

**आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में  
IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "A", PUNE**

**सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष  
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM**

**आयकर अपील सं. / ITA No.246/PUN/2013**

**निर्धारण वर्ष / Assessment Year : 2008-09**

KPIT Cummins Global Business Solutions Ltd.  
(Now merged with KPIT Cummins Infosystems Ltd.)  
Plot No.35/36, Rajiv Gandhi Infotech Park,  
Phase 1, MIDC, Hinjewadi, Phase 1 Road,  
Pune – 411057

.... अपीलार्थी/Appellant

PAN: AACCK6967F

Vs.

The Asst. Commissioner of Income Tax,  
Circle 11(1), Pune

.... प्रत्यर्थी / Respondent

**आयकर अपील सं. / ITA No.459/PUN/2014**

**निर्धारण वर्ष / Assessment Year : 2009-10**

The Asst. Commissioner of Income Tax,  
Circle 11(1), Pune

.... अपीलार्थी/Appellant

Vs.

M/s. KPIT Technologies Ltd.  
(Erstwhile M/s.KPIT Cummins Global  
Business Solutions Ltd.)  
Plot No.35/36, Rajiv Gandhi Infotech Park,  
Phase 1, MIDC, Hinjewadi, Phase 1 Road,  
Pune – 411057

.... प्रत्यर्थी / Respondent

PAN: AACCK6967F

**आयकर अपील सं. / ITA No.525/PUN/2014**  
**निर्धारण वर्ष / Assessment Year : 2009-10**

KPIT Cummins Global Business Solutions Ltd.  
 (Now merged with KPIT Technologies Ltd.)  
 Plot No.35/36, Rajiv Gandhi Infotech Park,  
 Phase 1, MIDC, Hinjewadi, Phase 1 Road,  
 Pune – 411057

.... अपीलार्थी/Appellant

PAN: AACCK6967F

Vs.

The Dy. Commissioner of Income Tax,  
 Circle 11(1), Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Kishore Phadke  
 Revenue by : Shri Rajeev Kumar, CIT

सुनवाई की तारीख / Date of Hearing : 10.01.2018	घोषणा की तारीख / Date of Pronouncement: 09.04.2018
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**आदेश / ORDER**

**PER SUSHMA CHOWLA, JM:**

Out of this bunch of three appeals, appeal filed by the assessee is against order of ACIT, Circle 11(1), Pune, dated 22.11.2012 relating to assessment year 2008-09 passed under section 143(3) r.w.s. 144C of Income Tax Act 1961 (in short the 'Act') and the cross appeals filed by the Revenue and assessee are against order of DCIT, Circle 11(1), Pune, dated 09.01.2014 relating to assessment year 2009-10 passed under section 143(3) r.w.s. 144C(13) of the Act.

2. The appeal filed by the assessee relating to assessment year 2008-09 and cross appeals filed by the Revenue and assessee relating to assessment

year 2009-10 were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. First, we shall take up the appeal relating to assessment year 2008-09.

The assessee has raised the following grounds of appeal:-

*All the grounds of appeals are independent and without prejudice to each other*

1. *The learned AO and DRP erred in law and on facts in disallowing depreciation of Rs.2,26,62,278/-; on the payment made for acquiring "Right to Render BPO Services" to Cummins Inc., USA though considered as a depreciable asset by the appellant.*
2. *The learned AO and DRP erred in law and on facts in holding that the Right to Render BPO Services" is not an asset which diminishes in value over a period of time.*
3. *The learned AO and DRP erred in law and on facts in not allowing entire payment of Rs 20,18,75,000 (5 Million USD) for acquisition of Right to Render BPO Services" as deductible expenditure u/s 37(1).*
4. *The learned AO, TPO and DRP erred in law and on facts in determining, u/s 92CA, the Arm's Length Price (ALP) of international transaction of Software Services by the appellant to its Associated Enterprise, at Rs.36,60,61,947 instead of Rs.30,37,24,020; thereby making an addition of Rs.6,23,37,926. The learned AO, TPO and DRP ought to have appreciated that such high pitched addition is totally illogical considering the fact that the AE company has only retained Rs.2.74 Crores from the end customers invoicing.*
5. *The learned AO, TPO & DRP erred in law and on facts in determining u/s 92CA, the Arm's Length Price (ALP) of international transaction of software services by adopting a mark-up of 31.93% over costs instead of the appellant's earned mark up of 9.46% on cost.*
6. *The learned AO erred in law and on facts in not granting appropriate working capital adjustment to the appellant.*
7. *The AO, TPO & DRP erred in law and on facts in not granting benefit of proviso to section 92C(2) of the ITA, 1961 though specifically requested during the course of hearing.*
8. *The appellant craves leaves to add, modify, alter, amend, or withdraw all or any of the Ground of appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.*

4. Further, the assessee has also raised an additional ground of appeal

which reads as under:-

9. *Without prejudice to the other ground of appeals, the lower authorities ought to have granted deduction u/s 10A of the ITA, 1961; on the increased total income due to disallowance of depreciation on intangible asset amounting to Rs.2,26,62,278/-.*

