

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-1' : NEW DELHI)**

**BEFORE HON'BLE VICE PRESIDENT, SHRI G.D. AGRAWAL
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.845/Del./2016
(ASSESSMENT YEAR : 2011--12)**

M/s. Timex Group India Limited, vs. DCIT, Circle 25 (2),
First Floor, Tower – B, New Delhi.
Plot No.B – 37, Sector – 1,
Noida – 201 301 (Uttar Pradesh).
(PAN : AA ACT0773C)

**CO No.95/Del/2016
(in ITA No.845/Del./2016)
(ASSESSMENT YEAR : 2011--12)**

DCIT, Circle 25 (2), vs. M/s. Timex Group India Limited,
New Delhi. First Floor, Tower – B,
Plot No.B – 37, Sector – 1,
Noida – 201 301 (Uttar Pradesh).
(PAN : AA ACT0773C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Senior Advocate
Shri Neeraj Jain, Advcoate
Shri Romit Katyal, CA
Shri Sahil Sharma, CA

REVENUE BY : Shri Sanjay I. Bara, CIT DR

Date of Hearing : 13.11.2018

Date of Order : 20.12.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The aforesaid appeal filed by the assessee and cross objections filed by the Revenue are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The Appellant, M/s. Timex Group India Limited, (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 31.12.2015 passed by the AO in consonance with the orders passed by the Id. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2011-12 on the grounds inter alia that :-

“General

1. That the impugned order of assessment framed by the assessing officer in pursuance of the directions of the Dispute Resolution Panel (hereinafter referred to as 'DRP') under Section 143(3) read with Section 144C of the Income-tax Act, 1961 ('Act'), is bad in law, violative of principles of natural justice and void ab-initio.

1.1 That the assessing officer erred on facts and in law in completing the assessment under section 143(3) read with section 144C of the Income-tax Act ("the Act") at an income of Rs.165,588,189 as against Nil returned income.

Transfer Pricing Issues:

2. That the assessing officer erred on facts and in law in making addition to the income of the appellant to the extent of Rs.28,27,99,372 on account of the alleged difference in the arm's length price of international transactions.

Advertisement, marketing and sales promotion expenses:

3. That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to

Rs.27,87,32,906 in relation to advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant.

3.1 The DRP/TPO erred on facts and in law in not appreciating that AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per section 92B of the Act, in the absence of any proved understanding / arrangement between the appellant and the associated enterprise (hereinafter referred to as 'AE'), so as to invoke the provisions of section 92 of the Act.

3.2 Without prejudice that the DRP / TPO erred on facts and in law in not excluding the following selling expenses aggregating to Rs.11,25,29,382 from the AMP expenditure for the purpose of the benchmarking analysis:

S.No.	Particulars	Amount (Rs.)
1	Selling and distribution expenses	3,15,24,071
2	Hoarding expenses	64,98,948
3	Showcase and display expenses	93,36,589
4	Minimum Guarantee	4,41,44,493
5	Sales promotion	2,10,25,281
	Total	11,25,29,382

3.3 Without prejudice, the DRP/TPO erred on facts and in law in applying markup of 42.19%, being gross profit margin of the comparable companies, on the alleged excess AMP expenditure incurred by the appellant, while computing the value of compensation to be received by the appellant on account of promotion of 'Timex' brand.

Provision of back office support services

4. That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to Rs.40,66,466 in relation to the transaction of provision of back office support services undertaken by the appellant.

4.1 That the TPO erred on facts and in law in comparing the appellant, providing routine back office support services,

with the following functionally different companies for the purpose of benchmarking analysis:

- i. Accentia Technologies Ltd.*
- ii. Acropetal Technologies Limited(Seg)*
- iii. Eclerx Services Limited*
- iv. ICRA Techno Analytics Limited*
- v. Infosys BPO Ltd*
- vi. TCS E-Serve Ltd*

4.2 That the TPO erred on facts and in law in rejecting the following companies with export earnings less than 75% of total income, not appreciating that com parables companies are required to be selected on the basis of their functional profile and not on the basis of location of their customers:

- i. Cameo Corporate Services Ltd*
- ii. Delta Services (India) Pvt Ltd*
- iii. CSS Technergy Ltd*

4.3 That the TPO erred on facts and in law in rejecting Sparsh BPO on the basis that the company has a negative networth, not appreciating that the company has positive net worth as on March 31, 2011

4.4 That the TPO erred on facts and in law in rejecting Twinstar Export Ltd. On the basis that it is engaged in manufacturing of insulators

4.5 That the TPO erred on facts and in law in rejecting R Systems International Ltd on the basis that it has a different financial year, not appreciating that the company is functionally comparable to the appellant.

4.6 That the TPO erred on facts and in law in considering foreign exchange fluctuation as an item of non-operating nature for computing operating profit margin of the appellant and the comparable companies

4.7 That the DRP/TPO erred on facts and in law in not allowing appropriate adjustment on account favorable working capital position of the appellant vis-a-vis the comparable companies

4.8 That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment holding that "the taxpayer has not shown with evidence as to whether each of the risks were actually undertaken by the comparables."

5. That the assessing officer erred on facts and in law in levying interest under Section 234B and Section 234C of the Act."

3. The Objector, DCIT, Circle 25 (2), New Delhi, by filing the present cross objections challenged the assessment order dated 31.12.2015 passed by the Assessing Officer qua the assessment year 2011-12 on the grounds inter alia that :-

"1. That under Rule 27 of the Income Tax (Appellate Tribunal) Rule, 1963, the revenue supports the order of DRP passed in the case of M/s Timex Group of India Ltd. for A.Y. 2011-12 determining the ALP at Rs.28,27,99,372/- as against Rs.24,74,23,188/- as determined by the TPO.

2. That if the above finding of the DRP is not upheld, under Rule 22 of the Income Tax (Appellate Tribunal) Rules, 1963, the following grounds may kindly be considered as a cross objection:

(i) That in the facts and circumstances of the case the Ld. DRP erred in rejecting the Bright Line Test Method adopted by the Transfer Pricing Officer for determining the values of ALP.

(ii) That the revenue reserves the right to amend, modify, add to or withdraw the above grounds of cross objection."

4. Briefly stated the facts necessary for adjudication of the controversy at hand are : The Timex Group India Ltd., a subsidiary of Timex Group Luxury Watches B.V. is into designing, manufacturing and marketing innovative timepieces and jewellery. Timex Group companies include the Timex Business Unit (Timex, Timex Ironman, Opex, TX, Nautica, Marc Ecko); Timex Group

Luxury Watches (Valentino, Salvatore, Ferragamo); Sequel (Guess) and Vertime (Versace, Versus). The Time Group's brand portfolio include global brands like Timex, TX, Versace, Versus, Valentino, Guess, Vincent Berard, Guess Collection, Ferragamo, Ecko, Nautica and Opex.

5. During the year under assessment, the taxpayer entered into international transactions as under :-

<i>Nature of transaction</i>	<i>Sales</i>	<i>Operating Cost (OC)</i>	<i>Operating Profit (OP)</i>	<i>OP/OC (%)</i>
<i>Provision of software development services</i>	<i>2,60,97,175</i>	<i>2,42,59,000</i>	<i>18,38,000</i>	<i>7.58%</i>

6. The taxpayer has incurred Advertisement, Marketing and Promotional (AMP) expenditure during the year under assessment as under :-

<i>Particulars</i>	<i>Amount in Rs.</i>
<i>Advertisement and Sales Promotion Expenditure (Gross)</i>	<i>20,76,15,000</i>
<i>Selling and Distribution Expenses</i>	<i>4,10,75,000</i>
<i>Total AMP</i>	<i>24,86,90,000</i>
<i>Sales</i>	<i>175,68,00,000</i>

7. The taxpayer incurred Rs.24,86,90,000/- on account of AMP expenditure which accounts for 14.16% to the sales ratio. The TPO in order to benchmarking international transaction qua AMP expenses applied "Bright Line Method" by following the Special Bench decision passed by the Tribunal. The Id. TPO in order to

determine Arm's Length Price (ALP) of AMP expenditure incurred by the taxpayer rejected two comparables viz. HMT International Limited and Titan Industries Limited and chosen two comparables selected by the taxpayer and determined the bright line method of the two companies to work out the AMP expenses/sales percentage as under :-

<i>No.</i>	<i>Name of the Company</i>	<i>AMP Expense / Sales (%)</i>
<i>1</i>	<i>KDDL Ltd.</i>	<i>2.12%</i>
<i>2</i>	<i>Kamla Retails Ltd.</i>	<i>1.49%</i>
	<i>Mean</i>	<i>1.81%</i>

