

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

**BEFORE SHRI N.V VASUDEVAN, JUDICIAL MEMBER
AND
SHRI JASON P.BOAZ ACCOUNTANT MEMBER**

ITA Nos.273/Bang/2016
(Asst. Year – 2011-12)

The Dy. Commissioner of Income-tax,
Circle-2(1)(2), 2nd Floor, BMTC Depot
80 Feet Road, 6th Block, Koramangala,
Bengaluru-560095.

.... Appellant

Vs.

M/s EMC Software and Services (India) Pvt. Ltd.,
(earlier known as EMC Data Storage (India) Pvt.Ltd.
Prior to scheme of Amalgamation approved by the
Hon'ble High Court of Karnataka)
Bagmane Construction Pvt.Ltd., SEZ, Outer Ring Road,
K.R.Puram, Doddanekundi Village,Bengaluru-560 048.
PAN – AABCE09892.

..... Respondent

CO No.76/Bang/2016
(By assessee)

Appellant by : Shri C.H Sundar Rao, CIT
Respondent by : Smt.Tanmayee, Advocate

Date of Hearing : 17-04-2018
Date of Pronouncement : -04-2018

ORDER

PER SHRI N.V VASUDEVAN, JUDICIAL MEMBER :

This is an appeal by the assessee against the order dated 30/12/2015 of Dy. Commissioner of Income-tax, Circle-2(1)(2), Bangalore relating to assessment year 2011-12 in respect of an order passed by the DCIT, Circle 2(1)(1), Bangalore, u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (Act). The

Assessee has also filed a Cross Objection against the very same order. The Cross-Objection is partly supportive of the order of the DRP.

2. The Assessee is a wholly owned subsidiary of EMC Corporation, USA. The Assessee is engaged in the business of providing contract software development services(SWD Services) and Information Technology Enabled Services (ITES) and marketing support services to its Associated Enterprises (AE). In the appeal by the revenue and the C.O. by the Assessee the disputes relate to determination of Arm's Length Price (ALP) in respect of provision of SWD services and ITES to the AE.

3. **SOFTWARE DEVELOPMENT SERVICES SEGMENT:** Grounds No. 1 to 6 raised by the revenue relate to the addition made consequent to determination of Transfer Price by the Transfer Pricing Officer(TPO) in the SWD Services segment, which addition was deleted by the DRP in its directions on the adjustment to Arm's Length Price (ALP) suggested by the TPO. We have already seen that during the relevant previous year, one of the international transactions that took place between the Assessee and its AEs was the provision of software development services ("SWD services for short) to them at a price of Rs.223,06,23,932/-. Since the transaction of provision of Software service by the Assessee was an international transaction, income from such international transaction has to be determined having regard to Arm's Length Price (ALP) as laid down in the provisions of Sec.92 of the Act.

4. The TPO to whom the question of determination of ALP of the international transaction of providing software development services by the Assessee to its AE suggested an addition to the total income of the Assessee consequent to determination of Transfer Price of a sum of **Rs.20,32,27,064/-**.

5. The Assessee in support of its stand that the price paid to the AE for rendering software development services was at Arm's Length filed a Transfer Pricing Analysis containing the following details:

| | |
|--|--------------------|
| Operating Income | Rs.223,06,23,932/- |
| Operating Cost | Rs.197,04,10,457/- |
| Operating Profit (Op. Income – Op. Cost) | Rs. 26,02,13,475/- |
| Operating/Net mark-up (OP/TC) | 13.21% |

The Assessee as well as the TPO adopted Transaction Net Margin Method as the Most appropriate Method for determination of ALP and the Profit Level Indicator for comparison was Operating Profit to Total Cost (OP/TC)

6. The Assessee selected 16 companies as comparable companies and computed the arithmetic mean of the profit margins of those companies at 13% which was much lower than the profit margin of the Assessee which was 13.21%. The Assessee therefore claimed that the price received in the international transaction was higher than the arithmetic mean of profit margin of comparable companies and therefore the price received is at Arm's Length.

7. The TPO accepted only two of the 16 companies selected as comparable companies by the Assessee viz., Mintree Ltd. and Persistent Systems & Solutions Ltd. The TPO identified 11 other companies as comparable companies and arrived at a set of 13 comparable companies with that of the Assessee and arrived at arithmetic mean of the profit margin of those 13 companies at 24.82% before working capital adjustment and 23.52% after working capital adjustment. The following chart will show the list of 13 comparable companies ultimately chose by the TPO and the arithmetic mean of the profit margin of those companies.