5. Briefly, in the facts of the case, the assessee had furnished the return of income declaring total income (loss) of ₹ 2,35,92,780/-. The assessee company was engaged in the business of providing Information Technology Enabled Services (ITES) to its associated enterprises. The assessee also provided technology based support services like Helpdesk, network operations centre, security operations centre, etc. The assessee was STPI unit and was registered with Software Technology Parks of India. During the year under consideration, the assessee had claimed deduction under section 10A of the Act. The assessee had also claimed depreciation on intangible assets i.e. Right to Render Business process outsourcing service. The opening WDV of intangible assets was ₹ 20,67,31,603/- and the assessee had claimed depreciation of ₹ 2,29,70,178/-. The closing WDV of said asset was ₹ 18,37,61,425/-. The assessee explained that it had entered into a tripartite agreement with Cummins Inc and KPIT Cummins Infosystems Ltd. for obtaining Right to Render Business process outsourcing services to Cummins group entities globally. This agreement was effective from 11.04.2007 and was for a period of 60 months. As per terms of agreement, the assessee company made payment of USD 5,00,000 i.e. ₹ 2067.32 lakhs on 27.09.2007 as consideration to secure the Right to Render such business process outsourcing services. As per the assessee, the payment met the recognition criteria of intangible assets under AS-26 of ICAI and hence, during the year the addition to the intangible assets of ₹ 2067.32 lakhs was made. The payment was amortized over the remaining period of agreement i.e. over a period of 54 months and therefore, the charge to the Profit and Loss Account during the instant assessment year was ₹ 229.71 lakhs. The Assessing Officer asked the assessee to prove how the said expenditure was intangible asset and how it attracted section 32(1)(ii) of the Act as it was neither know-how, patent, copyright, trademark, license, franchise nor any other business or

commercial right or similar nature. In reply, the assessee claimed that it was in accordance with Accounting Standard 26 issued by the Institute of Chartered Accountants of India and being intangible asset, was entitled to depreciation @ 25%. The assessee referred to different terms of agreement in order to explain the exact nature of transaction and also to establish its claim that the expenditure was incurred wholly and exclusively for the purpose of business. The relevant submissions of assessee in this regard are reproduced at pages 4 to 6 of the assessment order. The assessee also explained that the business was generated under the agreement for financial year 2008-09 and also in succeeding years. The Assessing Officer first deliberated upon the concept of depreciation vide para 3.5 at page 10 of the draft assessment order and referred to AS-6 of ICAI. He then referred to the definition of intangible assets under section 32(1)(ii) of the Act and observed that the claim of assessee that the assessee was eligible for claiming depreciation on the face of it was erroneous. The Assessing Officer was of the view that *by no stretch of imagination can it be conceived that the asset named as right to render BPO services by the assessee diminishes in its value due to wear and tear because of its use and efflux of time. At best this asset could be called as goodwill, which has been acquired by the assessee from its Cummins through the said agreement.* In view of the same, the Assessing Officer held the asset not to be eligible to claim depreciation and the same was withdrawn. The Assessing Officer thereafter, vide para 3.10 had analyzed the Accounting Standard 26 of ICAI and the claim of assessee that it was an intangible asset and held *There, the asset acquired by assessee by paying the consideration over and above the value of net assets can rightly be called as 'goodwill'.* The plea of assessee of garnering substantial business from Cummins group to gain a business foothold into the BPO segment of business was rejected by the Assessing Officer in the absence of assessee to establish

any relation between the payment made to Cummins and business generated from Cummins group companies. The Assessing Officer also noted that the learned Authorized Representative for the assessee had claimed in his statement that sum of ₹ 20,18,75,000/- was payment against intangible assets, which as per him, was false as it was not clear that from where the assessee had extracted the amount as the real amount was ₹ 229.71 lakhs. In view thereof, depreciation allowance of ₹ 2,26,62,278/- claimed by the assessee on intangible assets was disallowed and added back to the returned income.

6. The Dispute Resolution Panel (DRP) admitted that payment of sum against business rights was not disputed by the Assessing Officer. It was also not disputed that the said payment was for acquiring right to carry on business by the assessee since only after the said payment, the assessee was authorized to carry on BPO activity for Cummins and its associated entities. The DRP thus, held that payment was capital in nature as it was incurred before the said business activities commenced. The claim of depreciation under section 32(1)(ii) of the Act was thus, denied. The Assessing Officer thus, passed final assessment order and made an addition of ₹ 2,26,62,278/-.

7. The assessee by way of grounds of appeal No.1 and 2 has raised the issue of claim of depreciation on the aforesaid payment made for acquiring right to render BPO services to Cummins in USA. Vide ground of appeal No.3, the assessee has raised alternate plea that the entire payment of ₹ 20.18 crores for acquisition of right to render BPO services was deductible expenditure under section 37(1) of the Act.

8. The learned Authorized Representative for the assessee pointed out that the Assessing Officer had denied the claim as it does not fit into definition of intangible assets. However, the Assessing Officer further says that the payment made was similar to goodwill i.e. any other asset of similar nature. He further pointed out that when the Assessing Officer passed the order, the decision of Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (2012) 24 taxmann.com 222 (SC) was not available, hence the claim was not allowed in assessment year 2008-09. He further pointed out that in assessment year 2009-10 before the Assessing Officer, the assessee relied on the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra), but the Assessing Officer denied depreciation, against which the assessee is in appeal. However, in assessment year 2010-11, the DRP allowed the claim of assessee and the Revenue is not in appeal against the order of DRP. Reference was made to para 7.6 of the said order. Our attention was drawn to Master Service Agreement, which is placed at page 1 onwards of Paper Book-I. He further referred to the order of Assessing Officer with special reference to paras 3.8 and 3.9.1 at pages 12 and 13 of assessment order and pointed out that the Assessing Officer has categorically said that the payment at best was goodwill. He further stressed that the agreement with Cummins was only for a period of 60 months and it was not an agreement in perpetuity. Where the Assessing Officer clearly says that at best it was goodwill, since it does not fit into the family of intangible assets and the DRP says that in order to keep the issue alive, in para 6.3.2, he denied the claim of depreciation. He pointed out that the issue being settled by the Hon'ble Supreme Court (supra), hence the said claim of depreciation may be allowed to the assessee. He fairly pointed out that ground of appeal No.3 was on without prejudice basis to allow the entire claim of deduction under section 37(1) of the Act. The learned Authorized Representative for the assessee here also referred

to the additional ground of appeal raised and pointed out that in case depreciation is disallowed in the hands of assessee and there is increase in total income of assessee, then the assessee is entitled to claim the deduction under section 10A of the Act on higher income so assessed in the hands of assessee. In this regard, he placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Gem Plus Jewellery India Ltd. (2010) 194 TAXMAN 192 (Bom).

9. The learned Departmental Representative for the Revenue referring to the order of Assessing Officer pointed out that he denied depreciation on intangible assets as no classification was available. He referred to page 14 of Paper Book-II in para 1.5 and pointed out that there was no clarity of what was the nature of asset. He also referred to AS-26 of ICAI and pointed out that intangible assets should be identifiable.

10. In rejoinder, the learned Authorized Representative for the assessee pointed out that the assessee itself had classified it as intangible asset as under the said commercial rights, business was given to the assessee. He further placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Gem Plus Jewellery India Ltd. (supra) and Mumbai Bench of Tribunal in Skyline Caterers (P) Ltd. Vs. ITO (2008) 116 ITD 348 (Mum-Trib).

11. We have heard the rival contentions and perused the record. The first issue which is raised in the present appeal is against claim of depreciation on payment made for acquiring right to render BPO services to Cummins Inc, USA. The assessee during the year under consideration had entered into tripartite

Master Service Agreement between Cummins Inc & KPIT Cummins Infosystems Ltd. on one hand and the assessee on the other hand. Copy of said agreement is placed on record. The assessee entered into this agreement on 17.07.2007 and the term of said agreement was for a period of 60 months. Under the said agreement, Cummins Inc granted the assessee a right to render business process outsourcing services to Cummins group entities on global basis from its office in Pune, India. This was the purpose as per clause (1) of the said tripartite agreement. In lieu thereof i.e. for securing the right to render business process outsourcing services to Cummins group entities globally, the assessee agreed to pay Cummins USD 5,00,000 equivalent to ₹ 20.67 crores by 30.09.2007. We are concerned with Tranche A payment, which is as per clause 2(a). Hence, we are making reference to the same. There is another Tranche B payment, which is contingent upon agreement remaining in full force and effect throughout the period of 60 months. We are not concerned with the same, hence we are not referring to it.

12. The issue which arises in the present appeal is whether the payment so made by the assessee is in the category of intangible assets which is eligible for claim of depreciation under section 32(1)(ii) of the Act. The Assessing Officer had denied the said claim of assessee on the ground that the said payment did not fall in the category of know-how, patents, copyrights, trademark, license, franchise, etc. The Assessing Officer however, vide para 3.9.1 though admits that at best the payment could be called as goodwill, which had been acquired by the assessee from Cummins through the said agreement. The terms of agreement and what the assessee has acquired have been elaborately explained by the assessee before the Assessing Officer. It may be pointed out that at the

time when the Assessing Officer passed the order, goodwill was not considered as eligible for claim of depreciation under the term 'intangible asset'. The Assessing Officer denying the claim of depreciation observed that at best what was paid was goodwill. After passing of the order of Assessing Officer and DRP, the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (2012) 348 ITR 302 (SC) has held that goodwill was an intangible asset under section 32(1)(ii) of the Act covered with expression 'any other business or commercial rights of similar nature'. The Hon'ble Supreme Court also held the assessee entitled to claim the depreciation on such goodwill.

13. The learned Authorized Representative for the assessee has pointed out that in assessment year 2008-09, the decision of the Hon'ble Supreme Court was not available. However, the same was available in assessment year 2009-10 and it was relied upon by the assessee before the Assessing Officer and the DRP, but the plea of assessee was rejected. However, in assessment year 2010-11, similar plea was raised before the Assessing Officer and thereafter, before the DRP. Vide order dated 17.11.2014, the DRP held the assessee eligible to claim depreciation on the said consideration paid being intangible asset, covered by the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Smifs Securities Ltd. (supra). The relevant findings of DRP in paras 7.6 to 7.8 are clear from the copy of DRP order, placed on record by the assessee. Since the Assessing Officer in the year under consideration had also held the payment made by the assessee was at best being payment for goodwill and where similar claim has been allowed in the hands of assessee in assessment year 2010-11, we hold the assessee to be entitled to claim depreciation on the right to render BPO services being goodwill in the hands of assessee. Thus, we reverse the

order of Assessing Officer in disallowing depreciation of ₹ 2.26 crores. Accordingly, we direct the Assessing Officer to allow the said claim of assessee. The grounds of appeal No.1 and 2 raised by the assessee are allowed. However, the ground of appeal No.3 raised by the assessee on without prejudice basis in allowing the said expenditure as deductible under section 37(1) of the Act is rejected.

14. The additional ground of appeal raised by the assessee of granting deduction under section 10A of the Act on the increased income due to disallowance of depreciation on intangible assets amounting to ₹ 2.26 crores is though covered in favour of assessee by the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Gem Plus Jewellery India Ltd. (supra), however, since we have allowed the claim of assessee, the issue becomes academic in nature and the same is thus, dismissed.

15. Now, coming to the second issue raised vide grounds of appeal No.4 to 7 i.e. against transfer pricing adjustment made in the hands of assessee at ₹ 6,23,37,926/-.