8. The Id. TPO further added mark-up of AMP spent to the tune of 12.26% qua non-routine AMP activities carried out by the taxpayer for performing additional significant marketing function for its Associated Enterprises (AE). It is the case of the TPO that the taxpayer through its non-routine marketing (AMP activities) has not only enhanced the brand value of the AE in India but has also developed market intangibles for its AE which has resulted in enhanced sale and profit to the AE for which it has not been reimbursed. So, the Id. TPO by taking into account the Prime Lending Rate (PLR) of State Bank of India (SBI) and ultimately added mark-up at 12.26%. Consequently, the Id. TPO computed

the ALP of reimbursement on the basis of percentage AMP to sales by applying the bright line limit as under :-

<i>Advertisement, marketing and sales promotion (A)</i>	24,86,90,000
<i>Total Expenditure on AMP (B)</i>	24,86,90,000
<i>Sales of assessee (C)</i>	175,68,00,000
<i>AMP% of assessee [D = B/C*100]</i>	14.16%
<i>Arm's length level of AMP% (E)</i>	1.81%
<i>Arm's length level of AMP expenses [F=C*E%]</i>	3,17,98,080
<i>Amount spent in excess of 'bright line' and on creation of marketing intangible [G=B-F]</i>	21,68,91,920
<i>Mark-up @ 12.26%</i>	2,65,90,949
<i>The amount by which the assessee company should have been reimbursed by AE [I = G+H]</i>	24,34,82,869

9. However, in compliance to the directions issued by the DRP, the TPO has computed the AMP expenses incurred by the taxpayer for brand promotion of AE on the basis of its AMP/gross profit ratio vis-à-vis comparable companies by applying mark-up of 42.19% (being the average GP/cost ratio of comparable company on the alleged excess AMP expenses) made addition of Rs.27,87,32,906/- on account of AMP expenses which is as under:-

<i>Excess AMP (A)</i>	19,60,28,487
<i>Markup (B) @ 42.19%</i>	8,27,04,418
<i>AMP Adjustment [C = A+B]</i>	27,87,32,906

10. The taxpayer during the year under assessment also entered into international transactions of provision of ITES in the nature of

pay-roll processing, account processing etc. to the tune of Rs.2,60,97,175/-. The taxpayer in order to determine the ALP of international transactions applied Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) with operating profit/operating cost as PLI and chosen 7 companies as comparables with average OP/OC at 8.75% as against OP/OC of the taxpayer at 7.85% and found its international transactions at arm's length.

11. However, TPO selected 10 comparables with average OP/OC at 24.34% and proposed ALP adjustment of Rs.40,66,466/- on account of difference in the margin of comparable companies of the taxpayer.

12. The taxpayer carried the matter before the Id. DRP by filing objections who has disposed of the same. Feeling aggrieved, the taxpayer has come up before the Tribunal by way of filing the present appeal and the assessee has also filed the cross objection.

13. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

**GROUND NO.1 OF
ITA NO.845/DEL/2016 (ASSESSEE'S APPEAL)**

14. Ground No.1 is general in nature, hence requires no adjudication.

**GROUNDS NO.2 & 3 TO 3.3 OF
ITA NO.845/DEL/2016 (ASSESSEE'S APPEAL)**

**GROUNDS NO.1 & 2 OF
CO NO.95/DEL/2016 (REVENUE'S CO)**

15. Undisputedly, the taxpayer is into the business of manufacturing and sale of watches and is also into distribution of watches imported from its AE. It is also not in dispute that 85% of the turnover of the taxpayer is sale of watches manufactured by the taxpayer in India, it being operated as a full-fledged manufacturer and full risk bearing distributor. It is also not in dispute that the TPO has applied "bright line method" for determining the existence of international transaction in order to compute the ALP of such transaction. It is also not in dispute that the Id. TPO has proceeded on the premise that the taxpayer by incurring non-routine marketing (AMP) activities has not only enhanced the brand value of its AE in India but has also developed marketing intangible for the AE which enhanced sale and provided benefits to the AE. It is also not in dispute that the TPO has added markup of

12.26% on the ground that the taxpayer has significantly assumed greater risk than the ALP.

16. Pursuant to the show-cause notice dated 05.01.2015 issued by the Id. TPO, the assessee has conducted fresh search to select the comparables. Accordingly, the taxpayer has selected 4 comparables viz. (i) HMT International Ltd.; (ii) KDDL Ltd.; (iii) Kamla Retail Ltd.; and (iv) Titan Industries Ltd.

17. The Id. TPO out of the 4 comparables rejected HMT International Ltd. and Titan Industries Ltd. as comparables chosen by the taxpayer and finally selected 2 comparables for the purpose of determining bright line limit which are as under :-

<i>No.</i>	<i>Name of the Company</i>	<i>AMP Expense / Sales (%)</i>
<i>1</i>	<i>KDDL Ltd.</i>	<i>2.12%</i>
<i>2</i>	<i>Kamla Retails Ltd.</i>	<i>1.49%</i>
	<i>Mean</i>	<i>1.81%</i>

18. The Id. TPO also taken the view that the taxpayer in providing AMP services utilized its own funds and proceeded to add the markup at least equal to the prime lending rate of SBI and thereby added the total of 12.26% markup on AMP expenditure.

19. The Id. AR for the taxpayer contended inter alia that incurring AMP expenses by the taxpayer is not an “international transaction” and that the Id. TPO has merely relied upon the

“bright line test” to infer the international transactions between the taxpayer and its AE without having any cogent material/evidence on record.

20. Bare perusal of the order under challenge passed by the Id. TPO particularly at pages 67, 73 and 75 goes to prove that the entire adjustment qua AMP expenses has been made by the TPO on the basis of bright line method and no material whatsoever has been brought on record to show that if the taxpayer and AE have acted in concert and that they have entered into any agreement to enter into international transactions qua AMP expenses.

21. Hon’ble Delhi High Court in *Sony Ericsson India Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del.)* and subsequently in *Maruti Suzuki India Ltd. v. CIT (2016) 328 ITR 210 (Del.)* has categorically held that BLT is not a valid basis for determining the existence of international transaction or for that matter for computing the ALP of such international transaction involving AMP expenses. So, in these circumstances, the order of TPO passed by making BLT as basis of the ALP adjustment is not sustainable in the eyes of law.

22. Furthermore, Hon’ble Delhi High Court in subsequent decisions viz. *Bausch & Lomb Eye Care (India) Pvt. Ltd. v. Additional CIT (2016) 381 ITR 227 (Del.)* and *Honda Siel Power*

Products Ltd. v. Dy. CIT (2016) 237 Taxman 304 held that it is for the Revenue to firstly discharge the onus to prove the existence of an international transaction between the taxpayer and its AE and only thereafter ALP of international transactions involving AMP can be computed.

23. It is further contended by the ld. AR for the taxpayer that quantitative adjustment made by the TPO on account of AMP expenses is not permissible within the framework of Chapter-X as has been held by the Hon'ble Delhi High Court in ***Maruti Suzuki India Ltd. v. CIT – ITA No.110/2014 & 710/2015***). Hon'ble High Court has categorically held that none of the substantive or procedural provisions of Chapter-X permits adjustment on account of AMP expenses.

24. The taxpayer has contested before ld. DRP that incurring of AMP expenses are not international transactions and BLT method has no statutory basis to infer the existence of international transactions qua AMP expenses, however, the ld. DRP has proceeded to hold inter alia that incurring of AMP expenses is an international transaction and directed to exclude the routine selling and distribution expenses and directed the TPO to use the cost plus method and further directed to apply the markup on excess AMP expenses as per sub-clause (ii) of Rule 10B(1)(c).

25. However, we are of the considered view that following the decision rendered by Hon'ble Delhi High Court in *Maruti Suzuki India Ltd. v. CIT* (supra), the first step for the Revenue to benchmark the AMP expenses is to establish the existence of international transaction; if it is proved, then to proceed for benchmarking the transactions qua AMP expenses. Now, it is the settled principle of law that existence of international transaction qua AMP expenses requires to be established de hors the "bright line test", particularly when the taxpayer has categorically denied the existence of international transaction and 87% of its turnover is from the sale of its manufacturing in India. Moreover, without prejudice, it is the case of the taxpayer that despite the directions issued by the Id. DRP, the TPO has wrongfully proceeded to consider selling and distribution expenses as part of the AMP expenses for the purposes of applying the bright line test.

26. In view of what has been discussed above, we are of the considered view that since the taxpayer is a full-fledged manufacturer as 87% of its turnover is from the sale of its manufactured goods in India and the entire AMP expenses have been incurred by it to enhance its sale in India and not for promoting the brand of its AE and for creating intangibles for its AE, the alleged excess AMP expenditure does not fall in the

category of international transactions. Moreover, the Revenue has not brought on record any cogent evidence to prove these facts. So, following the law laid down by the Hon'ble Delhi High Court in case cited as *Maruti Suzuki India Ltd. v. CIT* (supra), we are of the considered view that adjustment made by the Revenue on account of incurrance of AMP expenses are not sustainable in the eyes of law.

27. Learned DR for the Revenue, although admitted the legal position enunciated in the preceding paragraphs, but he contended that since all the aforesaid decisions are lying challenged before the Hon'ble Apex Court, the matter may be kept pending till the decision by Hon'ble Apex Court. However, we are of the considered view that since it is a stay granted matter and the proceedings before the second appellate authority have not been stayed by any higher forum, the same cannot be kept pending.

28. After considering the legal position as discussed in the preceding paragraphs, we are of the considered opinion that the ALP of an international transaction involving AMP expenses, the adjustment made by the TPO/DRP/AO is not sustainable in the eyes of law. At the same time, we cannot ignore the submission made by the learned DR that the matter is pending before Hon'ble Apex Court and the decision of Hon'ble Apex Court would be

binding upon all the authorities. In view of the above, we set aside the orders of authorities below and restore the matter to the file of the Assessing Officer. We hold that as per the facts of the case and the legal position as of now and discussed above in this order, the adjustment made by the TPO/DRP/AO in respect of AMP expenses is not sustainable. However, if the above decisions of Hon'ble Jurisdictional High Court which is under consideration before the Hon'ble Apex Court is modified or reversed by the Hon'ble Apex Court, then the Assessing Officer would pass the order afresh considering the decision of Hon'ble Apex Court. In those circumstances, he will also allow opportunity of being heard to the assessee.

GROUND NO.4 TO 4.8

29. The taxpayer during the year under assessment entered into international transactions qua provision of Information Technology Enabled Services (ITES) in the form of provisions of services in the nature of payroll processes, account processes, etc. to the tune of Rs.2,60,97,175/- with its Associated Enterprises (AE).

30. The taxpayer in order to benchmark its international transactions qua ITES applied transactional net margin method with operating profit/total cost (OP/TC) as Profit Level Indicator

(PLI), chosen 7 comparables having arithmetic mean of 8.75% as against OP/OC of the taxpayer at 7.58% and found its international transactions at arm's length.

31. Initially, the TPO selected 19 comparables with average OP/OC of 23.82%. However, after Id. DRP's order, TPO selected 10 comparables to benchmark the international transactions qua ITES which are as under :-

<i>S.No.</i>	<i>Name of the Company</i>	<i>OP/TC %</i>
<i>1.</i>	<i>Accentia Technologies Ltd.</i>	<i>28.89%</i>
<i>2.</i>	<i>Acropetal Technologies Limited (Seg)</i>	<i>14.26%</i>
<i>3.</i>	<i>e4e Healthcare Business Services Pvt. Ltd.</i>	<i>9.77%</i>
<i>4.</i>	<i>Eclerx Services Ltd.</i>	<i>56.82%</i>
<i>5.</i>	<i>ICRA Techno Analytics Limited</i>	<i>24.83%</i>
<i>6.</i>	<i>Infosys B P O Ltd.</i>	<i>17.86%</i>
<i>7.</i>	<i>Jindal Intellicom Ltd.</i>	<i>13.70%</i>
<i>8.</i>	<i>Microgenetic Systems Ltd.</i>	<i>-3.20%</i>
<i>9.</i>	<i>TCS E – Serve Ltd.</i>	<i>69.23%</i>
<i>10.</i>	<i>Jindal Intellicom Ltd.</i>	<i>11.20%</i>
	<i>Mean</i>	<i>24.34%</i>

32. It is the case of the taxpayer that the adjustment made by the TPO is not sustainable as the TPO has selected comparables engaged in provision of KPO services and sought to exclude – (i) Accentia Technologies Ltd.; (ii) Acropetal Technologies Limited (Seg); (iii) Eclerx Services Ltd.; (iv) ICRA Techno Analytics Limited; (v) Infosys B P O Ltd.; and TCS E – Serve Ltd., from the final set of comparables on the ground hat the same are not valid comparable for benchmarking the international transactions.

33. Undisputedly, the Id. DRP has accepted the contentions raised by the taxpayer that the TPO has erred in characterizing the provisions of Information Technology Support Services (ITSS) involving payroll processing, account processing, etc. services as software development services, as KPO services. So, ITES consisting of payroll processing, account processing, etc. cannot be treated as KPO services. It is contended by the Id. AR for the taxpayer that as against the directions issued by the DRP that all the comparables to be taken for benchmarking the international transactions should be of BPO services, but the Id. TPO has chosen all the companies as comparables which are into KPO services. So, we would discuss the aforesaid comparables challenged by the taxpayer one by one to examine their suitability vis-à-vis the taxpayer.

ACCENTIA TECHNOLOGIES LTD. (ACCENTIA)

34. After DRP's order, Id. TPO has introduced Accentia having OP/TC of 29.18% as a comparable which the taxpayer has challenged for exclusion on the ground that Accentia is engaged in providing KPO services as well as software services to its AE and it also owns various software products, namely, (i) instakare, (ii) instaweb, (iii) instaPMS, (iv) instaScribe etc..

35. We have perused the annual report of Accentia, relevant information is available at page 5 of the annual report, which is extracted for ready perusal as under :-

“ Accentia has gone a long way from being a single location, single service firm to a multi location, diversified Knowledge Process Outsourcing Company, operating from multiple locations in India, USA, UK and the Middle East. Not resting at being one of the fastest growing Healthcare Receivables Cycle Management Companies, we have now ventured into offering Software As A Service model in the healthcare outsourcing area, since the US administration has made sweeping changes in the healthcare sector, especially in the documentation area.

In 1998-1999 when the units in Trivandrum and Bangalore were started, Medical Transcription was a little known industry. In the decade that followed, Accentia ventured into Coding, Billing and Collections in HRCM, but since the change over from traditional medical transcription to EMR (Electronic Medical Records) is happening, we are now looking to capitalise on the huge opportunities that is now open for Healthcare BPO companies by adapting to the changed scenario.

Today Accentia is a Truly Global Company with thousands of talented professionals and operations in Trivandrum, Kochi, Bangalore, Hyderabad and Bhubaneswar in India; Fort Lauderdale, Portland, Oregon, Chicago and New Jersey in the US, London in the UK and Raz AI Khaima in the Middle East.”

36. Perusal of page 31 of the annual report further goes to prove that Accentia owns numerous software products viz. (i) instakare, (ii) instaweb, (iii) instaPMS, (iv) instaScribe etc.. Furthermore,

perusal of the profit & loss account, available at page 43 of the annual report, paper book, goes to prove that segmental financial of this company to work out profitability with respect to ITES segment and software development segment is not available.

37. Hon'ble Delhi High Court in case cited as *Pr.CIT vs. B.C. Management Services (P.) Ltd. – (2018) 403 ITR 45 (Delhi)* has affirmed the findings returned by the Tribunal excluding Accentia as a comparable vis-à-vis routine ITES provider on ground of being engaged in KPO services in health care sector. Moreover, Accentia owns various software products, as discussed in the preceding paras. Even, segmental financials to work out the profitability of Accentia qua ITES segment and software segment are also not available. The Id. TPO has selected Accentia as a comparable even against the directions issued by the Id. DRP that company engaged in KPO services is not to be selected as comparable. So, in these circumstances, we order to exclude Accentia being not a valid comparable.

ACROPETAL TECHNOLOGIES LTD. (SEG.)
(ACROPETAL)

38. TPO has selected Acropetal (segment) which is challenged by the taxpayer on the ground that it is engaged in provision of providing high-end services in hospital management system,

electronic medical records, PACS, diagnostics and workflow management. Perusal of annual report of Acropetal, relevant portion available at page 95 of the annual report paper book, shows that within ITES segment, Acropetal is engaged in health care by providing high end services viz. hospital management system, electronic medical records, PACS, diagnostics and workflow management. So, providing high end health care services require application of specialized knowledge and skill, which otherwise cannot be compared with routine ITES provider.

39. Hon'ble Delhi High Court in ***Rampgreen Solutions P. Ltd. vs. CIT – (2015) 377 ITR 533 (Delhi)*** defined the Knowledge Process Outsourcing (KPO) as a high value added process chain wherein the process are depending on advance skills, domain knowledge and the experience of persons carrying on such processes and as such, is understood as the high end of ITES in terms of value addition. In the ***Rampgreen Solutions P. Ltd. vs. CIT*** (supra), Hon'ble High Court held that a KPO services provider cannot be considered as a valid comparable for benchmarking the international transactions entered into by an entity rendering routine voice call services i.e. ITES services.

40. When it is not in dispute that Acropetal is into providing high end services in health care services and as such, it is a KPO, it

cannot be a valid comparable vis-à-vis taxpayer who is a routine ITES service provider as per the ratio of the judgment in *Rampgreen Solutions P. Ltd. vs. CIT* (supra). So, we order to exclude Acropetal from the final set of comparables.

ECLERX SERVICES LTD. (ECLERX)

41. The taxpayer again challenged the exclusion of Eclerx being engaged in the provision of Knowledge Process Outsourcing (KPO) services as it is into providing data analytics, web analytics, search engine analytics, price and competitive intelligence etc..

42. Perusal of the annual report of Eclerx shows that it is into providing high end KPO services. Services being provided by the Eclerx are highlighted at page 172 of the paper which are extracted as under :-

“ eClerx powers the operations of the Sales & Marketing divisions of some of the largest Fortune / Financial Times / Internet Retailer 500 scale companies globally, augmenting bandwidth to drive greater quality and control to their digital operations, data management and analytics needs. Some of the key Sales & Marketing functions we support include web content management & merchandising execution, web analytics, social media moderation and analytics, search engine analytics & support, CRM platform support, lead generation, customer data management, supply chain and channel analytics, price & catalogue competitive intelligence and broader data collection, cleansing, enriching and reporting.

We work with over 30 Global Fortune 500 scale clients including any of the world's leading High Tech and Industrial Manufacturing & Distributors, Online Retail, Interactive Media & Entertainment, Software Vendors, Travel and Leisure and Financial Services companies.”

43. The ratio of the judgment in *Rampgreen Solutions P. Ltd. vs. CIT* (supra) is applicable to the facts and circumstances of the case in which Eclerx has been specifically ordered to be excluded as a comparable vis-à-vis routine ITES services provider on the ground that Eclerx is into Knowledge Process Outsourcing (KPO) services. So, in these circumstances, we find Eclerx is not a valid comparable, hence ordered to be excluded from the final set of comparables.

ICRA TECHNO ANALYTICS LTD. (ICRA)

44. The taxpayer sought exclusion of I cra by again relying upon *Rampgreen Solutions P. Ltd. vs. CIT* (supra) on the ground that it is engaged in the provision of business intelligence and analytic services. Annual report of I cra, available at page 319 of the paper book, explains the services being rendered by it are as under :-

“The company is engaged in the software development & consultancy, engineering services, web development & hosting and subsequently diversified itself into the domain of business analytics and business process outsourcing.”

45. So, when I cra is into providing software development and high end analytic services, the same cannot be taken as a comparable for benchmarking the international transactions vis-à-

vis the taxpayer who is a routine back office processing services provider. So, again by applying the ratio of ***Rampgreen Solutions P. Ltd. vs. CIT*** (supra), we are of the considered view that Iera being into providing high end services in the nature of turfview analytics, business analytics, sales analytics, etc., and which is also into providing ITES services, it cannot be a valid comparable vis-à-vis taxpayer. So, we order to exclude the same.

INFOSYS B P O LIMITED (INFOSYS BPO)

46. The taxpayer sought to exclude Infosys BPO on ground of high turnover and relied upon the decision rendered by coordinate Bench of the Tribunal in ***Agnity India Technologies Pvt. Ltd. vs. ITO (ITA No.3856/Del/2010)***, subsequently affirmed by Hon'ble Delhi High Court.

47. It is the case of the taxpayer that the TPO has applied turnover criteria in order to select the comparables for benchmarking the international transactions which should be applied both on low and high turnover of the company. Undisputedly, Infosys BPO is having turnover of Rs.1129.11 crores. The taxpayer has given functional profile of Infosys BPO vis-à-vis taxpayer which is extracted for ready perusal as under :-

Parameters	Infosys Ltd.	Assessee
Risk profile	Operates as full fledged risk taking entrepreneurs	Operates as a captive service provider
Nature of services	Provides business process management services as part of the highly integrated strategy followed by the Infosys Group	Provides routine transaction processing services under the guidance
Revenue	Rs.1129.11 crores	Rs.2.60 crores
Ownership of brand/ proprietary software / R&D	Exploits the brand 'Infosys' for soliciting business	Operates as a captive service provider, not undertaking marketing activity

48. So, when we examine the functional profile of Infosys BPO, it is dis-similar to the taxpayer because Infosys BPO is into providing business process management services as against routine ITES being provided by the taxpayer. Moreover, Infosys BPO is operating as a full-fledged risk bearing entrepreneur as against taxpayer which is a captive service provider. So, keeping in view the turnover of Infosys BPO which is Rs.1129.11 crores against Rs.2.60 crores of the taxpayer and Infosys BPO is having a huge brand value with considerable R&D activities, it cannot be a valid comparable vis-à-vis taxpayer.

49. In the similar set of facts, Infosys BPO has been ordered to be excluded by the coordinate Bench of the Tribunal in *Hyundai Motors Engineering India Pvt. Ltd. vs. ITO* (ITA

No.1850/Hyd/2012) and Capital IQ information Systems (India) Pvt. Ltd. (ITA No.124/Hyd/2014).

50. In view of what has been discussed above, we find that Infosys BPO is not a valid comparable vis-à-vis taxpayer, hence ordered to be excluded.

TCS E-SERVE LIMITED (TCS E-SERVE)

51. The taxpayer sought exclusion of TCS E-serve again on the ground that it is into providing Knowledge Process Outsourcing (KPO) services. When we examine the TCS E-serve overview in the annual report, available at page 550 of the annual report paper book, it shows that it is providing a broad range of services that cater to process management requirements for delivery of wide range of financial products and enterprise support function which include financial information processing (data processing); customer care (voice based); business process management and analytics. Though the company is providing BPO services but its analytic services are high end KPO services, which makes it incomparable to the taxpayer which is providing routine BPO services.

52. The taxpayer has specifically relied upon the information available at the website of Reuters (http://in.reuters.com/finance/stocks/company_Profile?symbol=CIGR.BO) to prove that

TCS E-serve is engaged in provision of KPO services which is as under :-

" TCS e-Serve Limited, a part of Tata Consultancy Services (TCS), is a business process services (BPO) provider. The Company delivers business processing services, analytics and insights (KPO) and support services for both data and voice processes. The Company operates across various industry segments, which include banking and financial services industry (BFSI), travel, tourism and hospitality (TTH), and energy and utilities (E&U). The geographic segments of the Company are India, Americas, Europe and Others. The Company is focused on the banking, financial services and Insurance domains. The Company's subsidiaries include TCS e-Serve International Limited and TCS e-Serve America Inc."

53. Furthermore, perusal of the Schedule-O of notes forming part of the finance statements, available at page 620 of the annual report paper book, shows that TCS E-serve partially bears the cost of development of brand TATA by making contribution to Tata Brand Equity Fund in consultation for the right to use the said brand. So, it is apparently clear that TCS E-serve exploited the brand TATA which is a giant company, and is exploiting the goodwill and recognition of the established TATA brand leading to the high volume business and from time to time pricing.

54. So, by applying the ratio laid down by Hon'ble Delhi High Court in *Rampgreen Solutions P. Ltd. vs. CIT* (supra), TCS E-serve being into providing KPO cannot be taken as a valid comparable vis-à-vis the taxpayer.

55. Coordinate Bench of the Tribunal in case cited as ***Bechtel India Pvt. Ltd. vs. DCIT (ITA No.1478/Del/2015)*** has ordered to exclude TCS E-serve as a valid comparable vis-à-vis routine ITES provider by returning following findings :-

“ This company has been selected by the ld. TPO as a comparable. This company undertakes, customer service, transaction processes, collections, risk management, and analytics, and has created a lot of applications which are in the nature of intellectual property in terms of reconciliation software, fund transfers, etc. The company also undertakes software testing and validation activities. Possession of intellectual property rights has to be factored if such a company is to be taken as comparable. This cannot be done unless there is appropriate data. Further, from the TP study we observe that, this company is a wholly owned subsidiary of TCS E serve International Ltd. During the year under consideration, this company has made payments towards use of Tata brand. Consequentially use of the TCS brand has substantially increased the operating profits post acquisition. Hence we are of the opinion that this company cannot be taken as a comparable. We therefore direct to exclude this comparable.”

56. In view of what has been discussed above, we are of the considered view that TCS E-serve being into high end KPO services and is also exploiting brand TATA cannot be a valid comparable vis-à-vis taxpayer which is a routine ITES provider. So, we ordered to exclude the same.

57. In view of our findings, grounds no. 3 to 3.8 qua TP adjustment on account of AMP expenses, appeal filed by the assessee is allowed as per findings returned in preceding paras. However, appeal qua transfer pricing adjustment on account of ITES is allowed for statistical purposes. In view of what has been

discussed above, the AO/TPO is directed to compute the transfer pricing adjustment of international transactions accordingly. Consequently, appeal filed by the taxpayer is partly allowed as per findings given in preceding paras no.28 & 57 and cross objection filed by the Revenue is hereby dismissed.

Order pronounced in open court on this 20th day of December, 2018.

**Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 20th day of December, 2018
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A).
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**