| | Name of the Company | Mark-up on total Costs (WC-unadj) | Mark-up on Total Costs (WC-adj) |
|--|---------------------|-----------------------------------|---------------------------------|
|--|---------------------|-----------------------------------|---------------------------------|

| | | | (in %) |
|--|--|--------------|--------------|
| | Acropetal Technologies Ltd. (seg) | 31.98 | 28.33 |
| | E-Zest Solutions Ltd. | 21.03 | 18.74 |
| | E-Infochips Ltd. | 56.44 | 55.38 |
| | Evoke Technologies Pvt. Ltd. | 8.11 | 7.91 |
| | ICRA Techno Analytics Ltd. | | 22.54 |
| | Infosys Ltd. | 43.39 | 42.89 |
| | Larsen & Toubro Infotech Ltd. | 19.83 | 19.61 |
| | Mindtree Ltd.(seg) | 10.66 | 9.15 |
| | Persistent Systems & Solutions | 22.12 | 20.92 |
| | Persistent Systems Ltd. | 22.84 | 21.35 |
| | R.S.Software (India) Ltd. | 16.37 | 16.02 |
| | Sasken Communication Technologies Ltd. | 24.13 | 24.20 |
| | Tata Elxsi Ltd.(seg) | 20.91 | 18.71 |
| | AVERAGE MARK-UP | 24.82 | 23.52 |

8. The TPO thereafter computed the Arm's Length Price as follows:

| | |
|--|---------------------------|
| Arm's Length Mean Mark-up | 24.82% |
| Less: Working Capital Adjustment | 1.30%* |
| Adjusted mean an mark-up of the comparables | 23.52% |
| Operating Cost | Rs. 197,04,10,457/- |
| Arm's Length Price h Price – 123.19% of Operating Cost | Rs. 243,38,50,996/- |
| Price Received | Rs.223,06,23,932/- |
| Shortfall being adjustment u/s. 92CA | Rs.20,32,27,064 /- |

9. The Assessee objected to the manner of determination of ALP by the TPO before the DRP. Briefly, the directions issued by the DRP are as follows:

Functionality Filter:

The following companies were directed to be excluded by accepting the contentions of the Assessee:

- (i) Acropetal Technologies Ltd.
- (ii) E-Infochips Limited
- (iii) ICRA Techno Analytics Ltd.
- (iv) Infosys Ltd.
- (v) Tata Elxsi Ltd.

The DRP, however, rejected the contentions of the Assessee that Persistent Systems Ltd. and Sasken Communication Technologies Ltd. were not functionally comparable to it and consequently upheld their inclusion in the final list of comparables.

The DRP also *suo moto* directed the exclusion of L&T Infotech Ltd., R S Software (India) Ltd., Mindtree Ltd., and Evoke Technologies Pvt. Ltd.

Onsite Software Development activities:

In addition to the above, the DRP rejected the following companies selected by the TPO on the basis that they were predominantly engaged in onsite activities, although no onsite revenues filter had been applied by the TPO:

- (a) Acropetal Technologies Ltd. (rejected by DRP on other grounds also);
 - (b) L & T Infotech Ltd. (rejected by DRP *suo moto* on other grounds also);
 - (c) RS Software (India) Ltd. (rejected by DRP *suo moto* only on this ground);
- and
- (d) Mindtree Ltd. (rejected by DRP *suo moto* on other grounds also)

List of Comparables post the DRP's Directions:

On giving effect to the above directions issued by the DRP, the final list of comparables is as follows:

| Sl. No. | Name of the Company |
|---------|---------------------|
|---------|---------------------|

| | |
|----|--|
| 1. | e-Zest Solutions Limited |
| 2. | Persistent Systems & Solutions Ltd. |
| 3. | Persistent Systems Ltd. |
| 4. | Sasken Communication Technologies Ltd. |

| | |
|----|----------------------|
| 5. | L&T Infotech Limited |
|----|----------------------|

10. Pursuant to the directions of the DRP, as the arithmetical mean of the working capital adjusted margins of the above comparables was within the +/-5% range of the Assessee's NCP mark-up for provision of SWD services, the TP adjustment made towards the said international transaction came to be deleted in the final assessment order.

11. Aggrieved by the directions of the DRP which were incorporated by the AO in the final order of assessment, the Revenue has preferred appeal before the Tribunal. Briefly, the grounds in Revenue's appeal are as follows:

(i) That the DRP erred in directing the exclusion of RS Software (India). Ltd., Acropetal Technologies Ltd., despite the said companies satisfying the quantitative and qualitative filters applied by the TPO. **(Ground No.1 & 2)**

(ii) That the DRP erred in deleting E-infochips Ltd. on the ground that it fails the filter of service revenue income less than 75% of the sales. **(Ground No.4)**

12. The grounds in the cross-objections which are being pressed are as follows:

(i) That the TPO erred and the DRP further erred in including two companies, viz. Persistent Systems Ltd. and Sasken Communications Technologies Ltd., in the list of comparables although they fail the test of comparability. **(Ground No.1.6)**

(ii) That the DRP erred in *suo moto* rejecting RS Software Pvt. Ltd., Mintree Ltd., and Evoke Technologies Ltd., from the list of comparables (**Ground No.2**).

13. As far as Gr.No.2 is Revenue's appeal is concerned, the sum and substance of the ground of appeal is that the DRP ought not to have excluded 2 comparable companies from the list of final comparable companies chosen by the TPO for comparison of profit margin of the Assessee with comparable companies. The two companies that were excluded by the DRP which is in challenge by the Revenue before the Tribunal are (i) **Acropetal Technologies Ltd.**, and (ii) **RS Software (India) Ltd.**

14. **Acropetal Technologies Limited** - As far as exclusion of this company as a comparable company is concerned, it is seen from the Directions of the DRP that this company was excluded on the grounds that: (i) the segmental information containing the break-up of its export sales and employee costs, was not available and it was not possible to ascertain if it passed the export earnings and / or employee costs filters; and (ii) a substantial portion of its software development activities have been outsourced on sub-contract and it could, therefore, not be retained as a comparable. The DRP in directing exclusion of this company followed decision of Hyderabad Bench of ITAT in the case of *Capital IQ Information Systems (India) Pvt. Ltd.* (ITA No.1961/Hyd/2011). The DRP also observed that this company was predominantly doing on-site development of software and therefore cannot be compared with a company which develops software off-shore. One of the filters applied by the TPO was that companies where employee costs are less than 25% of turnover cannot be regarded as comparable. In the absence of segmental information, it was not possible to ascertain as to whether this company passes the test adopted by the TPO himself for comparison. The learned DR submitted that the required data can be culled out from the information available in the public domain or by resorting to a process of calling for information from this company u/s.133(6) of the Act. The learned counsel for the Assessee in this regard pointed out that the Hon'ble Delhi

High Court rejected a similar argument by the Revenue in the case of Prl.CIT Vs. Saxo India Pvt. Ltd. ITA 682/16 order dated 28.9.2016. In the circumstances, this company was rightly held by the DRP to be not comparable. We are of the view that once a company becomes not comparable for the reason that segmental information to apply filters, we need not consider any other aspect of comparability. The learned counsel for the Assessee made submissions before us that this company was rightly directed to be excluded by the DRP on the above basis and further contended that even otherwise, this company is not functionally comparable to the Assessee. As already stated, we do not wish to go into this aspect as this company goes out of comparability on other reasons.

15. As for **RS Software (India) Ltd.**, it was rejected by the DRP solely on the basis that it was allegedly predominantly engaged in the onsite development of software in FY 2010-11. In this regard, it is seen that this company was selected by the TPO and accepted by the Assessee as a comparable, and it was accordingly included by the TPO in the list of comparables. In the proceedings before the DRP, the Assessee did not object to its inclusion in the list of comparables. However, despite the above, the DRP on its own directed its exclusion. We are of the view that since the revenue as well as the Assessee wants to retain this company as a comparable company, this company should be regarded as comparable company.

16. As far as Ground No.4 raised by the revenue is concerned, the Revenue seeks to challenge the exclusion of **E-Infochips Ltd.** on the ground that it failed the software service income filter at 75%. At the outset, the Assessee submits that E-Infochips Ltd. was excluded by the DRP on the ground that: (i) no segmental information regarding its diverse functions is available; (ii) it failed the software service income filter at 75%; (iii) there were major fluctuations in profit and turnover every year which seems to be influenced by extraordinary/peculiar circumstances; and (iv) there is a presence of inventory (Page 10 and 11 of the

DRP's direction). The Revenue, in its appeal, has challenged its exclusion only the second ground. In other words, the Revenue has not challenged its exclusion on the other grounds stated hereinabove and thus its exclusion on these grounds have attained finality and cannot be disturbed by this Hon'ble Tribunal. Even otherwise, we are of the view that the DRP rightly arrived at the finding that the company's software development service revenue for FY 2010-11 was less than 75% of its total operating revenue for that year. Thus, the above action of the DRP in rejecting the above company is correct.

17. As far as Ground No. 1 & 2 in the Revenue's appeal is concerned, the revenue in this ground has challenged the order of the DRP on the ground that the DRP *suo moto* introduced a new filter i.e. onsite software development filter and thereby rejected companies on the basis that they were predominantly engaged in the onsite development of software in FY 2010-11.

18. In this regard, we are of the view that On-site revenue filter is an accepted filter to be applied for choosing comparable companies engaged in software development and falls within the parameters of Rule 10B(2) of the Income Tax Rules, 1961 (Rules). In any event, the three companies whose exclusion from the list of comparable companies is challenged before the Tribunal, go out of comparability for other reasons and not solely on the application of on-site revenue filter. Therefore, we find no merit in Gr.No.1 & 2 raised by the Revenue.

19. As far as Ground No.3 & 5 are concerned, these grounds raised by the Revenue are to the effect that the DRP should not exactly compare comparable companies with the Assessee and should only comparable similar companies and that under TNMM only if there is material differences in the comparability between the comparable companies and the Assessee they should be regarded as not comparable. According to the Revenue the DRP failed to notice this legal

position in its order. These grounds are vague and does not set out any particular instance of such violation and are therefore held to be without any merit.

20. In the result, the revenue's appeal is allowed to the extent of its prayer for inclusion of R.S.Software Pvt.Ltd., as a comparable company and in all other respects Gr.No.1 to 6 raised by the Revenue are dismissed.

21. Since, the inclusion of R.S.Software Pvt.Ltd., will not have any impact on the upward revision of ALP of the international transaction, we are of the view that there is no necessity to decide the various grounds raised by the Assessee in it's cross objection in so far as it relates to determination of ALP of SWD services segment. The cross-objection is therefore dismissed as infructuous in respect of SWD Services segment.

22. **ITES SEGMENT:** As far as ITES segment is concerned, the final list of companies chosen by the TPO was 10 and the addition on account of ALP based on the average profit margin of these 10 companies was a sum of Rs.3,66,42,275/-. Pursuant to the directions of the DRP only 4 companies remain in the list of comparable companies viz., (i) Accentia Technologies Ltd., (ii) ICRA online Ltd. (Seg.) (iii) Jindal Intellicom Pvt.Ltd. and (iv) Mindtree Ltd.

23. The Revenue in its appeal has challenged the order of the AO incorporating the directions of DRP excluding Acropetal Technologies from the final list of comparable companies chosen by the TPO (Gr.No.7 & 8). In its cross-objection the Assessee has objected to inclusion of Accential Technologies Ltd., in the list of comparable companies by the DRP (Gr.No.1.6).

24. As far as ground Nos. 7 and 8 in the Revenue's appeal is concerned, the same relates to exclusion of Acropetal Technologies Ltd., as a comparable company. The submissions of the Id DR was that the Acropetal Technologies

Ltd., satisfies all the qualitative and quantitative filters adopted by the TPO. Despite that the DRP excluded this company from the list of comparable companies for the reason that this company was engaged in diverse activities for which no segmental information is available. The DRP also held that there was unallocated expenses to the extent of Rs.21.52 crores and, therefore came to the conclusion that this company may not be functionally comparable with that of the assessee. The DRP had relied on the decision of Bangalore ITAT in the case of Symhpony Marketing Solutions India Pvt. Ltd., Vs. ITO, in IT(TP)A No.1316/Bang/2012, wherein the ITAT took the view that this company performs engineering designs services and therefore not comparable with the ITES company.

25. The Id DR submitted that segmental revenue of this company is available at page 554 of the assessee's paper book and it reads as follows:-

| <i>Business Segment</i> | <i>Engineering Design Service</i> | <i>Information Technology Service</i> | <i>Health Care</i> | <i>Total</i> |
|-----------------------------------|--|--|---------------------------|---------------------|
| <i>Income</i> | 494,399,332 | 814,016,893 | 108,112,712 | 1,416,528,937 |
| <i>Expenditure</i> | 269,038,397 | 381,803,492 | 48,365,066 | 699,206,956 |
| <i>Allocated General Expenses</i> | 88,532,609 | 161,353,308 | 22,427,745 | 272,313,662 |
| <i>Segment Operating Income</i> | 136,828,326 | 270,860,093 | 37,319,901 | 445,008,320 |
| <i>Unallocated Expenses</i> | | | | 215,288,393 |
| <i>Operating Income</i> | | | | 229,719,927 |
| <i>Other Income</i> | | | | 1,275,052 |

| | | | | |
|------------------------------------|--|--|--|-------------|
| <i>Net Profit Before Taxes</i> | | | | 230,994,979 |
| <i>Income Taxes</i> | | | | 24,341,319 |
| <i>Net Profit After Tax</i> | | | | 206,653,660 |

26. According to him, therefore the conclusion of the DRP cannot be sustained.

27. We have considered the submission of the Id DR and we find that this company has been excluded on several grounds by the DRP which are as follows:-

“Having considered the submissions, on perusal of the annual report, it is noticed by us that the assessing officer has considered the revenue from the engineering design segment, which is not comparable with the function of the assessee company. It is also noticed by us from page 9 of the annual report that the company's services facilitate reduced product design cycle time and cost. It is also noticed from page 12 that the company is committed to deliver the cost effective software products, services and solutions to its customers for which no segmental information is available. It is also noticed that in the profit and loss a/c, software development expenses of 7 69.92 crore has been debited out of which RS. 55.77 crore has been incurred on technical sub contract. In respect of such on-site expense, segmental information is not available, Further, in the segmental information, the unallocated expenses are to the extent of RS. 21,52 crore. All these differences makes it clear that even if the engineering design segment is considered as comparable, the correct margin and comparability cannot be arrived at, Further, due to the functional differences, Hon'ble Bengaluru ITAT in the case of - Symphony Marketing Solutions India Pvt. Ltd. vs. ITO (IT (TP) A No. 1316/Bang/2012), held that Acropetal cannot be considered as comparable as it performs engineering design services in addition to other judicial pronouncements relied by the assessee, accordingly we direct the assessing officer to exclude the company from the comparables”.

28. The fact that segmental details are not available is not the only reason for exclusion of this company. Apart from the above, a co-ordinate Bench of the

Tribunal in the case of Symphony Solutions India Pvt.Ltd., (Supra) has considered this company as performing functions of engineering design services. Respectfully following the decision of the Co-ordinate Bench of this Tribunal, We, hold that the DRP was justified in excluding this company from the list of comparable companies. We therefore do not find any merits in ground Nos. 7 and 8 by the Revenue.

29. As far as the cross-objection of the Assessee is concerned, in ground 1.6 the assessee has sought exclusion of Accentia Technology Ltd., from the final list of comparables, after the order of the DRP. The ground on which the assessee seeks exclusion of this company is that this company is engaged in providing high end services in the nature of knowledge processing out sourcing. According to the Assessee it was engaged in back office services which are only supportive and cannot be compared with services performed by Accentia Technology Ltd. Besides the above, this company is also stated to have income from coding which is substantial. The Id counsel for the assessee placed reliance on the decision of the ITAT Bangalore Bench in the case of M/s Swiss Re Shared Services India Pvt. Ltd., Vs. ACIT in IT(TP)A No.380/Bang/2016 order dated 8/7/2016 for assessment year 2011-12. Our attention was drawn to the order of the paras 9 to 20 of the order of the Tribunal, wherein the Tribunal has considered comparability of this company in the ITES segment and has held as follows:-

09. Adverting to Accentia Technologies Ltd, Ld. AR submitted that the said company had inorganic growth during the relevant previous year due to creation of a US based localised front-end company. As per the Ld. AR, Accentia Technologies Ltd, was doing outsourcing work as well as coding. Coding work fell within the realm of software development only. According to the Ld. AR, medical transcription earnings of Accentia Technologies Ltd, comprised of preparation of customised notes of patients, record keeping of patients, insurance verification of patients, appointment scheduling of patients, providing accessible practice management

system, providing EMR systems including EMR coding, billing, bill payment management system, adhoc reporting etc., As per the Ld.AR, said company catered to the health care industry and their products were customised and not similar to what assessee was doing. As per the Ld. AR the work done by Accentia Technologies Ltd, required skilled knowledge and advanced analytics. Ld. AR submitted that during the relevant previous year, the said company had invested in another company which had an expertise in EMR Software and Saas. In any case, as per the Ld. AR, segmental results of Accentia was not available in between various segments like MT billing collection and coding. When segmental results were not available, as per the Ld. AR it was not proper to consider Accentia Technologies Ltd, as a good comparable. Reliance was also placed on decision of Delhi Bench of the Tribunal in the case of Equant Solutions India P. Ltd v. DCIT [ITA.1202/Del/2015, dt.21.01.2016] and that of coordinate bench in the case of Amba Research (India) P. Ltd, v. DCIT [IT(TP)A.286/Bang/2015, dt.09.03.2016]. As per the Ld. AR though the above decisions were for A. Y. 2010-11, Accentia Technologies Ltd, was doing the very same activities during the relevant previous year also. Hence according to him these decisions could be taken as a precedence for excluding the said company from the list of comparables.

10. *Per contra, Ld. DR submitted that 80% of the revenue of Accentia Technologies Ltd, were from medical transcription, which fell within ITES only. As per the Ld. DR, actual activities of the assessee compared favourable with Accentia Technologies Ltd. When 80% of the income was from ITES services, as per the Ld. DR further segmentation was not required. As for the reliance placed on the decisions of Delhi Bench in the case of Equant Solutions India P. Ltd, (supra) and coordinate bench in the case of Amba Research India P. Ltd (supra), Ld. DR submitted that these were for A. Y. 2010-11 and there was a clear finding by the Tribunal that results of Accentia Technologies Ltd, were skewed because of acquisition of a business during that year and also due to inorganic growth.*

11. *In reply Ld. AR submitted that even within the same ITES segment differentiation could be made based on high-end and low-end services. Relying on judgment of Hon'ble Delhi High Court in the case of Rampgreen Solutions P. Ltd v. CIT [ITA.102/2015, dt.10.08.2015], Ld. AR submitted that there could be high-end and low-end services which may not be comparable. As per Ld. AR in the case of assessee, it was doing low-end BPO services in the field*

of insurance and could not be compared with a high-end service provider in the medical field.

12. We have perused the orders and heard the rival contentions. Twentieth annual report of Acentia Technologies Ltd, for financial year 2010-11 has been filed at paper book page 491 to 568. In the part captioned 'Management discussion and Analysis', the company mentioned its medical transcription business being moved from a low-end category to a high-end category. Management of the said company had decided to acquire necessary skills inorganically so that it could do medical coding and provide end to end services in HRCM. In what is called by the said company as EMR method, it captured and stored all demographic and clinical data in data base format rather than keeping physical reports as done in orthodox medical transcription methods. That M/s. Accentia Technologies Ltd, was providing integrated end to end software services and remodelling its own business is clear from page 25 of its annual report which is reproduced hereunder :

As explained above, EMR captures and stores all clinical and demographic data in a database format compared to physical reports created and maintained through the age old practice of medical transcription which has been the major business area of Accentia over the years

Remodelling of Business Plan

The adoption of EMR based clinical practice has opened up avenues for an integrated end-to-end SaaS model (Software as a Service) of service delivery. Since August 2010, Accentia's product development team along with their functional experts and development partners have been involved in the mission of designing and developing a world class, fully integrated, multi disciplined, cloud based hosted application which integrates all services from electronic medical records(EMR)-practice management system(PMS)-code mapping/scrubbing-medical billing & receivables management system(RCM)-electronic data interchange

(EDI) with insurance companies(payer). The above seamlessly integrated SaaS system functions as a one-stop shop for a clinical provider that manages all their healthcare documentation needs, receivables management needs, performance tracking and reporting and would eliminate the need to keep networking and technology personnel at their end to manage the software system, since it is served by a hosted server.



13. Type of work done by the said company has been explained in detail at pages 24 and 25 of annual report. This is reproduced hereunder :

ACCENTIA'S SAAS PLATFORM

Customized Notes

After the physician's patient visit, they can make new records based on diagnosis and log them in by keying in data, selecting the right templates or even dictating. InstaKare allows physicians to follow their own method of maintaining records. These templates are customized to their existing report structure. Physicians don't need to change their ways. We'll adapt to theirs. And if they like they can create new templates.

DRT, is Discrete Reportable Transcription which allows physicians to dictate areas of their report they want to dictate and leave the remaining to the EMR or their templates. With DRT, physicians can dictate information that is not captured on the EMR. The service is incredibly flexible.

Information Gateway

Now the InstaKare EMR really transforms physician's medical record management system. No more searching through files and notes that are properly saved, but still difficult to locate. Even physicians note taking software can become a nightmare if physicians don't know what they are looking for. Physicians can access all patient information, history and medical complaints. These records are available at their fingertips and they can search and review images, scans, reports, and more.

Insurance Verification

InstaKare PMS provides physicians with inbuilt insurance verification that is linked to several insurance company portals. What more, trained Accentia staff with cross check the auto verification and will even conduct it for physicians manually if required. This will happen in real time and results will be delivered in a few minutes.

Intuitive Scheduling

PMS comes with a nifty Appointment Scheduler that can link all the doctors to a particular case. Its intuitive and flexible and reduces multiple entries and corrections. It brings the smarts to scheduling and updates physician's roster intelligently.

Anywhere Accessibility

In the Practice Management System (PMS) physicians will be able to organize and monitor every aspect of their dynamic office environment. Physicians will also find the Patient Management Portal, which allows their patients to easily use their mobile or computer to book appointments and make requests with physician's office. PMS allows them to reach physicians at their comfort over web, chat and telephone.

**START
HERE**

instaKare™

360 Degree Healthcare Solution

Meaningful Use

It's not enough to have an EMR solution, it's important to use it meaningfully. Our Practice Management Consultants advise physicians on Meaningful Use of the InstaKare service and provide reports and analysis to ensure physicians receive the incentives of Eligible Providers as stipulated by the government.

ePrescription and Documentation Management

The rules are strict, but we've got it all covered. The EMR maintains all aspects of meaningful use and government standards. This includes maintaining patient records, test reports, and e-prescription.



Coding

We help physicians to get the most out of the codes. Integrated EMR and PMS ensures the coding and billing are managed with just a click. Physician's diagnosis is fed into the Coding Module which automatically generates procedure and diagnosis code. These codes can be changed, added or deleted as per their requirement. Certified coders will review the notes and codes and ensure that all the reimbursement procedures are followed as per required insurance reimbursement standards.



Billing

Claims Processing is done after verification of the billing including procedure codes and claim amount validation. This ensures physicians get maximum reimbursement. The experts at Accentia manage all their billing, appealing refilling and documentation. We want physicians to get their dues and we will do the chasing for physicians. We manage electronic and paper claims and have a tracking system for monitoring and tracking progress of payments.



from Accentia

Bills Payment Management

Claims Processing is done after verification of the billing including procedure codes and claim without validation. This ensures physicians get maximum reimbursement. The experts at Accentia manage all their billing, appealing refilling, and documentation. We want physicians to get their dues and we'll do the chasing for physicians. We manage electronic and paper claims and have a tracking system for monitoring & tracking progress of payments.



Account Receivables Management

We have seen practices ruined because of the lack of understanding and follow up on rejections and denials. At Accentia, we work those payments coming in. The Account Receivables & Collections team at Accentia follows up on all rejected or denied payments. The team gets in touch with patients, insurance companies, and attorneys on physician's behalf. Our process oriented services ensure physicians get maximum returns.



Adhoc Reporting

Want to know how physician's practice is faring? We help physicians see the big picture and the little details-with our dynamic adhoc reports. Dash board reports, reminder details and billing information help physicians review their performance anytime, anywhere. Our account managers strive to keep physicians in the lead.



14. *If we have a look at the billings made by M/s. Accentia Technologies Ltd, its income for the relevant previous year read as under :*

INCOME**Sales & Services**

| | |
|----------------------------------|----------------------|
| Medical Transcription | 687,114,041 |
| Billing and Collections | 219,088,563 |
| Income From Coding | 1,62,82,920 |
| Interest on FD | 13,182,314 |
| Income from Exchange Fluctuation | 918,215 |
| Total | <u>1,083,127,053</u> |

Not only was the medical transcription work done by it of a high-end variety, it also had substantial income from coding coming to about 16% gross receipts. No segmental results were also available. Its audited financial statements at para 7 of the notes to accounts mentioned as under :

- 7) The Company is operating in a single business segment that is providing back office support to its group companies and its affiliates on cost plus basis and as such all business activities revolve around this segment, hence there is no separate primary reportable segment as required by Accounting Standard-17 on "Segment Reporting" notified under section 211(3C) of the Companies Act, 1956.

15. *As against the above, Assessee was providing back office support to its group companies and affiliates, in the field of reinsurance, which its affiliates were engaged in. Work done by the assessee has been captured by us at para three above. This in our opinion was entirely different from the type of activities that Accentia Technologies Ltd, was into. Type of services rendered by the assessee is also clear from the service agreement entered with its AE called Swiss Re, Zurich, dt.01.02.2009. Annexure-1 to this agreement, is reproduced hereunder :*

~~CAT team Bangalore processes and analyses data using standard data analysis and Natural Catastrophic (NatCat) techniques. More specifically, CAT team Bangalore would~~

NatCat exposure analysis and comparison

Review the clients portfolio to better understand underlying exposure and changes in exposure from one year to another.

NatCat Modeling & underwriting support

Analyse the clients portfolio by using in-house (MultiSNAP) and third party cat modeling software (Risklink) to get an estimate of the cat load for the treaty. Scope of service to be provided is global

Tool maintenance and development support

Support Swiss Re's global cat perils team's initiative and work on developing and maintaining NatCat models

Cat Team hub

Support Swiss Re's underwriting community in their NatCat costing efforts. Identify gaps in the area of cat risk assessment and collaborate with underwriter and Cat Perils team to develop solutions to fill those gaps

Adhoc Projects

Project work related to improving cat risk assessment and understanding on modeling software's in Swiss Re

1.2 Deliverables

Based on the analysis, the CAT team Bangalore provides Swiss Re Zürich with:

- ◇ Exposure analysis & comparison: Excel sheets containing findings from the analysis and year on year data comparison reports
- ◇ NatCat modelling & underwriting support: Analysis results (loss frequency curve, average annual loss estimate) from external and internal NatCat models.
- ◇ Tool Maintenance and development support: Results of testing and calibration exercise in the desired format.
- ◇ Cat team hub: deliverables as specified for individual tasks
- ◇ Ad-hoc projects: Other projects and deliverables as assigned.

16.A reading of the above would show that assessee was functioning in a field different from M/s. Accentia Technologies Ltd. What it was providing may not be low-end services, neither was it of a high-end variety. The deliverables that assessee was expected to give its AE abroad is mentioned in schedule 2 of its agreement which is reproduced hereunder :

- ↳ Market Intelligence for the reviewed units portfolio
- ↳ Analysis for costing accuracy
- ↳ Overview of prior review/audit issues
- ↳ Overview of guidelines and business intelligence relevant for reviewed units portfolio
- ↳ Input and maintenance for e-tool
- ↳ Reporting and Reporting Analytics
- ↳ Continuous improvement projects: Other projects as assigned.

17. Thus the functions which were done by Accentia Technologies Ltd, and the functions which were rendered by the

assessee were entirely different. We cannot say that the type of services done by the assessee was of a level as sophisticated as the one which was being provided by Accentia Technologies Ltd. In the case of Rampgreen Solutions P. Ltd (supra), Hon'ble Delhi High Court mentioned as under at para 31 of its order, which reads as under :

31. In the present case, the Tribunal noted that Vishal and eClerx were both engaged in rendering ITeS. The Tribunal held that, "once a service falls under the category of ITeS, then there is no sub-classification of segment". Thus, according to the Tribunal, no differentiation could be made between the entities rendering ITeS. We find it difficult to accept this view as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice-based call centers that render routine customer support for their clients. Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information

Technology for the delivery of their services, would, in our opinion, be erroneous.

18. *Thus when characteristics of services rendered were dissimilar and the competence required to operate the services were different, it will not be correct to compare the results of two companies.*

19. *In the case of Amba Research India P. Ltd (supra), this Tribunal had directed exclusion of Accentia Technologies Ltd, for comparison purposes. Assessee in the said case was providing ITES services to its holding company at British Virgin Islands. Observation of the Tribunal at para 8 of the order dt.09.03.2016, is reproduced hereunder :*

08. *We have perused the orders and heard the rival contentions. No doubt Accentia Technologies Ltd, formed a part of the list of comparables considered by the assessee in its TP study. However assessee had objected to its inclusion citing functional dissimilarity before the AO as well as the DRP. Question regarding comparability of Accentia Technologies in the ITE segment for A. Y. 2010-11 had come up before this Tribunal in the case of Novo Nordisk India P. Ltd (supra). It was held as under at paras 31 and 32 of the order dt.30.07.2015 :*

31. *We deal with the comparable companies which the Assessee seeks exclusion. 1. Accentia Technology Ltd., 2. Infosys BPO Ltd. The comparability of these company with a ITES company was considered by this Tribunal in the case of Paraxel International (India) Pvt. Ltd. (supra) and the Tribunal held as follows on the comparability of the aforesaid companies with a company providing ITES in the following manner:-*

“10. In grounds No.4 to 6, the assessee has challenged the comparables selected by the TPO for the purpose of TP analysis and as submitted by the learned counsel or the assessee, the assessee is objecting to the selection of only the following five comparables, out of the twelve companies selected as comparables-

| <i>Sl. No.</i> | <i>Company Name</i> |
|----------------|--------------------------------------|
| <i>1.</i> | <i>Accentia Technologies Limited</i> |

2. *Cosmic Global Ltd.*
3. *Eclerx Services Ltd.*
4. *Genesys International Ltd.*
5. *Infosys B P O Ltd.*

11. We have heard the arguments of both the sides on the issue of inclusion/exclusion of the above five companies as comparables and also perused the relevant material on record including the various decisions of the coordinate benches of the Tribunal cited by the learned counsel for the assessee.

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/s. 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/s. ITO Ward 2(1), Hyderabad (ITA No.159/Hyd/2014 dated 31.7.2014); and Hyundai Motors India Engineering P. Ltd., Hyderabad V/s. 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.

.....

Infosys BPO

20. As regards selection of Infosys BPO as a comparable company, the learned counsel for the assessee has contended that the said company cannot be taken as comparable because of its uncomparable size of operations. He has contended that the turnover of the said company

was many times higher than that of the assessee during the year under consideration. Although the Learned Departmental Representative has contended that the size of operations does not matter as far as selection of comparables is concerned especially in the sector of IT Enabled services, it is observed that similar issue has been decided by the Hon'ble Delhi High Court in the case of CIT V/s. Agnity Technologies Pvt. Ltd. (219 Taxman 26) holding that huge turnover companies like Infosys and Wipro cannot be considered as comparables with smaller companies like the assessee in the present case. Respectfully following the decision of the Hon'ble Delhi High Court in the case of Agnity Technologies P. Ltd. (supra), we direct the Assessing Officer/TPO to exclude Infosys BPO from the list of comparables."

32. As far as Accentia Technology Ltd., is concerned, even during the previous year relevant to AY 2010-11, there was amalgamation of Ascent Infoserve Private Limited with Accentia Technology Ltd., and consequent thereto the assets and liabilities and accumulated reserves and the financial results for the year ended 31st March, 2010, of the amalgamating company were incorporated in the amalgamated company. As far as Infosys BPO Ltd., is concerned, the observations made by the Tribunal in the decision referred in the earlier paragraph will hold good for the present AY 2010-11 also. Respectfully following the decision of the Tribunal referred to above, we direct that the aforesaid 2 companies be excluded from the list of comparable companies for the purpose of computing arithmetic mean for comparability purpose. The TPO is directed to give effect accordingly.

Even after exclusion of Accentia Technologies Ltd, along with the exclusion of four comparable companies directed by DRP, there will be four companies left in the list of comparables which, in our opinion, cannot be considered as too small a sample for an effective TP study. In the circumstances, we direct exclusion of

Accentia Technologies Ltd also from the list of comparables. Ordered accordingly.

20. No doubt the said decision was for A. Y. 2010-11, but the conditions which prevailed in the said previous year more or less existed in the impugned assessment year also. Considering all these aspects, we are therefore of the opinion that Accentia Technologies Ltd, was not a good comparable for the purpose of ALP study of the assessee.

30. The learned DR brought to our notice the decision of the DRP at Para-25 of its order on the comparability of this company. He brought to our notice that this company was found comparable in ITES segment with the Assessee in Assessee's own case for AY 2007-08 in IT (TP) A.No.973/Bang/2010. The learned DR submitted that the functional profile of this company and the Assessee was held to be same by the Tribunal in the aforesaid decision.

31. We have given a careful consideration to the rival submission. It is true that the Tribunal found this company to be comparable with the Assessee in AY 2007-08. But the decision of the Tribunal referred to by the learned DR in the case of Swiss Re Shared Services (supra) relates to AY 2010-11. The tribunal has given elaborate reasons for exclusion of this company as a comparable company and concluded at Paragraph 17 of its order that this company was not comparable with a low end or mid end service provider in ITES as it was in high end service provider in ITES. In view of the above decision of the Tribunal, we are of the view that Accentia Technology Ltd., should be excluded from the final list of comparable companies. The AO is directed to compute the ALP after excluding Accentia Technology Ltd., from the list of comparables that remains after the order of the DRP.

31. In the result, the grounds relating to ITES raised by the Revenue is dismissed while that raised by the assessee is allowed.

Order pronounced in the open court on **25th April, 2018.**

Sd/-
(JASON P.BOAZ)
ACCOUNTANT MEMBER
Bangalore
Dated : 25/4/2018
Vms

Sd/-
(N.V VASUDEVAN)
JUDICIAL MEMBER

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Sr. Private Secretary, ITAT, Bangalore

1. Date of Dictation
2. Date on which the typed draft is placed before the dictating Member
3. Date on which the approved draft comes to Sr. P. S.....
4. Date on which the fair order is placed before the dictating Member
5. Date on which the fair order comes back to the Sr. P.S.
6. Date of uploading the order on website.....
7. If not uploaded, furnish the reason for doing so
8. Date on which the file goes to the Bench Clerk
9. Date on which order goes for Xerox & endorsement.....
10. Date on which the file goes to the Head Clerk
11. The date on which the file goes to the Assistant Registrar for signature on the order
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order
13. Date of Despatch of Order.