16. The learned Authorized Representative for the assessee pointed out that it was the second year of operation but the first year of adjustment. He referred to the order of TPO in para 9 and pointed out that the assessee was making exports to associated enterprises and overheads in respect of exports were being looked after by associated enterprises. He gave an example that where 'A' was billing AE ₹ 100/-, then AE in case of offshore work was billing ₹ 106/- and in case of onshore work was billing ₹ 112/-. Referring to the order of TPO, it was

pointed out by the learned Authorized Representative for the assessee that he says that transactions with associated enterprises were in fact controlled. The learned Authorized Representative for the assessee pointed out that the total value of arm's length price should be determined at Nil since the assessee had charged maximum and if it charges more than that, then losses of associated enterprises would go up. In this regard, reliance was placed on the ratio laid down by the Delhi Bench of Tribunal in *Interra Infotech (India) (P.) Ltd. Vs. ITO (2016) 66 taxmann.com 3 (Delhi – Trib.)*. The connected issue which was raised was the selection of comparable. The learned Authorized Representative for the assessee in this regard pointed out that the assessee was aggrieved by selection of concerns Coral Hub Ltd. and Crossdomain Solutions Ltd., since they were not functionally comparable. In respect of Coral Hub Ltd., the learned Authorized Representative for the assessee pointed out that it was engaged in e-publishing, whereas the assessee was providing ITES support services to its associated enterprises. In this regard, he placed reliance on the ratio laid down by the Pune Bench of Tribunal in *BNY Mellon International Operations (India) (P.) Ltd. Vs. ACIT (2014) 52 taxmann.com 306 (Pune – Trib.)* and *Cummins Turbo Technologies Ltd. Vs. DCIT (IT) (2015) 53 taxmann.com 492 (Pune – Trib.)*. In respect of Crossdomain Solutions Ltd., the learned Authorized Representative for the assessee pointed out that the said concern was providing high end KPO services and was not comparable to the assessee. The learned Authorized Representative for the assessee in this regard placed reliance on the ratio laid down by the Pune Bench of Tribunal in *Cummins Turbo Technologies Ltd. Vs. DCIT (IT) (2016) 68 taxmann.com 273 (Pune – Trib.)* and the Hon'ble High Court of Delhi in *Rampgreen Solutions Pvt. Ltd. Vs. CIT (2015) 377 ITR 533 (Del)*.

17. Another concern which the assessee wants to be excluded is Genesys International Corporation Ltd., which was also high end KPO service provider. In this regard, he placed reliance on the decision of Pune Bench of Tribunal in Vistcon Engineering Center (India) (P.) Ltd. Vs. ACIT (2016) 70 taxmann.com 248 (Pune – Trib.).

18. The learned Authorized Representative for the assessee further pointed out that two other concerns the assessee wants to be excluded are Triton Corporation and Maple eSolutions Ltd. In this regard, he placed reliance on the ratio laid down by Pune Bench of Tribunal in Oceans Connect (I) (P.) Ltd. Vs. ACIT (2015) 57 taxmann.com 368 (Pune – Trib.) and the Delhi Bench of Tribunal in ACIT Vs. Tech Book Electronics Services (P.) Ltd. (2016) 67 taxmann.com 169 (Delhi – Trib.). In this regard, he pointed out that both the concerns Triton Corporation and Maple eSolutions Ltd. were found to be not comparable to a concern engaged in ITES services by the Tribunal in the above mentioned decisions.

19. Another issue raised by the assessee was against rejection of concerns by the TPO on the ground that they were loss making. In this regard, he stressed that where the concerns were not persistent loss making, then the same could not be excluded as held by the Hon'ble Bombay High Court. He concluded by saying that in case above concerns are excluded / included, then other issues raised on TP adjustment would become academic.

20. The learned Departmental Representative for the Revenue in reply, referred to the order of TPO in paras 8 and 9 and pointed out that the concern

Cosmic Global and Triton Corporation were picked up by the assessee in preceding year. He referred to para 13 of the order of TPO to point out that the TPO has extensively observed why the concerns picked up were comparable to the services provided by the assessee. Our attention was also drawn to the activities of assessee in para 3 of order of TPO and it was pointed out that they were mixed. In respect of Coral Hub Ltd., the learned Departmental Representative for the Revenue pointed out that it was engaged in e-publishing and was functionally comparable to the assessee. Similarly, Mapple eSolutions Ltd. was both in IT and ITES segment and was comparable to the assessee. In respect of Genesys International Corporation Ltd. and Crossdomain Solutions Ltd., the learned Departmental Representative for the Revenue pointed out that the activities were similar to the assessee. In respect of concern showing losses, the case of Revenue was that whether they are persistent loss making or not, was not verified by the TPO.

21. The learned Authorized Representative for the assessee in rejoinder pointed out that Triton Corporation was fraudulent company and the financials of said concern could not be picked up for comparison.

22. We have heard the rival contentions and perused the record. The assessee was offering skills and rule based services i.e. transaction processing, finance & accounting, HR processing, etc; technology based services e.g. Technical help desk solutions and knowledge based solutions such as Sarbanes Oxley solutions, data analytics, etc. The assessee was offering enterprise and extensive solutions in the core business area of knowledge based, skill based and technology based services. The TPO notes that the assessee was providing

transaction management & compliance services to global clients in the core domain verticals of manufacturing & diversified financial services. The assessee had undertaken international transactions with its associated enterprises of provision of outsourcing services totaling ₹ 31,03,86,216/-. The TPO noted from the TP study report that the assessee was engaged in ITES segment. The assessee had selected TNMM method as most appropriate method and in TNMM analysis, operating profits earned by comparables were compared on PBIT over operating revenue. The assessee had identified certain concerns as comparable. The operating margins of assessee was 8.65% on operating cost. However, during the course of TP proceedings, the assessee submitted the updated margins of comparables selected and the mean margins of comparables totaling 16 worked out to 4.2% as against revised margins of assessee at 9.48%. The assessee was show caused in respect of certain concerns as being not comparable on account of the fact that they were functionally different or they were loss making. In view thereof, the TPO proposed another set of comparables totaling 14 whose arithmetic mean margins worked out to 33.9% as against margins of assessee at 9.48%. The assessee was show caused in this regard. The assessee in reply objected to selection of certain concerns and gave reasoning in respect of each of the said concerns. The TPO dealt with the objections of assessee. The first observation of TPO was the loss shown by the assessee. The TPO was of the view that the said loss was since the assessee was not able to initiate good rates with the clients through its associated enterprises. Then, he dealt with issues raised by the assessee in selection and rejection of different concerns. Rejecting the same, the TPO drew up final set of comparables as under:-

Sr. No.	Company Name	TPO
1	Cosmic Global Limited	27.59
2	Informed Technology (I) Ltd.	8.39
3	Triton Corporation Ltd.	25.26
4	ICRA Online Ltd.	11.83
5	Aditya Birla Mimacs	2.2
6	Coral Hubs Ltd. (Earlier known as Vishal Information Technologies Ltd.)	51.79
7	Crossdomain Solutions Ltd.	27.59
8	e4e Healthcare Solutions Ltd. (Formerly known as Nittany Outsourcing Services Pvt. Ltd.)	19.38
9	Maple eSolutions Ltd.	20.67
10	Genesys International Corporation Ltd.	48.12
	<b>Total</b>	<b>242.82</b>
	<b>Arithmetic Mean</b>	<b>24.28</b>

23. The mean margin of said concerns worked out to 24.28% as compared to re-working of margins of assessee at 15.51% and worked out the adjustment of ₹ 4,11,11,716/-. The Assessing Officer in the draft assessment order proposed the said adjustment to the arm's length price of international transactions. The assessee filed objections to the DRP. The DRP directed that the action of TPO / Assessing Officer was appropriate except to consider segmental accounts of Maple eSolutions Ltd. and Triton Corporation Ltd. The TPO thus, modified the margins of Maple eSolutions Ltd. and Triton Corporation Ltd. after the directions of DRP and the TP adjustment was re-calculated at ₹ 6,23,37,926/- as against earlier adjustment of ₹ 4,11,11,716/-. An opportunity of hearing was granted to the assessee with regard to proposed enhancement in the TP adjustments. The assessee objected to the same on the ground that the DRP had not considered submissions of assessee that both the concerns Maple eSolutions Ltd. and Triton Corporation Ltd. were bad comparable. Rejecting the same, the Assessing Officer in the final assessment order made transfer pricing adjustment of ₹ 6,23,37,926/-, against which the assessee is in appeal.

24. The first issue which is raised is in respect of selection / rejection of comparables. First, we may take up comparables for which directions of DRP were given i.e. Triton Corporation Ltd. and Maple eSolutions Ltd. The assessee had claimed that both the concerns were fraudulent companies and though it had selected said concerns as comparable during last year but since the new financial details were available, the same were not to be applied. In this regard, the Assessing Officer had applied the margins of said concerns, whereas the DRP directed that only the margins of segmentals should be applied. The learned Authorized Representative for the assessee in this regard has pointed out that exclusion of Triton Corporation Ltd. and Maple eSolutions Ltd. has been decided by the Pune Bench of Tribunal in Oceans Connect (I) (P.) Ltd. Vs. ACIT (supra) vide its order dated 29.04.2015, where the assessment year involved was assessment year 2005-06. He further referred to the order of Delhi Bench of Tribunal in ACIT Vs. Tech Book Electronics Services (P.) Ltd. (supra), wherein vide order dated 15.02.2016 for assessment year 2008-09, the said concern was rejected being fraud company. Reliance was placed on various other decisions of different Tribunals wherein similarly it has been held that the said concern was fraud company and hence, the margins of said concern were not to be applied. The concern which was held to be fraud concern by series of decisions cannot be included in the final set of comparables. Accordingly, we hold that Triton Corporation is to be excluded. Similarly, Maple eSolutions Ltd. has been held to be a company under severe indictment. In view of low credibility of comparable company, the said concern is to be excluded from final set of comparables. In ACIT Vs. Tech Book Electronics Services (P.) Ltd. (supra), another issue which has been held against both the concerns is the non-availability of segmental details. However, we find that in the present appeal, the Assessing Officer / TPO have applied segmental data after the directions of DRP and hence, this point is

decided against the assessee. However, we direct the exclusion of Triton Corporation Ltd. and Maple eSolutions Ltd. on the ground that the said concerns are fraud companies / under indictment, as the case may be.

25. Next, we take up the plea of assessee in respect of Coral Hubs Ltd. The said concern has been held to be engaged in e-publishing business and hence functionally not comparable to a concern providing ITES services. The said ratio has been laid down by the Pune Bench of Tribunal in the case of Cummins Turbo Technologies Ltd. Vs. DCIT (IT) (supra) relating to assessment years 2007-08 and 2008-09 and also in BNY Mellon International Operations (India) (P.) Ltd. Vs. ACIT (supra) in assessment year 2008-09. Following the same parity of reasoning, we hold that the concern which is engaged in e-publishing is not comparable to the present assessee before us, which is engaged in providing ITES services to its associated enterprises. Hence, the same is to be excluded from final set of comparables.

26. The next concern which the assessee has claimed to be not comparable is Crossdomain Solutions Ltd., which as per the assessee is engaged in providing high end KPO services. The plea of learned Departmental Representative for the Revenue before us was that the assessee is also engaged in providing knowledge based services and hence, functionally comparable. We find that the issue of a concern providing ITES services being dissimilar to a concern providing KPO services is covered by the decision of Pune Bench of Tribunal in Maximize Learning Private Limited Vs. ACIT in ITA No.267/PN/2014, relating to assessment year 2009-10, order dated 29.04.2015, wherein it was held as under:-

“19. The last plea raised by the assessee was for exclusion of Crossdomain Solutions Ltd. from the list of comparables. The said comparable was part of the final list of comparables selected by the TPO for benchmarking the international transaction of the assessee in assessment year 2008-09. The said comparable was engaged in high end KPO services and hence were claimed to be not a comparable with the assessee which was a normal ITES provider. The Tribunal accepting the said plea of the assessee in assessment year 2008-09 held the said concern was to be excluded from the final list of comparables by observing as under :-

“25. The last plea of the assessee is to exclude from the list of comparables Crossdomain Solutions Ltd.. In this context, before the TPO assessee submitted that the said concern was not comparable with the assessee. It was pointed out that the said concern was engaged in the payroll activity apart from being engaged in KPO services. The assessee also referred to the website of the said concern to point out that the said concern was identified as a Knowledge Process Outsourcing services provider (KPO) and not a simple business process outsourcing services provider. Before the DRP, it was also contended that the said concern was engaged in high end KPO services which varies from a routine low end ITES provider in terms of skill set used and nature of services provided. It was also contended that the said concern has developed products for effectively servicing its customers and the same was entirely different than that of the assessee’s business of rendering routine IT enabled services. At the time of hearing before us, the Ld. Representative for the assessee has referred to the following Tabulation which brings out the difference between e-learning activities carried out by the assessee and the KPO activities carried out by the said concern :-

<b>E-learning</b>	<b>KPO</b>
The assessee provides low-end IT enabled services in the form of e-learning solutions.	KPO is a form of outsourcing, in which knowledge-related and information-related work is carried out by the service providers.
E-learning solutions services provided by the assessee are not very complex in nature and thus do not require highly skilled professionals to perform the functions.	Unlike the outsourcing of manufacturing or routine software services, this typically involves high-value work carried out by the highly skilled staff.
E-learning solution provides cannot earn high margins of profits since they primarily derive their revenue from performing functions that are not exclusively provided by them and have close substitutes in the market.	Most firms providing Knowledge processing possess exclusive information, knowledge and experience which cannot be found in most of their competitors. Thus, they tend to command higher margins of profits.
Low-end IT enabled service providers employ workers who have the basic knowledge and can be trained to perform the necessary functions.	KPO firms earn extraordinary profits due to the highly skilled resources they employ in the form of highly-qualified professionals.

26. On the other hand, the Ld. CIT-DR appearing for the Revenue contended that the TPO as well as the DRP have rejected the plea of the

assessee as the submissions were on a wrong footing. It was reiterated that the nature of services rendered by the said concern were falling in the category of IT enabled services which is also broadly the category of the services being rendered by the assessee. Therefore, the said concern was rightly included by the TPO in the list of comparables.

27. We have carefully considered the rival submissions. Ostensibly, the reason advanced by the TPO to reject the plea of the assessee are too general and are not justified. Even where two concerns may be undertaking activities which can be broadly categorized as ITES in common parlance but where an assessee is able to establish that intrinsically the activities are not comparable, such a concern would not be included for the purposes of comparability analysis. In the context of the present case, the plea of the assessee is that the business of M/s Crossdomain Solutions Ltd. ranged from high end KPO services, development of products and routine low and IT enabled services. For instant, the website extract and also the Annual report of the said concern shows that it was engaged in payroll outsourcing on a substantive scale. The Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) for the very assessment year found that there was no bifurcation available for various diversified activities being carried out by the said concern and therefore on an entity level the said concern could not be compared to a normal ITES provider. In our view, following the decision of the Bangalore Bench of the Tribunal in the case of Symphony Marketing Solutions India Pvt. Ltd. (supra) which was also followed by the Hyderabad Bench of the Tribunal in the case of Market Tools Research Pvt. Ltd. vs. ACIT (ITA No.1811/Hyd/2012 dated 24.10.2013, the aforesaid concern is liable to be excluded from the list of comparables.”

20. Further, the Tribunal in BNY Mellon International Operations (India) Private Limited vs. DCIT (supra), in assessment year 2009-10 had excluded the said concern as comparable by observing as under :-

“12. Another plea raised by the assessee is for exclusion of Crossdomain Solutions Ltd. from the final set of comparables. In this regard, assessee canvassed before the TPO that the said concern was functionally not comparable to the activity of IT enabled services being carried out by the assessee. It was pointed out by the assessee before the TPO that the said concern was involved in various activities which involved outsourcing, human resources, insurance, healthcare/accounting and consulting, business excellence, market research/analysis and IT services. It was pointed out that the above functions being performed by the said concern were not comparable to the activity of an IT enabled service provider undertaken by the assessee. It was also canvassed that there was no segmental profitability available from the Annual financial statement of the assessee and the said concern was not a comparable concern on the entity level. The TPO has rejected the plea of the assessee on similar grounds as taken by him for rejecting the assessee's plea for exclusion of Accentia Technologies Ltd..

13. Before us, the Ld. Representative has relied upon the decision of the Mumbai Bench of the Tribunal in the case of DCIT vs. M/s Willis Processing Services (India) Pvt. Ltd. vide ITA No.2152/Mum/2014 dated 10.10.2014 in order to justify the exclusion of Crossdomain Solutions Ltd..

14. We find that M/s Wills Processing Services (India) Pvt. Ltd. (supra) was a concern where the tested party was providing IT enabled services to its various group concerns and activities were quite similar to the activity of IT enabled services rendered by assessee to its affiliates. In this context, the concern, M/s Crossdomain Solutions Ltd. was found to be functionally not comparable by the DRP and such decision was affirmed by the Tribunal by making the following discussion :-

“3. M/s Crossdomain Solutions Ltd.

*This company has been rejected by the DRP on the ground that it is indulged in high skill IT services which are not comparable to the routine I.T. Enabled services. The Tribunal Hyderabad Bench in the case of M/s Market Tools Research Pvt. Ltd. in ITA No.1811/Hyd/2012 has held that this company is providing services which are in the nature of KPO. Further, the company is engaged in providing Niche services as well as developed its own brand 'Exdion' to target the insurance industry in US. The Tribunal followed the findings of the Bangalore Bench in the case of M/s Symphony Marketing Solutions India Pvt. Ltd. in ITA No.1316/Bang/2012 while rejecting the issue of this company in the final set of comparables. Respectfully following the findings of the co-ordinate bench, we uphold the directions of the DRP for the rejection of this company from the final list of comparable.”*

15. *Following the aforesaid precedent, which has been rendered in the context of the same assessment year, we uphold assessee's plea for exclusion of Crossdomain Solutions Ltd. from the final set of comparables. We hold so.”*

27. The said issue has also been decided in favour of assessee in series of decisions. Following the same parity of reasoning, we hold that Crossdomain Solutions Ltd. is to be excluded from final set of comparables.

28. The last concern which the assessee wants to be excluded is Genesys International Corporation Ltd. on the ground that it is engaged in high end KPO services. The said concern was engaged in providing geographical information services comprising Photogrammetry, Remote Sensing, Cartography, Data conversion and related computer based services. As noted by the Pune Bench of Tribunal in Vistcon Engineering Center (India) (P.) Ltd. Vs. ACIT (supra), since the concern is engaged in activities which are not functionally comparable to the assessee, the same cannot be included in the final set of comparables. We

direct the Assessing Officer / TPO to exclude Genesys International Corporation Ltd. from final set of comparables.

29. Now, coming to the next set of comparables which have been rejected by the TPO on the ground that they are loss making concerns. The plea of assessee before us is that since the said concerns were not persistent loss making, hence the same cannot be excluded.

30. The learned Departmental Representative for the Revenue in this regard pointed out that the said aspect i.e. whether the said concerns were persistent loss making or not, had not been verified by the TPO. In case the concerns were persistent loss making, then the same are to be excluded from final set of comparables. However, if the concerns are not persistent loss making and the losses have arisen during the year under consideration only, then the said concerns if functionally comparable, can be selected in final set of comparables. However, this needs verification at the end of TPO. Accordingly, we remit this issue back to the file of TPO for verification. The assessee shall furnish relevant data before the TPO / Assessing Officer, who shall decide the issue after providing reasonable opportunity of hearing to the assessee and in accordance with law. The TPO/Assessing Officer is thus, directed to re-compute the adjustment on account of arm's length price in this regard, if any.

31. The learned Authorized Representative for the assessee pointed out that in case these concerns are rejected, then other TP issues raised would become academic. Hence, we do not adjudicate the same.

32. Before parting, we may also refer to the observations of TPO that the transactions with associated enterprises were in fact controlled. The assessee on the other hand, claims that associated enterprises were incurring losses i.e. overheads were being looked after by them. Hence, the total value of arm's length price should be taken at Nil as the assessee had charged maximum possible. In case it charges more price from the associated enterprises, then loss of associated enterprises would go up. We are not adjudicating this issue, in view of the plea of assessee that in case the above mentioned concerns were excluded, then no further TP adjustment has to be made in the hands of assessee. Accordingly, we hold this aspect of the issue as academic and hence, do not adjudicate the same. The grounds of appeal raised by the assessee are thus, partly allowed.

33. Now, coming to the cross appeals filed by the assessee and Revenue in assessment year 2009-10. The assessee in ITA No.525/PUN/2014 has raised the following grounds of appeal:-

1. **Corporate Income Tax related issues**

1.1 *The learned AO and DRP erred in law and on facts in disallowing depreciation of Rs.4,52,22,538/-; on the payment made for acquiring "Right to Render BPO Services" to Cummins Inc., USA though considered as a depreciable asset by the appellant.*

1.2 *The learned AO and DRP erred in law and on facts in holding that the "Right to Render BPO Services" is not an asset which diminishes in value over a period of time.*

2. **Transfer Pricing related Issue**

2.1 *The learned AO / TPO/ DRP erred in law and on facts in determining the Arm's Length Price (ALP) of international transaction u/s 92CA of BPO Services by the appellant to its Associated Enterprise, at Rs.49,03,45,096 instead of Rs.45,77,02,481; thereby making an addition of Rs.3,26,42,615. The learned AO, TPO and DRP ought to have appreciated that such high pitched addition is totally illogical considering the fact that the AE company has only retained Rs.3.12 Crores from the end customers invoicing on gross basis.*

- 2.2 *The learned AO / TPO/ DRP erred in law and on facts in determining the Arm's Length Price (ALP) of international transaction u/s 92CA, of BPO services by adopting a mark-up of 23.45% over costs instead of the appellant's earned mark up of 16.16% on cost on entity level.*
- 2.3 *The learned AO / TPO/ DRP erred in law and on facts in determining the Arm's Length Price (ALP) of international transaction of BPO services by adopting a mark-up of 23.45% over costs at the entity level instead of international transactions with AEs which required to be benchmarked.*
- 2.4 *The learned AO / TPO / DRP erred in law and on facts in not granting appropriate working capital adjustment to the appellant.*
- 2.5 *The AO, TPO & DRP erred in law and on facts in not granting benefit of proviso to section 92C (2) of the ITA, 1961 though specifically requested during the course of hearing.*
3. *The learned AO erred in law and on facts in not granting credit for the full taxes paid by the Company including taxes deducted at source from the payments received by the Company from its customers.*

34. The Revenue in ITA No.459/PUN/2014, relating to assessment year 2009-10 has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing the Assessing Officer to exclude Crossdomain Solutions Pvt. Ltd. as comparable company based on the definition provided in Safe Harbor Rules not appreciating the fact that the Safe Harbor Rules have been introduced vide Notification No.S.O.2810(E) dated 18/9/2013 and could not be applied retrospectively.*
2. *On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing to exclude the above company as comparable even though no information was available in the annual report indicating it as KPO service provider.*
3. *On the facts and in the circumstances of the case, the Dispute Resolution Panel erred in directing the Assessing Officer to include Sparash BPO Ltd. as comparable company since it is into ITeS ignoring the fact that Sparsh BPO is 100% domestic service provider as held by Hon-ble ITAT Pune's decision in the case of Brinton Carpets in ITA No.1296/PN/10 for A.Y.2006-07.*

35. The first issue raised by the assessee is same i.e. depreciation on the amount paid to Cummins Inc for acquiring right to render BPO services. The issue stands covered by our decision in the paras hereinabove and we direct the Assessing Officer to allow the claim of assessee on the said payment made by the assessee.

36. The second issue which has been raised in the present appeal is against TP adjustment made in the hands of assessee amounting to ₹ 3,26,42,615/-. The learned Authorized Representative for the assessee pointed out that it was aggrieved by inclusion of two concerns i.e. Coral Hubs Ltd. and Crossdomain Solutions Ltd. In respect of Coral Hubs Ltd., it was pointed out that the said concern was engaged in e-publishing. Referring to the directions of DRP in para 2.2.4.5 at page 12 of the order, it was pointed out that the DRP had accepted Crossdomain Solutions Ltd. to be engaged in providing high end KPO services and had directed its exclusion but the said concern was retained by the TPO and hence, both the assessee and the Revenue are in appeal. The learned Authorized Representative for the assessee also pointed out that the Revenue is in appeal for exclusion of Crossdomain Solutions Ltd. and inclusion of Sparash BPO Ltd.

37. We have heard the rival contentions and perused the record. The issue arising in the present appeal is against transfer pricing adjustment made in the hands of assessee, wherein the TPO on analysis of functional comparability of various concerns had drawn up final set of comparables, which read as under:-

Sr. No.	Name of Comparable	OPTC
1	Aditya Birla Minacs Worldwide Ltd.	-2.75%
2	Informed Technologies India Ltd.	32.98%
3	Omega Healthcare Management Services Pvt. Ltd.	15.43%
4	Cosmic Global Ltd.	40.61%
5	ICRA Online Ltd.	16.92%
6	Coral Hubs Ltd.	34.06%
7	Crossdomain Solutions Ltd.	29.40%
8	e4e Healthcare Solutions Ltd.	39.45%
	Mean	25.76%

38. The assessee is aggrieved by inclusion of Coral Hubs Ltd. We have already decided the said concern to be not functionally comparable to the

assessee which is providing ITES services to its associated enterprises, whereas the said concern was engaged in e-publishing. Following the same parity of reasoning, we hold that Coral Hubs Ltd. is to be excluded from final set of comparables.

39. Now, coming to the next concern i.e. Crossdomain Solutions Ltd. The DRP had noted the said concern to be providing high end KPO services and had directed its exclusion; but the Assessing Officer in final assessment order has retained the said concern. However, the Assessing Officer has included the margins of said concern in the mean margins of comparables selected.

40. The Revenue is in appeal against the order of DRP in directing its exclusion. We have already decided this issue in the paras hereinabove while deciding the appeal for assessment year 2008-09 and had directed its exclusion. Accordingly, we uphold the order of DRP in this regard and dismiss the grounds of appeal No.1 and 2 raised by the Revenue.

41. The assessee is in appeal as the said concern was retained by the Assessing Officer in final assessment order. We find no merit in the order of Assessing Officer in this regard, especially after the directions of DRP in para 2.2.4.5 at page 12 of its order. Accordingly, we direct the Assessing Officer to exclude the said concern Crossdomain Solutions Ltd. from final set of comparables. Hence, the ground of appeal raised by the assessee in this regard is allowed. The learned Authorized Representative for the assessee only stressed about the non inclusion of comparables and not addressed any other ground of TP adjustment. Accordingly, we do not adjudicate the same.

42. Now, coming to the appeal of Revenue i.e. ground of appeal No.3. The TPO had not included Sparash BPO Ltd. in final set of comparables.

43. The case of assessee before the DRP was that the said concern was to be included in final set of comparables. The DRP vide its order in para 2.2.1.4 at page 6 had held the said concern to be engaged in ITES services and merely because it had small number of clients, same was not relevant filter to be applied for selection or rejection of the company. The DRP thus, directed to include the said concern in the list of comparables. The Assessing Officer in the final assessment order has included the margins of said concern.

44. The Revenue is in appeal against the directions of DRP in this regard.

45. While selecting a concern to be comparable, the first step is to be seen is whether it is functionally comparable and the next step is the turnover filter as applied in the TP study report by the TPO. Whether the concern had small number of clients or large number of clients was not relevant but we find that this aspect of said concern being functionally comparable and its turnover, has not addressed either by the TPO / DRP. Accordingly, we direct the Assessing Officer / TPO to verify the claim of assessee as to its functional comparability and whether the turnover of said concern falls within the turnover filter finally applied in the case of assessee and decide whether it is to be included in the final set of comparables. Accordingly, we hold so. The Assessing Officer is thus, directed to re-compute the mean margins of finally selected comparables and determine the adjustment, if any, on account of transfer pricing provisions in the hands of

assessee. The grounds of appeal raised by the Revenue are thus, partly allowed.

46. In the result, appeal of assessee relating to assessment year 2008-09 is partly allowed, appeal of assessee relating to assessment year 2009-10 and appeal of Revenue are partly allowed.

Order pronounced on this 9<sup>th</sup> day of April, 2018.

Sd/-  
**(ANIL CHATURVEDI)**  
 लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-  
**(SUSHMA CHOWLA)**  
 न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 9<sup>th</sup> April, 2018.

GCVSR

**आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :**

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary  
 आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune