assessee was providing. It is also mentioned in the annual report of the said company that it was providing high end services in the engineering design services. No doubt as mentioned by the Ld. DR, it may not be feasible to have comparables which fit in the exact mould as that of an assessee in TP analysis. However, when one company is giving sophisticated set of services which involves higher level of skill sets, and the other is doing it on a lower level, we cannot say that the former should be considered as a comparable to the latter. Though for a different year, comparability of Acropetal Technologies Ltd, (seg) had come up before Hyderabad bench of the Tribunal in the case of Excellence Data Research (P.) Ltd. (supra). Observations of the Tribunal as it appears at para 18.1 reads as under :*

"18.1 After considering the rival contentions, we agree with the objections raised by assessee. As seen from the Annual Report, this company is involved in engineering design services and has products also, which makes it functionally not comparable. Even at the segmental level, it provides engineering design services, which was considered as high end, by the coordinate bench of the Tribunal in the case of Hyundai Motors India Engineering (supra) in earlier year. Therefore, we are of the opinion that this company cannot be selected as a comparable. We accordingly direct the Assessing Officer/TPO to exclude this company."

24. *Considering all these, we are constrained to take a view that engineering design services segment of M/s. Acropetal Technologies Ltd, (seg), cannot be considered as a proper comparable for the TP study of the assessee.*

29. *Seeking exclusion of Jeevan Scientific Technologies Ltd, (seg), Ld. AR submitted that the turnover of the said company was less than Rs.1 crore. As per the Ld. AR, TPO himself had excluded companies having turnover below Rs.1 crore. Relying on paper book, page 719, which is a part of the annual report of Jeevan Scientific Technologies Ltd, (seg), Ld. AR submitted that the revenues from BPO operations of the said company came to only Rs.79.21 lakhs. As per the Ld. AR, the total operating revenue of the said company for the relevant previous year was only Rs.2.49 crores of which substantial part was from other streams of operation.*

30. *Per contra, Ld. DR submitted that the segment considered by the TPO had a turnover of Rs.246,75,00,000/-. Thus according to him Jeevan Scientific Technologies Ltd, (seg), was a good comparable.*

31. *We have heard the rival contentions. Audited balance sheet and financial statement of Jeevan Scientific Technologies Ltd, (seg), taken from capitaline data base has been filed before us by the assessee at paper book page.677 to 740. Net revenue of the said company for the relevant previous year from its operation was Rs.2,45,39,231/-, as per its income statement at paper book page 725. TPO had considered the revenue as Rs.2,46,75,000/-. However segmental revenue of the said company, as it appear at paper book page 719 show its earnings from BPO operations is Rs.71.219 lakhs. Thus TPO had considered the total revenue instead of the segmental revenue. The turnover of the segment which was being compared was less than Rs.1 crore and by the yardstick applied by the TPO himself, the company ought have been excluded from the list of comparables. Whether the segmental information of the said company given by the assessee at paper book page 719, nevertheless requires a verification. We therefore set aside the comparability of Jeevan Scientific Technologies Ltd, (seg), back to the file of the AO/TPO for consideration afresh. In case the earning of the said company from its BPO operations is less than Rs.1 crore it has to be excluded from the list of comparables.*

32. *In the result, we direct exclusion of Accentia Technologies Ltd, Acropetal Technologies Ltd, (seg) from the list of comparables, whereas we uphold the inclusion of ICRA Online Ltd, (seg) in the list of comparables. However, viz., Jeevan Scientific Technologies Ltd, (seg), we are remitting the issue of its fitness for comparison back to the AO/TPO for considering the turnover of the BPO segment of the said company. Ordered accordingly.”*

8. Since the exclusion of these 3 comparables were examined by the Tribunal in the foregoing case, where the assessee is engaged in similar activities, we find no justification to take a contrary view in this appeal. We, accordingly, following the same, exclude 2 comparables i.e., Accentia Technologies Ltd., and Acropetal Technologies Ltd., from the finalist of comparables and for Jeevan Scientific, we

restore the matter to the AO/TPO to re-examine in the light of other comparables as in the case of Swiss Re Shares Services (India) Pvt. Ltd., wherein the Tribunal has directed for reconsideration on the basis of turnover filter. Whereas, after judgment of *Chryscapital Investment Vs. DCIT (2015) 56 Taxmann.com 417*, the turnover filter cannot be held to be a good filter unless it affects the profitability of the comparables. Therefore, Jeevan Scientific Technology Ltd., be re-examined by the TPO in the light of other filters.

9. The assessee has also sought the inclusion of the R System International Ltd., on the ground that TPO has excluded it on account of different financial year. The learned counsel for the assessee further contended that the data for the relevant financial year i.e., April to March can be derived from the quarterly data available on the website of the company, therefore this comparable should be included in the list of comparables. In support of his contention that where the data can be available for the relevant financial year, the comparable should be included in the list of comparables, the learned counsel for the assessee has relied upon the order of the Tribunal in the case of Business Process Outsourcing Pvt. Ltd., Vs. ACIT in IT(TP)No.238/Bang/2016, M/s. Mercer Consulting India Pvt. Ltd., Vs. DCIT in ITA No.101/2015 (Punjab & Haryana High Court) and Mckinsey Knowledge Centre India Pvt. Ltd., in ITA No.217/2014 (Delhi High Court). Copy of these orders are placed on record.

The learned DR placed reliance upon the order of the DRP.

10. Having carefully examined the orders of the lower authorities in the light of rival submissions, we find that it has been repeatedly held through various orders by the Tribunal that wherever the data for the relevant financial year can be derived from the data available on the website and that comparables stands on other filters, the same should be included in the list of comparables. In the instant case, assessee has tried to demonstrate that data for the relevant financial year (April to March) can be derived from the data available on website. Therefore, we are of the opinion

that this comparable should be included in the list of comparables and before doing so the AO/TPO will examine the details and if the data for the relevant financial year can be derived from the data available on the website and it stands on other filters, the same can be included in the list of comparables.

11. The learned counsel for the assessee further contended that while determining the ALP, the credit of risk adjustment should be given because appellant is a captive contract IT enabled service provider to its AE and being the captive service provider, the appellant is devoid of any significant risk relating to business operations as the risk are borne by AE because it owns all the valuable intellectual property rights (know-how, copyrights etc.,) and other commercial or marketing intangibles. Accordingly, being a mere service provider, the assessee does not own any interest in these intangibles and provides mere services based on the requirement of the AE in return for a fixed mark up on cost incurred in rendering of services. It was further contended that risk to adjust for the market risk per se as the appellant is not subject to any volatility of the market as opposed to the comparable companies during the assessment year. The comparable companies selected by the TPO are independent, risk bearing entities whereas the software segment of the assessee is a risk free entity that is compensated on a Cost plus basis irrespective of the result of its operation. In the open market any entity assuming increased risk will also be compensated by an increase in the expected return in the long run. Hence it is essential to make a risk adjustment to bridge the disparities in risk profile between the appellant and the comparable companies selected by the TPO. The learned counsel for the assessee further placed a reliance upon the order of the Tribunal in the case of Intellinet Technologies India Pvt. Ltd., Vs. ITO (ITA No. 1237/Bang/2010) and Bearing Point Business Consulting Pvt. Ltd., Vs. DCIT (ITA No. 1124/Bang/2011).

The learned DR placed reliance upon the order of the DRP.

12. Having carefully examined the order of the lower authority in the light of rival submissions, we find the lower authorities have not considered the factor of

risk adjustment while computing the ALP for international transactions. According to assessee, assessee is a captive contract IT enabled service provider to its AE. Therefore, being a mere captive service provider, the assessee does not own any interest in intangibles. It provides mere service in return of fixed mark up on cost incurred in granting of services. Whereas the comparables selected by the TPO are independent risk bearing entities. It is an admitted fact that in the open market any entity assuming increased risk will also be compensated by increase in the expected return in the long run. Under these circumstances where risk factor is different in the case of assessee as well as comparables, risk adjustment should be allowed while computing the ALP for international transactions. This aspect was examined by the Tribunal in the case of *Intellinet Technologies India Pvt. Ltd., and Bearing Point Business Consulting Pvt. Ltd.*, (Supra) in which the Tribunal has directed the TPO to consider all the contentions of the assessee and after taking into account all the relevant material decide the percentage of risk adjustment to be made in accordance with law. The relevant observation of the Tribunal in the case of *Intellinet Technologies Ltd*, is extracted hereunder:

“7.1 As seen from the records, the assessee had acquired the business and also earned income out of the said transaction by cost plus basis. Thus, it can be seen that the assessee has not encountered the risk of having a single customer, whereas the same cannot be said as regards the comparables. As pointed out by the learned counsel for the assessee, the comparables were dealing in open market and therefore, they were prone to the marketing and technical risks. They would have incurred certain expenditure on marketing services and also to safeguard the technical use by them. In such a case, the risk encountered by the assessee cannot be said to be the equivalent risks attached to the comparables. The risk attributed to the assessee by the TPO is an anticipated risk whereas the risk attributed by the assessee to the comparables is an existing risk. In such situation, the TPO ought to have given the risk adjustment to the net margin of the comparables for bringing them on par with the assessee company. The assessee's contention that the risk adjustment should be at 5.5% or at the difference of prime lending rate of the RBI and the banks is not acceptable to us. Therefore, we direct the TPO to consider all the contentions of the assessee and after taking into account all the relevant material decide the percentage of risk adjustment to be made in accordance with law. This ground is accordingly, allowed for statistical purposes.”

13. Since the Tribunal has repeatedly held that in such circumstances risk adjustment should be given after making necessary verification, we are of the view that in the instant case we should restore the matter to the TPO to consider the contentions of the assessee and after taking into account all relevant facts make the risk adjustment while determining the ALP for international transactions. We order accordingly.

14. Through ground No. 2.8, the learned counsel for the assessee has contended that DRP also erred in excluding provision for doubtful debt from the cost base in the computation of mark up of certain comparable companies. In this regard, we have examined the material on record and we are of the view that same treatment should be given while excluding/including the provisions for bad and doubtful debts in the case of the assessee company and the comparables. If the provisions of the doubtful debts have been excluded in the case of assessee company, the same be excluded in the case of comparables. Two different types of treatment cannot be given in the case of assessee company and the comparables. Therefore we also restore the issue to the AO/TPO to examine the facts relating to provision for doubtful debts in the assessee company as well as in the case of comparables.

15. Through ground No. 2.9, the learned counsel for the assessee has contended that the DRP erred in rejecting the assessee's claim of adjustment on account of accelerated depreciation. In this regard, the learned counsel for the assessee has contended that it depreciates its asset at higher rate than the rates prescribed by the Schedule XIV of the Companies Act, 1956. However, most of the comparable companies considered by the learned TPO followed rates as prescribed under Companies Act thereby charging a lower rate of depreciation. Therefore an adjustment on account of differential in the rates of depreciation charged by the appellant vis-à-vis, the comparable should be given. In support of his contention, that when applying the arm's length principle, the conditions of the controlled transactions (transaction between the tax payer and the AE) are compared to the conditions of the comparable uncontrolled transactions. In this context, "to be

comparables means that none of the differences (if any) between the situations being compared could materially affect the conditions being examined in the methodology (i.e., price/margin)". In case, there are any such differences, reasonably accurate adjustment need to be made to eliminate the effect of any such difference. In support of this contention, the learned counsel for the assessee has placed the reliance upon the judgment in the case of *Outsource Partners International Pvt. Ltd, Vs. DCIT IT(TP)A No.337/Bang/2015, EXL Service.Com Vs. ACIT in ITA No. 1939 and 1981/2008*. Copies of the same are available on record.

The learned DR on the other hand has placed the reliance upon the order of the DRP and TPO.

16. Having carefully examined the material available on record in the light of rival submissions we find that wherever rates of depreciation are different in the case of assessee and the comparables, the depreciation adjustment should be allowed. This aspect was examined by the Tribunal in the aforesaid judgments referred by the assessee. The Tribunal has repeatedly held that adjustment for difference in depreciation rate should be allowed in order to determine the ALP. The relevant observation of the Tribunal in the case of *EXL Service.Com Vs. ACIT in ITA No. 1939 and 1981/2008* is extracted hereunder:

5.12 Now the moot question is as to whether variation in the rates of depreciation can be considered as a relevant factor necessitating adjustment in the operating profit margin of the comparables. The ld. DR relied on DCIT v. Sumi Motherson Innovative Engineering Ltd. (2014) 150 ITD 195 (Delhi) and some other decisions to bring home his point of view of not carrying out any adjustment on account of difference in depreciation.

5.13 There can be no dispute on the principle that calculation of 'Operating profit' as envisaged under Rule 10B(1)(e) embraces cumulative effect of all the items of income and expenses which are of operating nature. Ordinarily, there can be no question of considering each item of such operating expenses or income in isolation de hors the other expenses to claim adjustment on the ground of such expenditure or income of the assessee on the higher side seen individually or as a percentage of other operating expense/incomes in comparison with its comparables. The reason is obvious that when we consider the operating profit margin, the effect of all the individual higher or lower items of expenses or incomes gets submerged in the overall operating profit margin, ruling out the

need for any adjustment on one-to-one comparison. One company may have taken a building on rent for carrying on its business, in which case, it will pay rent which will find its place in the operating costs. For the purposes of making comparison, one cannot contend that the payment of rent by one enterprise in comparison with a non-payment of rent by another, should be neutralized by giving proper adjustment from the operating profit of the comparable. The manifest reason is that the other enterprise may have its own office premises and the amount of depreciation on such premises will also form part of its operating cost. When we consider the operating profit of the first enterprise which is paying rent and then compare it with the second enterprise which is not paying any rent but is claiming depreciation on its own premises, the overall effect of rent in one case gets counterbalanced with depreciation on premises of the other. Similar is the position of a company having purchased new assets charging higher amount of depreciation allowance in its books of accounts vis-a-vis another comparable company using old assets with lower amount of depreciation. No adjustment on account of difference in the amounts of depreciation of two companies is called for when the operating profits are determined because in the case of a company having purchased new asset, there will be lower repair cost and vice versa. The effect of all the individual items of operating expenses and incomes culminates into the operating profit margin. That is why, the legislature has provided for comparing the ratio of 'operating profit margin' to a similar base of the assessee with that of its comparables, thereby dispensing with the need for making any adjustment on account of higher or lower amount of individual items of expenses and incomes. Merely because the amount of depreciation of one enterprise is more or less than the other, can never be a reason to seek adjustment. Such higher amount of depreciation may be due to large scale of the company and host of other factors. By considering percentage of operating profit margin under the TNMM of the assessee as well as comparables, the higher or lower volume of two companies becomes immaterial and so is the quantum of depreciation. The nitty-gritty of the matter is that no adjustment can be allowed simply for the reason that one company has charged higher amount of depreciation vis-a-vis its comparable companies. Not only no adjustment on this score is permissible, the assessee cannot also seek an exclusion or inclusion of a company on the ground that the ratio of its depreciation to total expenses is more or less in comparison with comparables. It is so for the reason that such higher percentage of depreciation to total expenses is marginalized by the lower percentage of repairs and other incidental costs of the assets and vice versa.

5.14 *However, the position may be a little different when there is a difference in the rates of depreciation charged by two companies on similar category of assets. One company may adopt the policy of charging depreciation on its assets in conformity with the rates prescribed in Schedule XIV of the Companies Act and other company may adopt a policy of charging depreciation at the higher rates or lower than those prescribed under Schedule XIV. This can be demonstrated with the help of an example. Other things being equal, if the operating profit of company A, after claiming depreciation of Rs.10 on the value of asset worth Rs.50 with rate of depreciation 20%, is Rs.100, the operating profit of company B with everything same including the value of assets at Rs.50, but with rate of depreciation 30%, will be Rs.95. It shows that the comparability is jeopardized*

due to higher rate of depreciation charged by company B at 30% in comparison with lower rate of depreciation charged by company A at 20%. In such a situation, although both the companies use similar type of assets and everything else is also equal, but their respective operating profit percentages undergo change due to higher or lower rate of depreciation, thereby distorting their comparability. It is this difference in the amounts of depreciation due to different rates of depreciation and not due to different quantum of depreciation simplicitor, which calls for bringing both the companies at par.

5.15 *At this juncture, we will consider the ratio of the decisions relied by the Id. DR to bolster his submission for not granting any adjustment on account of difference in the rates of depreciation on similar assets. In Sumi Motherson (supra), the assessee requested for suitable reduction towards higher depreciation charged by it, thereby boosting its percentage of depreciation to sales at a much higher level than that of comparables. Rejecting this contention, the tribunal held that it is not allowed to compare each and every item of the operating cost incurred by the assessee with similar cost in the case of comparables to ask for any adjustment. It is the overall effect of all such individual items descending into operating profit, which is considered for benchmarking the assessee's international transaction and if the amount of depreciation is distinctly compared with comparables, leaving aside other related and consequential items, such as repair costs etc., then the results are likely to be distorted. It was further observed that to ask for adjustment, it is essential that there should be some independent and substantial reason. It was held that : 'In the context of depreciation, one can rightly appreciate the need to make adjustment, if rate of depreciation charged by the assessee vis-a-vis its comparables is different. But the simplicitor difference in the amount of depreciation is inconsequential.'*

5.16 *Almost similar proposition has been laid down by the Delhi Bench of the tribunal in Nokia India (P) Ltd. v. DCIT 2014-TII-224-ITAT-DEL-TP by disapproving the exclusion of some companies on the strength of the filter of lower or higher depreciation as a percentage of total costs. In so holding, it observed that the higher amount of depreciation is usually coupled with the lower repair cost etc., and vice versa. That is how, it held that : 'there can be no justification in applying the filter of rejecting the companies with depreciation higher or lower than a particular percentage of total costs.'. It is, thus, overt that these two cases relied by the Id. DR, in fact, support the case of the assessee rather than the Revenue.*

5.17 *Another case relied by the Id. DR in 24/7 Customer Com (P.) Ltd. v. Dy. CIT 2012-TII-143-ITAT-BANG-TP, again does not take us any further. In that case, the assessee raised an additional ground for suitable adjustment towards higher rate of depreciation charged by the assessee vis-a-vis its comparables. It is patent from the penultimate para of this order that the tribunal eventually remitted the issue of depreciation, as raised through the additional ground, to the file of the AO/TPO for a fresh consideration and decision. So, this order also does not support the case of the Revenue. The last case relied by the Id. DR is Lason India (P.) Ltd. v. ACIT 2012-TII-47-ITAT-MAD-TP. The assessee in that case provided depreciation on assets under SLM at the rates higher than those*

provided in Schedule XIV, whereas the comparables provided for depreciation as per Income-tax Rules on written down value method. The assessee claimed before the tribunal that if depreciation of the assessee is also brought to the w.d.v. method, then its operating profit would be more. The tribunal rejected this claim of the assessee. In our considered opinion, the adjustment has been rightly denied because the method of charging depreciation was different and further the assessee sought adjustment from its profits, which is not permissible as will be seen infra. The ld. AR also candidly admitted that his point was limited to the adjustment due to difference in the rates of depreciation from SLM of the assessee to SLM of the comparables and not otherwise as is the position in Lason India (P.) Ltd. (supra).

5.18 *The sum and substance of the above cases is that neither any adjustment can be made for a simplicitor higher/lower amount of depreciation in itself or as a percentage of the total operating expenses nor an otherwise comparable company ceases to be comparable because of the above factors. However, an adjustment is called for when there is a difference in the rates of depreciation on similar types of assets under similar method of charging depreciation. At the cost of repetition, we want to accentuate the line of distinction between two cases, viz., first in which the amount of depreciation is more due to higher value of the assets employed by one company and second, in which the amount of depreciation is more not due to higher value of the assets employed by one company but due to higher rates of depreciation. Whereas, the first situation would not call for any adjustment, the second one would warrant adjustment in the operating profit of the comparable company. That is where Rule 10B(1)(e) (ii) & (iii) read with Rules 10B(2) & (3) come into play for neutralising the difference in the operating profits of the two otherwise comparable companies by making a "reasonably accurate adjustment ... to eliminate the material effects of such differences".*

5.19 *Now the next question is as to in whose hands the above adjustment should be allowed. The ld. AR argued that the excessive rate of depreciation charged by the assessee should be lowered to the rates as prescribed under Schedule XIV to the Companies Act so as to bring a parity between the rates of depreciation charged by the assessee vis-a-vis its comparables. This contention in our considered opinion, is not tenable. It has been noticed above that Rule 10B(1)(e)(iii) contemplates the making of adjustment to the net profit margin of the comparables determined under sub-clause (ii) to Rule 10B(1)(e). Even Rule 10B(3) also requires the making of adjustment in the hands of comparables to eliminate the material effects of differences. Thus, the adjustment can be made only in the hands of the comparables' operating profit margin and not to that of the assessee.*

5.20 *The ld. DR pleaded for not allowing any adjustment on this score by arguing that the difference in the rates of depreciation by the assessee and comparables does not affect the computation of the net operating profit margin on a long term basis. He stated that the higher rates of depreciation would no doubt lower the profit in the earlier years, but such reduction of profits would be set off with the higher amount of profit due to lower amount of depreciation in the later years, thereby, nullifying the effect of such higher rate of depreciation*

over the life time of an asset. Asserting on this argument, the ld. DR stated that no adjustment could be accordingly allowed.

5.21 This contention, in our considered opinion does not move forwards the case of Revenue for the reason that Chapter X of the Act requires computation of income from international transactions having regard to ALP on year to year basis. There is no provision for determining the ALP of an international transaction for more than one year in a consolidated manner. Unlike the hitherto determination of undisclosed income for the block period as provided under Chapter XIV-B of the Act, as opposed to year-to-year basis, there is no such provision for determining the ALP of an international transaction for more than one year by considering a few years as one unit during which an asset is put to use. Not only is this exercise impermissible under the law, but is also impractical of application. Various assets will have varying useful life spans due to different rates of depreciation and their useful life will not terminate at one common point of time, so as to facilitate the making of adjustment at such point of time. Be that as it may, since the legislature requires determination of ALP of an international transaction on yearly basis, what we need to do is to find out the effect of depreciation on year to year basis and not on a consolidated basis extending to the life time of such assets.

5.22.1 The ld. DR made still another contention opposing the assessee's stand. It was argued that re-calculating the operating profits of the comparable companies by providing depreciation on SLM in the hands of comparables at the higher rates, at par with the assessee's, would distort the comparison. He explained his point of view by stating that no doubt with the increase in the rates of depreciation of the comparables for the current year at par with the assessee, would achieve comparability, but this would adversely affect the calculation of operating profit of the comparables because of the inclusion of proportionate depreciation also on the assets which still appear in their books but actually depreciated fully due to parity with the assessee's higher rates of depreciation. It was explained with the help of an example in which the assessee is charging depreciation under SLM at the rate of 33.33% on a particular asset considering the useful life of three years, as against the comparables providing depreciation on similar asset under SLM at the rate of 16.21% by impliedly considering its useful life a little over six years. He explained that the comparable company providing depreciation at 16.66% on SLM would continue to hold assets in 4th, 5th and 6th year as well and the amount of depreciation in these three years will also be at 16.21% despite the fact that this particular asset has exhausted its useful life after three years as has been done by the assessee. This proposition, in the opinion of the ld. DR, warranted reduction in the amount of depreciation of comparables companies to the extent of 16.21% of the value of such asset from 4th to 6th years. It was thus pleaded that if some adjustment is to be allowed in favour of the assessee in line with the above arguments of the ld. AR, then a simultaneous negative adjustment on account of the above factor should also be directed.

5.22.2 This contention advanced on behalf of the Revenue can be properly appreciated if one understands the striking dissimilarities between the scheme of charging depreciation under the Income-tax Act, 1961 and the Companies Act,

1956. The concept of block of assets exists under the Act by which all the assets of a particular species having the same rate of depreciation are considered together as one unit. This can be seen from sec. 2(11) of the Act, which defines "block of assets" to mean 'a group of assets falling within a class of assets comprising— (a) tangible assets, being buildings, machinery, plant or furniture; (b) intangible assets, being, in respect of which the same percentage of depreciation is prescribed'. Under the scheme of block of assets, depreciation is charged on the total written down value of such block as appearing at the end of the year at the prescribed rates. There is no provision for charging depreciation on individual assets. Similarly, there is no mandate for computing capital gain at the time of transfer of such individual assets, unless the block of assets ceases to exist as such. Capital gains are computed u/s 50 of the Act under two prescribed situations by considering the block of assets in entirety de hors the event of sale of individual asset. First is the situation under which the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of the assets during the previous year, exceeds the aggregate of (i) expenditure incurred wholly and exclusively in connection with such transfer or transfers; (ii) the written down value of the block of assets at the beginning of the previous year; and (iii) the actual cost of any asset falling within the block of assets acquired during the previous year. It is this excess which is deemed to be the capital gains arising from the transfer of short-term capital assets. Second is the situation in which any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year. In such a situation, the cost of acquisition of the block of assets is taken as the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year. The income received or accruing as a result of such transfer or transfers is deemed to be the capital gains arising from the transfer of short-term capital assets. A careful perusal of the above provisions deciphers that the individual assets on their purchase merge with other assets of that block, thereby losing their separate identity. Depreciation is provided on the basis of the written down value of such block and not the w.d.v. of such individual assets. Even the event of their transfer also does not lead to automatic charging of capital gains, unless the case falls under either of two clauses of section 50. Assessee gets depreciation on the w.d.v. of such assets, which stand merged with the w.d.v. of the block, even after their transfer, of course subject to the provisions of section 50 and other relevant sections.

5.22.3 Now let us examine the position under the Indian Companies Act, 1956. Section 349 deals with the determination of net profits. Sub-section (1) provides that in computing the net profits of a company in any financial year, : '(a) credit shall be given for the sums specified in sub-section (2) and credit shall not be given for those specified in sub-section (3); and (b) the sums specified in sub-section (4) shall be deducted, and those specified in sub-section (5) shall not be deducted.'. Clause (k) of sub-section (4) states that deduction shall be allowed for 'depreciation to the extent specified in section 350'. The later section, in turn provides that: 'The amount of depreciation to be deducted in pursuance of clause

(k) of sub-section (4) of section 349 shall be the amount of depreciation on assets as shown by the books of the company at the end of the financial year expiring at the commencement of this Act or immediately thereafter and at the end of each subsequent financial year, at the rate specified in Schedule XIV.' Clause (d) of sub-section (3) states that in making the computation aforesaid, no credit shall be given for 'profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets.' At this stage, it is relevant to note the prescription of the proviso to this clause which stipulates that :

'where the amount for which any fixed asset is sold exceeds the written-down value thereof referred to in section 350, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written down value.' Clause (d) of sub-section (5) further provides that in making the computation aforesaid, no deduction shall be allowed for loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or of any part thereof not including any excess referred to in the proviso to section 350 of the written-down value of any asset which is sold, discarded, demolished or destroyed over its sale proceeds or its scrap value. Proviso to section 350 provides that: 'if any asset is sold, discarded, demolished or destroyed for any reason before depreciation of such asset has been provided for in full, the excess, if any, of the written-down value of such asset over its sale proceeds or, as the case may be, its scrap value, shall be written off in the financial year in which the asset is sold, discarded, demolished or destroyed.'

5.22.4 *On a reading of section 349 in conjunction with section 350 of the Companies Act, it emerges that depreciation on each asset is separately provided at the rates specified in Schedule XIV for the purposes of the determination of profit. If an asset is sold or discarded before providing full depreciation on it, then the excess of the w.d.v. of such asset over its sale price/scrap value, to the extent provided, shall be written off in the financial year in which the asset is sold or discarded. In the converse situation, where the amount for which any fixed asset is sold exceeds the written-down value thereof referred to in section 350, then credit shall be given for so much of the excess, to the extent provided, as is not higher than the difference between the original cost of that fixed asset and its w.d.v. in the year of its sale. These two situations can be demonstrated with the help of a simple example. If asset A with original cost of Rs. 100 having w.d.v. of Rs.40 is sold for Rs.50, then the profit of Rs.10 is to be credited to the Profit and Loss account for the year of sale of such asset. If asset A with original cost of Rs. 100 having w.d.v. of Rs.40 is sold for Rs.30, then the loss of Rs.10 is to be debited to the Profit and Loss account for the year of sale/scraping of such asset.*

5.22.5 *On a comparative study of the scheme for charging depreciation and treatment of profit/loss on the sale of specific assets under both the statutes, we observe that whereas, the Act does not recognize individual assets for the purposes of allowing depreciation and grants depreciation on the block of assets, the Companies Act recognizes the existence of separate assets and stipulates*

depreciation on each asset distinctly in the Profit and loss account. When an asset is sold, there is no scope for calculating profit or loss on sale of each asset in excess of its w.d.v. under the Act. It is done only for the block of assets in the manner given and to the extent enshrined in section 50. On the other hand, the Companies Act mandates claiming deduction for loss or crediting gain on the sale of each asset separately to its Profit and Loss account, which is not in excess of difference between the original cost and the w.d.v. of such asset.

5.22.6 With the above legal position at hand, let us evaluate the contention of the ld. DR that the comparables companies' depreciation for the current year would also include depreciation in respect of the assets which have seen the end of their useful life but still continue to form part of the schedule of fixed assets because of providing depreciation at lower rates on such assets in comparison with the assessee. This contention of the ld. DR, though appears attractive at the first blush, but loses its shine on an in-depth analysis. It is severely simple that if an asset has reached the milestone of the end of its useful life, then it would be either sold or discarded. Ordinarily, no company would continue to hold obsolete assets. Once an asset is sold after its useful life, the company will write off the unamortized depreciation in the year of its sale or discarding, by considering its sale price and w.d.v. and hence it would cease to appear in the books of account. Once it does not appear in the books of account, there can be no question of any depreciation on it in the later years as has been put forth on behalf of the Revenue. Continuing with the example given by the ld. DR, we find that the particular asset on the completion of its useful life of three years would become obsolete in fourth year and sold/discarded by the company and the short-fall in the amount and depreciation charged over its cost would be accordingly written off in its accounts. In such a situation, that particular asset with useful life of three years would cease to appear in the Schedule of fixed assets of the comparable company at the end of fourth, fifth and sixth years respectively, As such, no value of such assets will be available for depreciation in the next year(s).

5.23 Turning to the facts of the instant case, we find that the method of charging depreciation, both by the assessee and its comparables, is by and large the same that is SLM. The assessee is seeking adjustment only due to higher rates of depreciation charged by it under SLM with the lower rates of depreciation charged by four comparable companies, other than Mapro Industries Ltd. and Karvy Consultants Ltd. In view of above discussion, we hold that the operating profit margins of these four comparable companies should be recomputed by the TPO/AO in line with the rates of depreciation charged by the assessee under SLM. To put it simply, the amount of depreciation of the four comparable companies on their assets shall also be recomputed under the SLM alone as per the rates at which the assessee has provided depreciation. In doing so, if the comparable companies have charged depreciation at a lower rate in comparison with the assessee, then suitable increase should be made to their amount of depreciation and if the comparables have charged depreciation at a higher rate in comparison with the assessee on some of the assets, then suitable reduction should be made in the amount of their depreciation. Here it is significant to note that one of these four companies, namely, Nucleus Netsoft and GIS India Ltd. has

charged depreciation on all its assets under SLM except for Computers, on which it provided depreciation on written down value basis. The TPO should see if he can correctly deduce the amount of depreciation, on the basis of data available, for the year on 'Computers' also under SLM. If due to one reason or the other, such precise calculation is not possible, then no adjustment should be carried out in the calculation of the operating profits of this company, even on other items of assets. Ordinarily, we would have ordered for the exclusion of this company from the list of comparables in the event of no possibility of computing depreciation on computers under the SLM by converting it from w.d.v. method, because of this being a material factor and not quantifiable. But since neither the assessee nor the Revenue seek the exclusion of this company from the list of comparables, we cannot suo motu order so. We, therefore, sum up our conclusion on this aspect of the matter by holding that if the assessee as well as the comparable companies are using the SLM and there is a difference in the rates of depreciation charged by them, then there is a need to make suitable adjustment to the profits of the comparables.

17. The Tribunal has taken a consistent view that wherever different rates of depreciation are charged in the case of assessee as well as the comparables, the depreciation adjustment should be allowed. In the instant case, the learned counsel for the assessee has tried to demonstrate that the rate of depreciation charged in the case of assessee and the comparables are different. Therefore we are of the view that let this matter be re-examined by the TPO/AO and if they notice that the rates of depreciation are different in the case of assessee and the comparable companies, the reasonable depreciation adjustment be made in order to determine the ALP for the international transactions.

18. The next issue through ground No. 2.10 and 2.11 relate to the working capital adjustment and in this regard it has been repeatedly held by the Tribunal that working capital adjustment should be allowed while determining the ALP without putting any cap thereon. Therefore, we restore this issue to the file of the AO/TPO to allow the working capital adjustment while computing the ALP for international transactions. Other grounds raised in this appeal are general in nature and do not require any independent adjudication.

19. IT(TP)A No. 526/Bang/2016

This appeal is preferred by the Revenue against the order of the AO passed consequent to the order of DRP on a solitary ground that the DRP has erred in

granting 1% risk adjustment arbitrarily without appreciating the facts of the case and its comparables. In this regard, this issue has already been adjudicated by us in the assessee's appeal and we restore the matter to the file of the AO/TPO to verify the facts and to allow the risk adjustment if he finds that the different nature of risk is involved in business activities of the assessee's and the comparables. Accordingly, this ground is disposed off.

20. IT(TP)A No. 535/Bang/2017

This appeal is preferred by the assessee against the assessment order framed consequent to directions of DRP inter alia on following grounds.

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law.*
2. *That the Ld. Dispute Resolution Panel ("DRP")/ Ld. AO erred in law and on the facts and in the circumstances of the case in reducing the deduction allowable under section 10AA of the Act by Rs.279,138. The said adjustment is on account of expenditure incurred on telecommunication expenses from the export turnover and total turnover.*
 - 2.1. *That the Ld. DRP/ Ld. AO ought to have appreciated that the telecommunication expenses can be reduced only to the extent they are attributable to delivery of article/ thing outside India and not for rendering of services outside India. In the present facts of the appellant, telecommunication expenses have been incurred by the appellant for providing services outside India.*
 - 2.2. *That the Ld. DRP/ Ld. AO has erred in concluding that expenditure incurred on telecommunication is deemed to have been incurred for providing services outside India. The Ld. DRP/ Ld. AO has ignored the submission of the appellant that the said expenditure incurred cannot be attributed to providing services outside India since the appellant company works on an offshore model.*
 - 2.3. *The Ld. DRP/ Ld. AC ought to have appreciated that the intention of provisions of Section 10AA of the Act is to ensure that export profits are not taxed. However, by making the above mentioned reduction, the profits on exports are being taxed in the hands of the appellant, thereby defeating the purpose of Section 10AA of the Act.*
3. *That the Ld. DRP/ Ld. AC erred in law and on the facts and in the circumstances of the case by making notional addition of Rs,2 18,382 per provisions of section 14A of the Act read with rule 8D of the Income-tax Rules, 1962 ("Rules").*

- 3.1. *That the Ld. DRP/ Ld. AO erred in law and on the facts and in the circumstances of the case while mentioning that the infrastructural expenses and man-power expenses cannot be ruled out and ignoring the fact that the exempt dividend income earned by assessee is automatically reinvested as per the scheme and no such expenses have been incurred by the assessee for earning the exempt income.*
- 3.2 *That the Ld. DRP/Ld. AO erred in law and on the facts and circumstances of the case by not taking cognizance of the detailed submission filed by the appellant.*
- 3.3 *Without prejudice to above Grounds, the Ld. DRP/ Ld. AO has erred in disregarding the fact that the disallowance of Rs. 218,382 pertains to the SEZ unit of the Assessee and addition made to the income of the Assessee of Rs.218,382 should be entitled for enhanced deduction under section 10AA of the Act.*
4. *The Ld. AO/ Ld. Transfer Pricing Officer's ("TPO") erred on facts and in law in enhancing the income of the Appellant by Rs. 358,286,971 holding that the international transactions pertaining to provision of Information Technology enabled services ("ITeS") do not satisfy the arm's length principle envisaged under the Act. In doing so, the Ld. AO/Ld. TPO have grossly erred in:*
- 4.1. *rejecting the Arm's Length Price ("ALP") as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Rules as well as the fresh search and in particular modifying/ rejecting the filters applied by the Appellant;*
- 4.2. *disregarding multiple year/ prior years' data as used by the Appellant in the TP documentation and holding that current year [i.e. Financial Year ("FY") 2011-12] data for comparable companies should be used despite the fact that the same was not necessarily available to the Appellant at the time of preparing its TP documentation;*
- 4.3. *collecting selective information of the companies by exercising power granted to him under section 133(6) of the Act that was not available to the Appellant in the public domain and relying on the same for comparability purpose (and to the extent of completely ignoring reliable data available in public domain/ annual reports in numerous cases).*
- 4.4. *rejecting the economic and comparability analysis in the TP documentation/ fresh search and in conducting a revised comparability analysis based on application of the following additional/ revised filters in determining the ALP:*
- 4.4.1. *exclusion of companies having revenue from services less than 75% of the total operating revenue;*
- 4.4.2. *exclusion of companies having employee cost less than 25% of the*

sales;

- 4.4.1 exclusion of companies with export sales less than 75% of their total sales;*
- 4.4.4. exclusion of companies having different financial year ending (i.e. not March 31, 2012);*
- 4.5. not appropriately considering the functions, assets and risk profile of the companies used for comparison with the Appellant, thereby including in the final comparable set certain companies with completely different functional profile;*
- 4.6. excluding certain companies on arbitrary/ frivolous grounds even though they are comparable to the Appellant in terms of functions performed, assets employed and risks assumed;*
- 4.7. rejecting/ignoring the companies for which current year data is available in the public databases, at the time of assessment proceedings, which are comparable to IT Enabled back-office services of the Appellant (without prejudice to the Appellant's arguments on use of current year data);*
- 4.8 rejecting Appellant's claim of adjustment on account of accelerated depreciation i.e. higher rate of depreciation charged vis-à-vis those of comparables) while computing margin of comparables;*
- 4.9 committing factual errors in the computation of working capital adjustment;*
- 4.10. including companies having abnormal margins/ volatile operating margins in the final comparables' set, that signify high element of entrepreneurial risk, thereby not appreciating the risk profile of the services rendered by the Appellant and not allowing the risk adjustment to the Appellant;*
 - 4.10.1. without prejudice, that if risk adjustment is not allowed to compensate for risk free activities of the Appellant and hence considered it to be risk bearing, in that case appropriate tested party for the arm's length analysis should be the Appellant's overseas Associated Enterprise ("AE");*
- 4.11. committing a number of factual/ computational errors in the computation of the operating profit margins of the comparables;*
- 5. Ld. AO/ Ld. TPO erred in not giving appropriate effect to the directions passed by the Hon'ble DRP and not sharing the basis of arriving at the revised TP adjustment while passing the final TP order. In this regard, a rectification letter has been filed before the Ld. AO/Ld. TPO.*
- 6. The reference made by the Ld. AO suffers from jurisdictional error as the Ld. AC has not recorded any reasons in the draft assessment order based on which he reached the conclusion that it was 'necessary or expedient' to refer the matter to the Ld. TPO for computation of the ALP, as is required under section 92CA(1) of the Act.*

7. *The Ld. AO/Ld. TPO has grossly erred on facts and in law by disregarding judicial pronouncements in India in undertaking the TP adjustment.*
8. *That the Ld. AO has grossly erred on facts and in law by initiating penalty proceedings under section 271(1)(c) of the Act mechanically and without recording any satisfaction for its initiation.*
9. *That the Ld. AD has erred in law and on the facts of the case by charging interest under section 234B and section 234C of the Act.*

The above grounds of appeal are mutually exclusive and without prejudice to each other.

The Appellant craves leave to add, alter, amend or vary any of the above grounds either before or at the time of hearing as we may be advised.

21. During the course of hearing, the learned counsel for the assessee has moved an application for admission of the additional grounds with the submission that in the original grounds, the assessee has raised a general plea with regard to pointing out the policy in the calculation of ALP whereas through additional grounds the comparables which are required to be excluded and included are identified.

22. We have carefully examined the original grounds and the additional grounds and we find that the additional grounds are clarificatory in nature and can be disposed off along with the original grounds. Therefore, we admit the same and prefer to adjudicate these grounds along with the original grounds. We however for the sake of reference extract the additional grounds as under:

“Transfer Pricing-Additional Ground of Appeal

It is most humbly prayed to the Hon'ble Tribunal to permit the Appellant to raise the following additional grounds of appeal in continuation to the existing grounds of appeal and shall be read with Ground No. 4.5, 4.6 and 4.9.

Ground No. 4.5A: Companies to be rejected

The Appellant submits that the Ld. TPO/ Ld. DRP has erred in not excluding Infosys BPO Ltd., TCS E-serve Ltd., BNR Udyog Ltd., BNR Udyog Ltd., Excel Infoways Ltd. and Universal Print Systems Ltd., companies which are not comparable to the Appellant.

Ground No. 4.6A: Companies to be accepted

The Appellant submits that the Ld. TPO/ Ld. DRP has erred in excluding Informed Technologies td., Cosmic Global Ltd., Cameo Corporate Services

Pvt. Ltd., Excel Callinet Pvt Ltd., Omega Healthcare Management Services Pvt. Ltd., R Systems International Ltd., and Caliber Point Ltd., companies which are comparable to the Appellant.

Reason for filing Additional Ground of Appeal

The Appellant during the preparation of Form 36B has taken a ground on the rejection of comparable companies from the TPO's proposed set which are not comparable to the Appellant and a ground on the acceptance of companies included by the Appellant in the TP Report/fresh search, which are comparable to the Appellant. However, in order to bring clarity on the existing ground no. 4.5 and 4.6, we are elaborating the name of each comparable company which is sought for rejection/acceptance. On the above basis, we humbly request the Hon'ble bench members to reject/ include the above-mentioned companies from the final set of comparable.

Ground No. 4.9A: Working Capital Adjustment

The Ld. TPO/ Ld. DRP has erred in not considering the fact that the Appellant does not have any working capital risk, therefore, no negative working capital adjustment should be allowed.

Reason for filing Additional Ground of Appeal

The Appellant during the preparation of Form 36B has taken a generic ground on working capital adjustment. However, in order to bring clarity on the existing Ground No. 4.9, we are elaborating the ground for easier understanding of the issue at hand. On the above basis, we humbly request the Hon'ble bench members to not propose a negative working capital adjustment.”

23. Ground No.1 is general in nature and with respect to ground No. 2, it was contended that this ground is covered by judgment of jurisdictional High Court in the case of Tata Elxsi Ltd., 349 ITR 98 in which it has been held that whenever any expenditures are to be excluded from the export turnover, the same should also be excluded from the total turnover. We, accordingly, following the same, direct the AO/TPO to exclude the telecommunication charges from the turnover also as it was excluded from the export turnover.

24. Ground No. 3 relate to the addition of Rs.2,18,382/- made having invoked the provisions of section 14A of the Income Tax Act (hereinafter called as an “Act”) read with rule 8D of the Income Tax Rules, 1962 (“Rules”). The learned counsel for the assessee has contended in this regard that the AO has made the addition under section 14A having noted that infrastructure expenses and

manpower expenses cannot be ruled out. He has not made out any case that assessee has incurred certain expenses in all the investments as the investment was made out of the interest free funds. The learned DR on the other hand has contended that it is for the assessee to demonstrate that interest free funds were invested in mutual funds, etc. The assessee failed to explain that the interest free funds were invested and there was no expenses either infrastructure expenses or man power expenses incurred in earning the income. Therefore the AO has rightly made the additions.

25. Having carefully examined the order of the lower authorities in the light of rival submissions we find that the assessee has made substantial investments of Rs.8,73,53,000/- and has earned the dividend income of Rs.23,53,000/-. Mutual fund is exempt under section 10(34) of the Act. The AO having examined the contentions of the assessee has made the additions after applying the Rule 8D of the Rules. It is not a case where no exempted income is earned. Assessee has earned the exempted income and the AO has invoked the provisions of section 14A and applied Rule 8D for determining the disallowances. Since rule 8D takes care of all aspects of interest bearing funds and interest free funds and expenditure incurred in management of portfolios etc., we are of the view, that once it is decided that provisions of section 14A is to be invoked, disallowances are to be made as per Rule 8D of the Rules. Accordingly, we find no infirmity in the order of the AO.

26. Ground No. 4 relate to the Transfer Pricing adjustments. In this regard, our attention was invited to the fact that for determining the ALP for the international transactions, the TPO has selected 10 comparables. On receipt of TPO order, the AO has prepared the draft assessment order against which assessee has filed the objections before the DRP. DRP has considered the objections filed by the assessee and having dealt with these objections, the DRP has excluded 2 comparables from the list of comparables, i.e., Accentia Technologies Ltd., and Informed Technologies and finally taken 8 comparables for determining the ALP. Out of these 8 comparables, the assessee has sought exclusion of Universal Print System

Ltd., Infosys BPO Ltd., TCS E-serve Ltd., BNR Udyog Ltd., and Excel Infoways Ltd. Exclusion of Universal Print System, Infosys BPO and TCS Service Ltd., on the ground of functional dissimilarity. It was further contended that exclusion of these comparables were examined by the Tribunal in the case of Swiss Re Shared Services (India) Pvt. Ltd., (supra).

27. In support of his argument, the learned counsel for the assessee has filed a consolidated chart identifying the comparables of which exclusion/inclusion is sought for on different grounds. As per this chart, out of 8 comparables finally taken by the DRP, the assessee sought the exclusion of 5 comparables i.e., Universal Print System Ltd., Infosys BPO Ltd., TCS E-serve Ltd., BNR Udyog Ltd., and Excel Infoways Ltd., on different grounds. He placed heavy reliance upon the order of the Tribunal in the case Swiss Re Global Business Services India Pvt. Ltd., Vs. DCIT in ITA No.2315/Bang/2016 for the assessment year 2012-13 with the submission that these comparables were examined by the Tribunal in this case and the Tribunal has excluded these comparables from the list of comparables.

28. The learned DR on the other hand has invited our attention that in the case of Swiss Re Global Business Services India Pvt. Ltd., though the reference was made of 4 comparables i.e., Universal Print System Ltd., Infosys BPO Ltd., TCS E-serve Ltd., and BNR Udyog Ltd., but they were not discussed in detail in that order and they were excluded following the judgment of the Hon'ble Bombay High Court in the case of Pentair Water India Pvt. Ltd., rejected summarily on the ground of turnover filter. Now, in the light of judgment of Hon'ble Delhi High Court in the case of *Chryscapital Investment(supra)*, the turnover filter is not considered to be a good filter unless and until it is established that it effects the profitability of the comparables. Therefore these comparables cannot be excluded from the list of comparables.

29. Having considered the rival submissions and from perusal of the record we find that the assessee has put emphasis on his argument that the comparables were examined by the Tribunal in the case of Swiss Re Global Business Services India

Pvt. Ltd., (supra). Therefore, following the same, these comparables can be excluded from the list of comparables. On careful perusal of the order of the Tribunal in the case of Swiss Re Global Business Services India Pvt. Ltd., we find that in para 4, the Tribunal has made a reference of these 4 comparables that too along with their turnover and relying upon the judgment of the Hon'ble High Court in the case of Pentair Water India Pvt. Ltd., of Bombay High Court in which only Infosys BPO was discussed, the Tribunal has excluded all the comparables from the list of comparables. For the sake of reference, we extract the relevant portion of the order of the Tribunal as under:

“2. After allowing the negative working capital adjustment of 1.74% the TPO has arrived at the adjusted mean margin of 29.85%. Accordingly, the TPO has proposed an adjustment u/s. 92CA of Rs. 11,67,33,647/-. The assessee challenged the action of the TPO before the DRP. The DRP has not accepted the objections of the assessee however suomoto rejected one company from the set of comparables on the ground of different business model. Thus the DRP has excluded M/s. Accentia Technologies Limited from the set of comparables. After the directions of the DRP, the final assessment order was passed by considering the nine comparable companies. Before the Tribunal, the assessee is seeking exclusion of six comparable companies out the nine companies from the set of comparables are as under:

S.No.	Company Name	Turnover as per TP Order (in INR crores)
1.	M/s. Universal Print Systems Limited (Segmental)	6.18
2.	M/s. Informed Technologies India Limited	1.94
3.	M/s. Infosys BPO Limited	1312.41
4.	M/s. Microgenetic Systems Limited	1.30
5.	M/s. TCS E-Serve Limited	1578.44
6.	M/s. BNR Udyog Limited (Segmental)	1.47

2. *The ld. AR of the assessee has submitted that the TPO has applied a turnover filter of less than one crore while selecting the comparables whereas no higher limit of turnover was applied by the TPO. He has thus submitted that when turnover was considered as a relevant factor by the TPO then both the lower end and higher end of turnover filter should have been applied. In support of his contention he has relied upon the decision dated 02.07.2015*

of Hon'ble Punjab & Haryana High Court in case of Agilent Technologies (International) Pvt. Ltd. Vs ACIT in ITA No. 121 of 2014 (O & M) and submitted that the Hon'ble High Court has upheld the order of the Tribunal for considering the impact of the turnover on the comparability. He has also relied upon the decision dated 16.09.2015 of Hon'ble Bombay High Court in case of CIT Vs M/s. Pentair Water India Pvt. Ltd. in Tax Appeal No. 18 of 2015. Thus, the ld. AR has submitted that the Hon'ble High Court has again upheld the order of the Tribunal wherein the companies having huge turnover were excluded by the Tribunal. Thus the ld. AR has submitted that if the filter of ten times of the turnover of the assessee is applied on both sides then all these six companies have to be excluded from the set of comparables.

3. *On the other hand, the ld. DR has submitted that when the TPO has applied only lower turnover filter then at this stage of proceedings it cannot be amended or changed which disturbs the entire process of selection. She has relied upon the orders of the authorities below.*
4. *Having considered the rival submissions as well as relevant material on record we find that the turnover is a relevant factor for the purpose of determining the comparability of the proposed companies for the purpose of determining the arms length price. The Hon'ble Bombay High Court in case of Vs M/s. Pentair Water India Pvt. Ltd. (supra) while dealing with the issue of the comparability of companies having high turnover in comparison to the assessee held in para 5 and 6 as under.*

“ 5. On perusal of the impugned Order passed by the Tribunal dated 23.05.2014, we find that the Tribunal has recorded the reasons for not accepting the said three companies are comparable by stating as follows:

- (i) *HCL Comnet Systems & Services Ltd:-*

We find force in the submission of the Id. AR that this company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the Assessee, the turnover is around Rs.11 crores only. While making the selection of comparables, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of Rs.11 crores cannot be compared with a company which is having turnover of Rs.260 crores which is more than 23 times the turnover of the Assessee. This company cannot be regarded to be in equal size to the Assessee. We, accordingly, direct the AO to exclude this company out of the comparables.

- (ii) *Infosys BPO Ltd. :-*

In this case also we noted the turnover in respect of this Company is Rs.649.56 crores while the turnover of the Assessee company is around Rs. 11 crores which is much more than 65 times of the Assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT(A) in excluding this Company out of the comparables.

Accordingly, we confirm the order of the CIT(A).

(iii) *Wipro Ltd.:-*

After hearing the rival submissions, we noted that the CIT(A) applying the turnover filter has excluded this company out of the comparables. The turnover reported in the case of Wipro Ltd. is Rs.939.78 crores while in the case of the Assessee the turnover is around Rs. 11 crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the Assessee company and accordingly, we do not find any infirmity in the finding of CIT(A) while he excluded this company on the turnover criteria following the decision of this tribunal in :

*Sony India (P) Ltd. vs. DCIT, 114 ITD 448
Delhi,
E-Gain Communication, 2008 TIOL 282
ITAT (Pune)
Deloitte Consulting India Pvt. Ltd. vs.
DCIT, ITA No.1082/Hyd/2010
Genisys Integrating System (India)(P.) Ltd.
vs DCIT, 53 Sot 159 (Bang)"*

- 6. The said findings of the Tribunal in respect of the said three Companies are on the basis of appreciation of evidence on record. We find no infirmity in the said findings of the Tribunal on that count. In fact, the Tribunal has endorsed the views of the CIT Appeals whilst coming to such conclusions. The concurrent findings of facts arrived at by the Authorities below, cannot be re-appreciated by this Court in the present Appeal."*
- 5. Thus the Hon'ble High Court has upheld that there was no infirmity in finding of the Tribunal on this issue wherein it was held that the company having turnover of more than 23 times of the assessee's turnover cannot be compared with the assessee. A similar view has been taken by the Hon'ble Punjab and Haryana High Court in case of Agilent Technologies (International) Pvt. Ltd. Vs ACIT (supra). It is pertinent to note that this Tribunal in a series of decision has taken a consistent view that in case turnover filter is applied it should be in the multiple of the assessee's turnover and accordingly the Tribunal has taken a view that in normal*

circumstances ten times of the assessee's turnover on both sides lower as well as higher would be an appropriate tolerance range of turnover while selecting the comparable companies. In the case in hand the assessee's turnover is Rs. 71.37 crores. Accordingly by applying the said parameter of ten times of assessee's turnover on both sides the companies which are having less than Rs. 7.1 crores and more than Rs. 713 crores on turnover would be excluded. Thus we find from the above details that these six companies are breaching the said tolerance range of turnover either on the lower side or on the higher side. In view of the above discussion as well as facts and circumstances of the case, we direct the AO / TPO to exclude the above mentioned six companies from the set of comparables."

30. In this order of the Tribunal, no discussion with respect to Excel Infoways Ltd., was at all made. This comparable was sought to be excluded on the ground of extra ordinary events and it fails the employee cost filter but details were not furnished during the course of hearing of appeal. Simply reliance of this order of Tribunal was placed with the submission that the exclusion of this comparable is covered by the order of the Tribunal in the case of Swiss Re Global Business Services India Pvt. Ltd., but we find no discussion in this regard in that order. Therefore, we find no merit in the assessee's contentions with regard to exclusion of this comparable.

31. So far as remaining 4 comparables i.e., Universal Print System Ltd., Infosys BPO Ltd., TCS E-serve Ltd., BNR Udyog Ltd., are concerned, we find that the comparables were excluded by the Tribunal on the ground of turnover filter which is not considered to be a good filter in the light of judgment of Hon'ble Delhi High Court in the case of *Chryscapital Investment(supra)*, Therefore, we are of the view that the issue of exclusion of this comparable should be re-examined by the lower authorities independently without being influenced with the aforesaid order of the Tribunal. We accordingly set aside the order of the DRP in this regard and restore the matter to the AO/TPO to re-examine the comparables in the light of other filters after affording opportunity of being heard to the assessee and thereafter determine the ALP in accordance with law.

32. So far as inclusion of R Systems International Ltd., is concerned, the learned counsel for the assessee has contended that this comparable was included by the TPO and the DRP on the ground that it has different financial year and it was contended that it has been repeatedly held that comparable cannot be excluded for different financial year and if relevant data upto the end of the financial year is available. The issue has already been examined by us in the foregoing appeals and following the view taken therein, we set aside the order of the AO in this regard and restore the matter to the file of AO/TPO to readjudicate the issue of inclusion of R Systems International Ltd., if financial data of the relevant financial year is available.

33. The issue with regard to market risk adjustment and depreciation adjustment has already been adjudicated by us in the foregoing appeals and following the view taken therein, we restore the issues to the AO/TPO to readjudicate the issue afresh after affording opportunity of being heard to the assessee in terms of observation made in foregoing appeals. Accordingly, this appeal is also disposed off.

34. In the result, all appeals are partly allowed for statistical purposes.

Pronounced in the open court on this 31st day of October, 2017.

Sd/-
(JASON P BOAZ)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 31st October, 2017.
/NShylu/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. DR, ITAT, Bangalore.
5. Guard file

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore