

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'I-2', NEW DELHI**

**BEFORE  
SHRI N.K.SAINI, ACCOUNTANT MEMBER  
AND  
SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No.20/Del/2017  
(Assessment Year: 2012-13)

Exevo India Pvt. Ltd., Vs. DCIT, Ward 8(2),  
(Now MA KS Solutions (India) New Delhi  
Pvt.Ltd.)  
Unit No.216, Second Floor  
Square One  
C-2, District Centre  
Saket  
New Delhi 110 017

PAN :AABCE0738K

(Appellant)

(Respondent)

Appellant by : Sh. Nageshwar Rao, Adv.  
Respondent by : Sh. HK Chaudhary, CIT, DR

Date of hearing:27.11.2017

Date of Pronouncement: 30.11.2017

**ORDER**

**PER BEENA A. PILLAI, JM:**

The present appeal has been filed by the assessee against the final assessment order dated 30/11//2016, passed by ITO, Ward 8(2), u/s.143(3), read with section 144C of the Act.

2. The assessee filed its return of income for the year under consideration on 30/11/2012, declaring total income of Rs.3,97,72,641/-. The return was selected under scrutiny and notices under section 143(2) of the Act was issued. The ld.AO observed that assessee entered into international transaction during financial year 2011-12, under consideration. A reference was thus made under section 92C (1) by the ld. AO to Transfer Pricing Officer (TPO) to determine arm's length price (ALP) of international transactions undertaken by assessee.

2.1 Ld. TPO issued notice calling for various details from assessee. Assessee accordingly filed documentation prescribed under Rule 10 D of the Income Tax Rules and other details sought by the ld.TPO. The ld.TPO observed from the details provided information technology enabled services to its AE, which is as under:

Nature of Transaction	Amount (INR)	Method Selected	
		MAM	PLI
Provision of information Technology Enabled Services	RS.23,39,89,655/-	TNMM	OP/OC

2.2 The assessee adopted transactional net margin method (TNMM) as the most appropriate method (MAM) to benchmark the international transaction. The assessee used operating profits to operating cost (OP/OC) as the

profit level indicator (PLI) to determine the margin of the comparables.

2.3 The Ld.TPO has not objected MAM and PLI calculated by assessee. The only issue disputed by ld.TPO is in respect of selection of comparables. Following are the set of comparables selected by the assessee for ITES segment.

S.No.	Name of the company	Weighted Average
1	Caliber Point Business Solutions Ltd.	19.06
2	Cosmic Global Ltd.	17.04
3	E4e Health Care Business Services Pvt.Ltd.	17.28
4.	Fortune Infotech Ltd.	17.37
5	Informed Technologies India Ltd.	17.32
6	Infosys BPO Ltd.	32.06
7	Jindal Intellicom Pvt. Ltd.	19.00
8	Microgenetics Systems Ltd.	8.80
9	R Systems International Ltd	0.95
	Average	16.54%

2.4 The ld.TPO rejected the comparables selected by assessee by applying turnover filter, companies which did not have current year data were rejected, the companies where multiple year data has been used, comparables where the related party transactions exceeded 25% of sales and comparables with different financial year data. The ld.TPO in turn selected additional comparables where the ratio of service income to total income was 75%, where

the income from export was 75%. The ld.TPO thus arrived at a new set of comparables which included some of the comparables selected by the assessee. The comparables shortlisted by Ld.TPO are as under:

S.No.	Name of the company	OP/OC %
1	Accentia Technologies Ltd.	12.82
2	Eclerx Services Ltd.	61.64
3	TCS E-serve Limited	65.82
5	BNR Udyog Ltd.	50.33
6	Excel Infoways Ltd	42.50
7	Microgenetics Systems Ltd	9.79
8.	R Systems International Ltd.	1.91
9.	Informed Technoligies India Ltd.	22.39
10.	Infosys BPO Ltd.	36.75
11.	E4e Healthcare Business Pvt.Ltd	23.13
12.	Acropetal Technologies Ltd	19.51
13.	Jindal Intellicom Ltd	3.41
	Average	29.30%

2.5 This led to proposal for transfer pricing adjustment in respect of ITeS Segment service amounting to Rs.22,416,042/-.

2.6 Thereafter assessee carried the matter before the dispute resolution panel (DRP)-I, New Delhi. The DRP under section 144C (5) of the IT Act, 1961, gave directions on 18/11/16, determining the total income at

Rs.22,792,818/- . DRP excluded R Systems from the list of comparables. The DRP confirmed the addition made by the risk adjustments. On receipt of the directions passed by the DRP, the Ld. AO passed the assessment order on 30/11/2016, making the impugned additions.

3. Aggrieved by the order of the Ld.AO the assessee is in appeal before us on the following grounds:

1. *That on facts and in law, the impugned order/directions passed by the DCIT, Circle 8(2) ("Learned AO")/ Deputy Commissioner of Income Tax - Transfer Pricing Officer - 1(2)(1), New Delhi ("Learned TPO")/ Hon'ble Dispute Resolution Panel ("Hon'ble DRP"), making an addition of INR 22,416,042 to the total income of the Appellant on account of adjustment in the arm's length price is bad in law.*
2. *That on facts and in law, the Ld. DRP/TPO/AO have erred in computing the total income of the Appellant at INR 62,188,683/- as against the returned income of INR 39,772,641 by making an upward adjustment of INR 22,416,042/- with respect to Arm's Length Price of the international transaction.*
3. *That on facts and in law, the Ld. DRP/TPO/AO have erred, in law and in facts, by not accepting the economic analysis undertaken by the Assessee in accordance with the provisions of the Act read with the Rules and conducting a fresh economic analysis for the determination of the ALP of the international transactions pertaining to IT enabled services provided to associated enterprises and holding that the Assessee's international transactions are not at arm's length.*
4. *That on facts of the case and in law, the Ld DRP/TPO/AO have erred by:*
  - a) *Not accepting the use of multiple year data, as adopted by the Assessee in Transfer Pricing documentation; and*
  - b) *Determining the arm's length price using data pertaining only to FY 2011-12 which was not available to the Assessee at the time of complying with the TP documentation requirements*
5. *The Ld TPO has applied filters which are not justified in the facts and circumstances of the case.*
6. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by using 'Turnover less than INR 1 crore' as a comparability criterion and not rejecting companies with high turnover.*

7. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by rejecting certain comparable companies identified by the Assessee for having different accounting year (i.e. companies having accounting year other than 1 April to March 31).*
8. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by using 'Export earnings less than 75 percent of operating revenues' as a comparability criterion*
9. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by using 'Employee cost greater than 25 percent of Sales' as a comparability criterion for the impugned transaction.*
10. *Without prejudice and in the alternative to the above ground, even if the criterion of 'Employee cost greater than 25 percent of Sales' is accepted, the Ld DRP/TPO/AO have erred on facts and circumstances of the case, by including comparable company viz. Excel Infoways Limited based on the incorrect application of employee cost filter to benchmark the impugned transaction.*
11. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred, in law and on facts and circumstances of the case, by wrongfully rejecting certain comparable companies and adding certain non-comparable companies to the final set of comparables for the purpose of determining the ALP of the impugned transaction on an ad-hoc basis, thereby resorting to cherry picking of comparables.*
12. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by selecting certain companies which are earning super normal profits as comparable to the Assessee.*
13. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by passing an order under section 92CA(3) which has computational errors in the margin of companies used for the determination of the ALP of the impugned transaction without considering the detailed margin computation of companies.*
14. *That on the facts of the case and in law, the Ld DRP/TPO/AO have erred by not making suitable adjustments to account for differences in the risk profile of the Assessee vis-a-vis the comparable companies.*
15. *That on the facts of the case and in law, the Ld DRP/TPO/AO have vitiated the principles of natural justice by*
  - a) *not giving due cognizance to the detailed analysis and technical arguments submitted by the appellant in response to the show cause issued by the Learned TPO;*
  - b) *issuing the final TP order after relying on completely new facts without giving the assessee any opportunity of being heard;*
  - c) *Following inconsistent/perverse approach in the selection of comparable companies*
16. *That on the facts and in the circumstances of the case, the Ld*

*DRP/AO have erred, by initiating penalty proceedings under Section 271 (1)( c) of Act without recording any adequate reasons for initiation.*

*17. That on the facts and in the circumstances of the case, the Ld AO have erred in charging interest under Section 234B and Section 234C of the Act.*

*The above grounds of appeal are mutually exclusive & without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.*

*The Appellant prays for appropriate relief based on the said grounds of appeal and the facts and circumstances of the case.*

4. At the outset Ld.Counsel submitted that;

**Grounds 1 - 3** are general in nature.

**Grounds 4-6, 12 and 13** are Academic.

**Ground No. 16** is premature.

**Ground No. 17** is consequential in nature.

4.1. We are therefore left with adjudicating **Ground No. 7-11** and **Ground No. 14-15**.

**Ground No. 7-11** deals with the inclusion/exclusion of certain comparables in the final list by Ld.TPO.

We have heard the rival contentions of both the sides, perused the orders passed by the authorities below, the paper books filed by the assessee and the case laws relied upon by both the sides. The dispute that arises is with respect to selection of comparables. To be precise, the controversy rotates around exclusion of following comparable in the list of comparables in respect of:-

1. Eclerx Services Ltd
2. Infosys BPO Ltd

3. TCS E-Serve Ltd
4. Excel Infoways Ltd.
5. BNR Udyog Ltd

Apart from that, the assessee is insisting on inclusion of the following comparables which were not included by the DRP as well as the TPO in their list of comparables:-

1. R Systems International Ltd.,
2. Caliber Point Business Solutions Ltd.,
3. Datamatics Financial Services Ltd.,
4. MPS Ltd.,
5. CG-VAK Software & Exports Ltd.

4.2 We shall take up these companies one by one to ascertain their compatibility or otherwise, with the assessee. Before embarking upon this exercise it is *sine qua non* to consider the functional profile of the assessee.

**Functional analysis of Assessee from TP study:**

5. Assessee is a wholly owned subsidiary of Exevo US and has been incorporated on 22/03/2002. The assessee is engaged in rendering the following services to its associated enterprises, vide an agreement dated 01/01/09:

1. Data collection service for primary research; using
  - a) telephonic interviews (CATI);
  - b) Web interviews (CAWI);
  - c) print or physical interviews;
  - d) combination of these
2. The survey programming

3. Data processing and data analysis services;
4. Coding services;
5. Business research services;
6. Voice quality audits; and
7. Data quality services.

5.1 Assessee is thus engaged in provision of information technology (IT) enabled services in the nature of survey programming, data collection, data analysis and business research. On perusal of the transfer pricing study report placed at page 65-145 in paper book volume 1, it is observed that assessee is a captive contract service provider rendering IT enabled services to its associated enterprise.

5.2 During the financial year 2012-13, assessee has rendered IT enabled services to Copal Market Research Ltd. Mauritius. Assessee is reimbursed on all its costs incurred along with a markup of 18% as per the agreement between assessee and the AE. Costs for the year under consideration refers to all the operating direct and indirect expenses incurred by assessee in rendering the specified IT enabled service to AE, as per the agreement entered into between them.

5.3 Assessee is not exposed to market risk as it renders IT enabled services to its AE and is assured of a specified return on its cost. It does not bear any credit and collection risk. As, assessee receives its remuneration in foreign currency and any foreign exchange fluctuation loss

is recovered along with the markup. Thus the assessee does not impair even the foreign exchange risk. Assessee does not employ any intangible assets with reference to the services rendered to the associated enterprise. Thus on the basis of the above functional analysis the assessee can be characterised as a routine service provider operating in a low risk or almost risk mitigated environment.

5.4 With the above understanding of the nature of services provided by assessee to its AE's, we will now proceed to examine the compatibility or otherwise of the companies disputed by assessee to the extent.

6. We shall first take up comparables where the assessee contends for exclusion.

**Eclerx services Ltd.**

6.1. Ld.TPO considered this as a comparable. Assessee objects to the compatibility of this company due to functional incompatibility. Ld.AR submitted that this company is engaged in providing KPO services which is distinct from the nature of services provided by the assessee. It has been submitted by Ld. Counsel that there is no segmental information available in the financials for the year under consideration of this company. The financial statement of this company is placed at page 58-59 of the paper book volume 2. It has further been submitted by Ld. Counsel that the DRP for assessment

year 2011-12 has accepted the claim of assessee and has deleted this company from the list of comparables.

6.2. Ld.DR, referred to the profile of assessee wherein it is also rendering services of coding which according to him cannot be considered to be an activity that could be carried out by a low end BPO. He submitted that assessee is definitely carrying out services, which falls into the category of an high end BPO and therefore this comparable is performing similar functions as that of assessee. In the rejoinder Ld. Counsel submitted that the coding services does not include any software coding which requires skilled manpower. He submitted that assessee is merely analysing the data provided by its AE and allocating certain codes in order to quickly access the data by its customers.

6.3. After considering the rival submissions and pursuing the financial statements placed in the paper book, we find that this company generates revenue from data analytics services and process solution comprising of both times/unit price and fixed fee-based service contracts. Further it has been observed that the revenue from time/unit price-based contracts is recognised on completion of the related services and is billed in accordance with the contractual terms specified in the respective customer contracts. It is observed that this company enables supports to critical processes for more than 50 clients and include global leaders and financial

services, manufacturing, retail, media, travel and hospitality. It is also observed that it powers operations of the sales and marketing divisions of some of the largest Fortune/financial Times/Internet retailer 500 scale companies globally augmenting brand with to drive greater quality and control to their digital operations, data management and analytics needs.

6.4. On going through the functions performed and the services rendered by this company, it can be easily categorised as high-end KPO. We find that Ld.TPO had adopted this company as a comparable as he was of the view that services rendered by this comparable are in the nature of BPO or back office services and that nothing he is earned from sale of products.

6.5. We have perused the annual reports of this company and have observed that this company is providing services in variety of fields for which highly skilled personnel was are required and segmental information are not available in respect of each category of services rendered. It is also observed that during the year the company has acquired Agilyst Inc., a US company providing operations and a tantalizing support to some of the largest cable and telecommunications companies in the world. Whereas assessee is only providing services to its associated enterprises on a fixed cost base. In our considered opinion this company is functionally dissimilar to that of the

assessee. Accordingly we direct the Ld. TPO to exclude this company from the list of comparables.

**Infosys BPO Ltd**

6.6. The TPO included this company despite assessee's objections. Assessee had objected for inclusion of this company as it provides high-end integrated services in the nature of business platforms, customer service outsourcing, finance and accounting etc. it has been submitted by Ld. Counsel that this company has been excluded by this Tribunal in ITA No. 907/del/2016 vide order dated 25/07/16 in assessee's own case, for assessment year 2011-12. It has been submitted by Ld. Counsel that there has been no change in the functions of this company as well as that of assessee vis-a-vis assessment year 2011-12.

6.7. Ld.DR, however, referred to the extracts made by the ld.TPO in the order to submit that Infosys BPO Ltd. is a comparable company with that of assessee. He placed reliance upon the manner in which this company derives its revenue which has been detailed at page 494 of the financial statement placed in the paper book volume 2. Ld. DR placed reliance on the observations recorded by the DRP and TPO.

6.8. After considering the rival submissions and pursuing the relevant material on record, we find that for the year under consideration, this company is primarily into

providing business process management services to organisations that outsource their business processes. It is further observed that this company has acquired hundred percent voting interest in Portland group Pty., on 04/01/12 which is a strategic sourcing and category management service provider based in Sydney, Australia. We have also perused the decision of this Tribunal in assessee's own case for previous assessment year wherein this comparable has been excluded from the list. This Tribunal has dealt with it as under:

*“6.6. After considering the rival submissions and perused in the relevant material on record, we find that for the year under consideration this company has had extraordinary financial events. It is noted that the company is providing high end integrated service by assisting its clients in improving their competitive positioning by managing their business process in addition to providing increased value. On the other hand, assessee is engaged in providing routine support services in the nature of data collection and analysis which is low end in nature bearing minimal risks.*

*6.6. Ld. A.R. has rightly placed his reliance upon the decision of Agnity India Technologies Pvt. Ltd. passed by Hon'ble Delhi High Court in I.T.A.No. 3856/2010 wherein, it has been held that this comparable must be rejected on account of difference in risk levels assumed, huge revenues derived and the fact that they are market leaders. Hon'ble court held as under:*

*“it is argued that the case of assessee is not comparable with Infosys Technologies Ltd., the reason being that the latter is giants in the area of development of software and it assumes all risks, leading to higher profit. On the other hand, the assessee is a captive unit of its parent company in the USA and it assumes only limited currency risk. Having considered these points, we are of the view that the case of aforesaid Infosys and the assessee are not comparable at all as seen from the financial data etc. of the two companies mentioned earlier in this order. Therefore, we are of the view that this case is required to be excluded.”*

*6.7. Since there is no similarity in the functional profile of this company and assessee respectfully following the ratio laid down in Agnity India Technologies (supra), we direct the Ld.TPO/AO to remove this company from the list of comparables.”*

6.9. Ld. DR has not been able to bring out any distinguishing feature in the functions of this company vis-a-vis previous year. Respectfully following the same we do not find any reason to differ from the above. Accordingly we direct Ld. TPO to exclude this company from the list of comparables.

### **TCS E-Serve Ltd**

6.10. The ld.TPO had included this company as a comparable, despite objections by the assessee. The assessee objected the inclusion of this company, as it provided financial information processing and customer contact services with high-level of foreign expenditure and

abnormal profits. Further Ld. Counsel submitted that this company has been excluded by this Tribunal in ITA No. 907/del/2016 vide order dated 25/07/16 in assessee's own case for assessment year 2011-12.

6.11. Ld.DR, referred to observations by the ld.TPO in the order to submit that TCS E Serve Ltd., is a comparable company with that of assessee. He submitted that the functions of this company has changed which is evident from page 177 of the paper book volume wherein the principal activity of this company has been characterised as under:

*“TCS E-serve Ltd (the company) along with its subsidiary TCS E serve international Ltd (TEIL) and TCS e-Serve America Inc., (TEAI) is primarily engaged in the business of providing business process service (BPO) its customers in banking, financial services and insurance domain.”*

6.12. After considering the rival submissions and perusing the relevant material on record, we find that the financial results of this company shows that this company is into financial services to help its customers achieve their business objectives by providing innovative best in class services. The Ld. AR submitted that the DRP had excluded this company in the immediately preceding previous year. It is observed at page 159 of paper book volume 2 that this company's operations include delivering core business processing services, analytics and insights (KPO)

and support services for both data and voice process. It has also been categorised as an integral part of the Tata Consultancy Services (TCS) strategy to build on its full-service offerings that offer global customers and integrated portfolio of services ranging from IT services to BPO services. It provides its services from various processing facilities, backed by a robust and scalable infrastructure network tailored to meet clients' needs.

6.13. The above function performed by this company differentiates it with the functions performed by assessee before us for the year under consideration. Hence following the rule of consistency, we are of the opinion that this company cannot be considered as comparable for the year under consideration. We therefore direct to exclude this comparable.

**6.14. Excel Infoways Ltd.**

Ld.TPO included this company as a comparable in spite of objections raised by assessee. Ld. Counsel has objected to the inclusion as it is functionally dissimilar with that of the assessee. Ld. Counsel submitted that there is no separate segmental information available in respect of revenue generation as this company is categorised to be involved in information technology/BPO related services. It has been submitted by Ld.Counsel that this company does not fulfill the requirement of employee cost filter as

applied by TPO in the case of comparables selected by assessee.

6.15. On the contrary Ld. DR submits that the TPO had called for the relevant details from this company by issuing notice under section 133 (6) wherein the company in reply to the notice has informed Ld. AO regarding employee cost of Rs. 2.02 crores and turnover pertaining to ITES/BPO segment. The relevant information sought from this company has been reproduced at page 24-25 of the order passed by Ld.TPO. Ld.AR submitted that on the basis of the information received from this company it has to be considered to be a fit comparable, however he submitted that these details have not been analysed by TPO vis-a-vis the financial report that is available in the paper book volume 2 at page 234-295.

6.16. We have considered the rival submissions and perused the relevant material on record.

It is observed that assessee had objected inclusion of this company on the basis of low turnover. Ld.TPO for the purposes of comparison had selected ITES segment only

it is further observed that the Ld. counsel had not disputed any functional dissimilarity of this comparable with that of assessee. We are therefore inclined to set aside this comparable to Ld.TPO for verifying the details provided by this comparable under section 133 (6) viz-a-viz the financial details provided by assessee in the paper

book. While doing this exercise ld.TPO may keep in mind that assessee is a zero risk company, such rendering services to its AE only on a fixed cost base. With this background turnover filter may be applied for the purposes of establishing the compatibility under ITes segment of this company's.

7. We set aside this comparable for proper verification with the above directions.

**BNR Udyog Ltd.**

8. Ld. TPO has included this company as a comparable despite there is objections raised by assessee. Ld. Counsel submitted that this company has RPT/net sales of 48.82% and has exorbitant growth in its revenue.

Ld. CIT DR submitted that the related parties to whom this company has entered into transaction are key management personal and enterprise is having common key management personal or their relatives. He further brought our notice to the observations made by DRP at page 56 of the order passed by DRP that assessee itself has chosen companies in medical transcription as valid comparable. He thus suggested that this company may be retained in the list of comparables.

We have perused the submissions advanced by both the sides and records placed before us. It has been observed that assessee has also disclosed related party transaction

during the year with its fellow subsidiary as well as key management personnel. In the case of the comparable company on the related party transaction is related only with key management personal and enterprise is having common key management personal or their relatives. The details have been listed at 555-556 of paper book (being internal page 42-43 of the audit report).

In our considered opinion we do not find any reason to remove this company from the list of comparables as there is no functional dissimilarity which has been disputed by assessee. Accordingly Ld. TPO is directed to retrain this company in the list of comparables.

We shall now take up the comparables where assessee contends for inclusion.

**CG-VAK software and exports Ltd**

8.1. It has been submitted by Ld. Counsel that ld.TPO excluded this company from the list of comparables without giving any reasons.

**Datamatics Financial Services Ltd., Calibre Point Business Solutions Ltd.,** are concerned ld.TPO rejected these companies due to different financial year ending in the data submitted.

8.2. Ld. Counsel submitted that assessee has now obtained the data as required by ld.TPO in respect of these companies, and therefore may be set aside for reconsideration by Ld. TPO on the basis of the same.

8.3. The Ld. D.R. placed his reliance on the findings of the authorities below.

8.4. We have perused the submissions advanced by both the sides in the light of the records placed before us. On perusal of the order passed by Ld. TPO it is observed that there has been no cogent reason assigned by ld.TPO for rejecting these comparables. DRP in its order at page 68 to 69 has simply highlighted in a tabular form upholding the rejection of these comparables. It is observed that there has been no application of mind by ld.TPO vis-a-vis financials produced. In case of CG VK Software and Datamatics, ld.TPO rejected without assigning any reasons. In case of Calibre Point Business Solutions, ld.TPO rejected, due to difference in the financial year ending. Ld. Counsel has submitted the data are now available for the year under consideration, in respect of these comparables, and therefore requested for setting aside to Ld. TPO for verification of the same.

In the interest of natural Justice, we find it fit and proper to set aside these comparables to ld.TPO for due verification of its compatibility with assessee on the basis of data submitted before him.

#### **8.5. R Systems International Ltd**

This company was rejected by Ld. TPO, as it had a different financial year ending. Ld. Counsel submitted that in the preceding assessment year ld.TPO had rejected this comparable. However this Tribunal vide order dated

25/07/16 in ITA No.907/del/2016 for assessment year 2011-12 considered this comparable as under:

*“ 7.6. After considering the rival submissions and pursuing the relevant material on record we find that the ld. TPO has not pointed out exact difference, the change of accounting year has made to the financial results of the comparable. The ld.TPO has further not pointed out whether it would not be possible to restate those financial results for a different accounting period without significant change in net profit margins or any other parameters considered relevant. Multinational companies generally operate in different geographical regions and different countries follow different accounting or financial years, functionally similar or even identical companies, cannot be held to be incomparable, only owing to differences in the date of ending of the financial year. As most of the business enterprises operate on the going concern concept, which is so fundamental to present the accounts. The concept used in accounting is just an artificial means to reckon the operating results of business operation at a given point in time and nothing would turn up on changing the end of accounting period from 31<sup>st</sup> March to any other date within a short span of time. Assuming a situation where the tested party is following a different financial year ending (say 01/01/2010 to 31/12/2010), following the filter adopted by the ld.TPO, one would reject all the company with the financial year ending 31<sup>st</sup> of March 2010 and only consider*

*companies with financial year ending 31/12/2010. The number of comparable companies available after using such a filter would be very limited and therefore, in such a case the net margin earned by the comparable companies would be different from the one that would be computed without using this filter. This view is supported by the coordinate bench of this Tribunal in the case of DCIT vs. McKinsey knowledge Centre India private limited in ITA No. 2195/del/2011 wherein it has been held that if a company is functionally comparable, it cannot be rejected merely on the ground that data for the entire financial year was unavailable, if the data can be reasonably extrapolated. Hon'ble Tribunal further observed that rule 10 B (4) cannot be interpreted in such a rigid manner so as to defeat the basic objective of the rule. The relevant extract of the ruling are reproduced below:*

*“ 23. .... However, in our considered opinion, if a comparable is functionally same as that of the tested party then the same cannot be rejected merely on the ground that data for entire financial year is not available. If from the available data on record the results were financial year can be reasonably extrapolated, then the comparable cannot be excluded solely on this ground. The learn ADR as referred to rule 10 B (4) which only mandates that the data which is to be utilised for analysing the comparability of uncontrolled transactions with an international transaction, has to be financial year only in which the international transaction has been entered into. This rule is based on matching principle but this rule cannot be interpreted in such a rigid manner so as to defeat the basic object of rule viz., selection of the*

*comparable for determination of arms length price of an international transaction”*

*(emphasis supplied)*

7.7. *In any case the ld.TPO has not cited any instances of functional dissimilarity of this comparable company with that of assessee. We therefore direct the ld. AO/TPO to consider this company in the final list of comparable.”*

8.6. On the other hand Ld.Counsel placed reliance upon the orders of authorities below.

8.7. We have perused the submissions advanced in the light of the records placed before us.

8.8. Ld.Counsel submitted that there is no change in the functions of assessee as well as this comparable for the year under consideration. Also that Ld. DR has brought no distinguishing feature either in the facts/profile of the assessee or in the case of this comparable company for the year under consideration vis-a-vis assessment year 2011-12. Under such circumstances, we do not find any reason to differ with the view taken by this Tribunal in respect of this comparable, on identical facts for preceding assessment year in assessee’s own case.

Respectfully following the decision of this Tribunal in assessee’s own case for assessment year 2011-12, we direct ld.TPO to consider this company as a comparable in final list.

Accordingly **Ground number 7-11** stands disposed off.

**Ground No. 14**

9. The ld. Counsel submitted that Ld.AO has not granted working capital adjustment. It is submitted by Ld. Counsel that assessee before us is not subjected to much risk and allowability of working capital adjustment has to be made in the case of the comparables, which has been upheld in various judicial rulings by coordinate benches of this Tribunal, which are as under:

- Mentor Graphics Noida Pvt. Ltd., reported in 109 ITD 101,
- Sony India reported in 288 ITR 52,
- Philips software reported in 25 SOT 226 and
- Mercer Consulting India Pvt. Ltd. reported in 150 ITD 1.

9.1. On the contrary Ld.CIT DR placed reliance upon the orders of authorities below

9.2. We have perused the submissions advanced by both the sides and the light of the records placed before us and the decisions relied upon by Ld. counsel.

9.3. Respectfully following the ratios laid down in the above judgments we are in agreement with the Ld. Counsel, that while comparing the margins earned by the comparable companies there is always the assessee, the difference on account of working capital employed should also be factored into. In order to improve the reliability of results, the financial data of comparable companies are required to be adjusted. The above stated decisions of

this Tribunal has held that in practice such adjustments usually include adjustments for accounts payable, accounts receivable and inventory.

9.2. We accordingly allow this ground of appeal raised by the assessee.

10. **Ground No. 16** deals with the initiation of penalty proceedings under section 271(1)(c ) of the Act. As this is premature we are not inclined to answer this question.

11. **Ground No. 17** deals with charging of interest under section 234B of the Act. This ground raised by the assessee is consequential in nature and we are not inclined to answer this question.

12. In the result appeal filed by the assessee stands allowed as discussed above.

Order pronounced in the open court on 30.11.2017.

Sd/-  
(NK SAINI)  
ACCOUNTANT MEMBER  
Date: 30.11.2017

Sd/-  
(BEENA A. PILLAI)  
JUDICIAL MEMBER

Mv.

Copy forwarded to:-

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

True copy.

By Order

(ITAT, New Delhi)

S.No.	Details	Date	Initials	Designation
1	Draft dictated on Dragon	29/11/17		Sr. PS/PS
2	Draft placed before author	30/11/17		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement			Sr. PS/PS
7	File sent to Bench Clerk			Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			