

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No.1285/Bang/2014
Assessment Year : 2009-10

The Deputy Commissioner of Income Tax, Circle 11 (4), Bangalore.	vs.	M/s. Informatica Business Pvt. Ltd., No. 66/1, Bagmane Commerz 02, Bagmane Tech Park, CV Raman Nagar, Bangalore – 560 093. <b>PAN: AABCI0762M</b>
APPELLANT		RESPONDENT

&

**IT (TP) A No. 1294/Bang/2014**

**Assessment Year: 2009-10**

**(By Assessee)**

Assessee by	:	Shri Pravin Kishore Prasad and Shri Umashankar Gautam, Advocates
Revenue by	:	Smt. Kabila .H, JCIT (DR)
Date of hearing	:	26.03.2019
Date of Pronouncement	:	25.04.2019

**ORDER**

*Per Shri A.K. Garodia, Accountant Member*

These are cross appeals filed by the assessee and revenue and these are directed against the order of Id. CIT (A)-IV, Bangalore dated 19.08.2014 for Assessment Year 2009-10.

2. The grounds raised by the assessee in its appeal as per revised and concise grounds of appeal are as under.

*“1. That the order passed by the learned Commissioner of Income Tax (Appeals) - IV, Bangalore (‘CIT(A)’), to the extent prejudicial to the Appellant, is bad in law and liable to be quashed. [corresponding to ground 1]*

*2. That the learned CIT(A) erred in upholding the rejection of*

*Transfer Pricing ('TP') documentation by the Deputy Commissioner of Income-tax - V [Learned Transfer Pricing Officer ('TPO')]/ Deputy Commissioner of Income-tax, Circle 11(4) (Learned Assessing Officer ('AO')) an in making an adjustment to the transfer price of the Appellant in respect of its software development services and customer support services provided to its associated enterprises holding that the international transactions do not satisfy the arm's length principle envisaged under the Income Tax Act, 1961 (the 'Act').[corresponding to ground 2]*

*3. That the Learned CIT(A) erred in upholding the Learned TPO approach of rejecting the Transfer Pricing ("TP") documentation maintained by the Appellant. [corresponding to ground 3]*

*4. That the Learned CIT(A) erred in upholding inclusion of companies [(a) KALS Information Systems Limited, (b) Bodhtree Consulting Limited, (c) Tata Elxsi Limited, (d) Sasken Communication Technologies Limited, (e) Persistent systems Limited, (f) Larsen & Toubro Infotech Limited in Software Development services segment) and (a) Infosys BPO Limited, (b) Accentia Technologies Limited, (c) Cosmic Global Limited, (d) Eclerx Services Limited in Customer Support services Segment)] in the comparability analysis, which are different from Appellant in functions, assets and risk profile and rejection of the companies that are similar to the Appellant, while performing comparability analysis by the Learned TPO and in doing so also erred in ignoring the low risk nature of the software development services and customer support services provided by the Appellant and not providing adjustment on account of risk differential with entrepreneurial comparables, as required while determining the arm's length price of the international transactions of the Appellant. [corresponding to ground 4]*

*5. That the Learned CIT(A) erred in upholding application of different quantitative and qualitative filters by the Learned TPO in respect of the software development services segment and in doing so grossly erred in upholding the Learned TPO's approach of rejecting certain comparable companies identified by the Appellant by applying employee cost greater than 25% of total revenue as a comparability criterion.[corresponding to ground 5(a)]*

*6. That the Learned CIT(A) erred in upholding application of different quantitative and qualitative filters by the Learned TPO in respect of the software development services segment and in doing so grossly erred in upholding the Learned TPO's approach of rejecting certain comparable companies identified by the Appellant by applying export earnings greater than 75% of sales as a comparability criterion ..[corresponding to ground 5(b)]*

*7. That the Learned CIT (A) erred in upholding application of*

*different quantitative and qualitative filters byte Learned TPO in respect of the software development services segment and in doing so grossly erred in upholding the Learned TPO's approach of rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. companies having accounting year other than March31 or companies whose financial statements were for a period other than 12 months). [corresponding to ground 5(c)]*

*8. That the Learned CIT(A) erred in upholding application of different quantitative and qualitative filters byte Learned TPO in respect of the software development services segment and in doing so grossly erred in upholding the Learned TPO's approach of applying the turnover < 1 crore for rejection of comparable companies. [corresponding to ground 5(d)]*

*9. That the Learned CIT (A) erred in upholding application of different quantitative and qualitative filters byte Learned TPO in respect of the customer support services segment and in doing so grossly erred in upholding the Learned TPO's approach of rejecting certain comparable companies identified by the Appellant for having different accounting year (i.e. companies having accounting year other than March31orcompanies whose financial statements were for a period other than 12 months) .. [corresponding to ground 6(a)]*

*10. That the Learned CIT(A) erred in upholding application of different quantitative and qualitative filters byte Learned TPO in respect of the customer support services segment and in doing so grossly erred in Upholding the Learned TPO:s approach of applying the turnover < 1crore for rejection of comparable companies. [corresponding to ground 6(b)]*

*11. That the Learned CIT(A)erred in upholding application of different quantitative and qualitative filters byte Learned TPO in respect of the customer support services segment and in doing so grossly erred in upholding the Learned TPO's approach of rejecting certain comparable companies identified by the Appellant for having diminishing revenues over a period of time, while at the same time rejecting the Appellant's approach of using multiple year data for selecting comparable companies. [corresponding to ground 7]*

*12. That the Learned CIT(A) erred in upholding rejection of the quantitative and qualitative filters applied byte Appellant and in doing so grossly erred in Rejecting certain comparable companies identified by the Appellant by applying export earnings greater than 25% of sales as a comparability criterion. .[corresponding to ground 8(a)]*

*13. That the Learned CIT(A) erred in upholding rejection of the quantitative and qualitative filters applied byte Appellant and in doing so grossly erred in Accepting certain comparable companies rejected*

*by the Appellant by applying exceptional year(s) of operations as a comparability criterion .. [corresponding to ground 8(b)]*

*14. That the learned CIT(A) erred in upholding the learned TPO's approach of not applying multiple year /prior year data for comparable companies while determining the arm's length price and in doing so also erred in using the data as at the time of assessment proceedings, instead of that available during FY2008-09, wherein the Appellant was required to prepare and maintain the TP documentation .. [corresponding to ground 9]*

*15. That the learned CIT(A) erred in upholding the rejection of 2 comparable companies in respect of the software development services segment, Thinksoft Global Services Limited and F C S Software Solutions Limited, by the learned TPO by stating that the working capital adjustment resulted in reduction of profit margins by more than 4%.. [corresponding to ground 10]*

*16. That the Learned CIT(A) erred in upholding the action of the Learned AO/ Learned TPO in limiting the working capital adjustment while determining the arm's length price .. [corresponding to ground 11]*

*17. That the Learned CIT(A) erred in upholding the action of the Learned TPO in inclusion of companies with huge turnover as comparable to the Appellant. . [corresponding to ground 12]*

*18. That the Appellant prays to allow the benefit of range of +/-5% as provided in proviso to Section 92C(2) of the Act, while determining the arm's length price .. [corresponding to ground 13]*

*19. That the Appellant prays to compute the arm's length price by considering correct operating margins of some of the comparable companies. [corresponding to ground 14]*

*20. The Learned AO and consequently the Learned CIT(A) has erred in law by not considering the export receipts for the period January to March 2009 as part of the export turnover while computing deduction under Section 10A of the Act on the pretext that the Appellant was unable to produce the corresponding softex forms. [corresponding to ground 15]*

*21. The Learned AO and consequently the Learned CIT(A) has erred in facts, by not considering the softex form for March 2009 which was submitted by the Appellant during the assessment proceedings.[corresponding to ground 16]*

*That the Appellant craves leave to add to and / or alter, amend, rescind or modify the grounds taken hereinabove before or at the time*

*of hearing of this appeal.”*

3. Similarly, the grounds raised by the revenue in its appeal are as under.

*“1. The order of the CIT (A) is opposed to law and the facts and circumstances of the case.*

*2. The CIT(A) erred in holding that the 10 comparables examined by him shall form the final comparables on which the ALP adjustment needs to be carried out by the TPO without examining the inclusion / exclusion of M/s.InfosysLtd., which was included in the final set of comparables of the TPO.*

*3. The CIT (A) erred in holding that foreign exchange loss / gain is operating in nature without appreciating that such loss / gain though attributable to the operating activity is not derived from the operating activity and without ascertaining the nexus of the forex gain / loss with the business activity of the assessee in both the software development and ITES sectors.*

*4. The CIT (A) erred in concluding in both the software development and ITES sectors that forex gain / loss are to be treated as operating in nature without appreciating that though they may be incidental to the operating activity, they cannot be deemed as operating in nature since, they are not critical to operational activities of the business conducted by the assessee.*

*5. The CIT (A) erred in directing the TPO to decide the case of the assessee in both the software development and ITES sectors by applying the principles emerging from the orders of the Delhi Bench of the Hon'ble Tribunal in Haworth (India) Pvt. Ltd. v Deputy Commissioner of Income-tax 11 ITR(Trib) 757 and the Bangalore Bench of the Hon'ble Tribunal in Trilogy E-Business Software v Deputy Commissioner of Income-tax 23 ITR(Trib) 464 without appreciating that in transfer pricing every case is unique and requires to be decided independently and that the directions issued are, beyond the mandate of the provisions of Section 251(1)(a) of the I.T. Act which does not empower the CIT(A) to set aside the issue.*

*6. The learned CIT(A) erred in law as well as facts in directing the TPO to exclude the comparables having export sales less than 75% of the operating revenue for ITES segment without appreciating that the assessee did not object to the applicability of export earning filter at 25% in the ITES sector which was put across to the assessee in the show cause notice.*

*7. The CIT(A) erred in not appreciating the fact that if any filter or criteria applied by the assessee is accepted or if any filter or criteria applied by the TPO is relaxed, the entire accept / reject matrix changes*

*resulting in a new set of comparables including those comparables which are neither taken by the assessee or the TPO and which do not find a place in the order under Section 92CA.*

*8. The CIT(A) erred in directing the AO to follow the ratio laid down by the Hon'ble Court in the case of Tata Elxsi Limited 349 ITR 98 and exclude the telecommunication charges / freight charges incurred in foreign currency from the total turnover also while computing the deduction u/s 10A of the I.T. Act as the decision of the High Court is binding, without appreciating the fact that there is no provision in Section 10A that such expenses should be reduced from the total turnover also, as clause (iv) of the explanation to Section 10A provides that such expenses are to be reduced only from the export turnover.*

*9. The CIT(A) erred in not appreciating the fact that the jurisdictional High Court's decision in the case of Tata Elxsi Limited 349 ITR 98 has not been accepted by the department and an appeal has been filed before the Hon'ble Supreme Court.*

*10. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored.*

*11. The appellate craves to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal."*

4. At the very outset, it was submitted by Id. AR of assessee that out of various grounds raised by the assessee in its appeal, the assessee is pressing only ground nos. 4, 15, 20 and 21 and the remaining grounds are not pressed and out of the ground no. 4 also, the assessee is not pressing regarding exclusion of one comparable company i.e. KALS Information Systems Limited. Accordingly these grounds i.e. 1,2,3, part of Ground No. 4,5 to 14 & 16 to 19 are rejected as not pressed. Thereafter he submitted that as per ground no. 4 of the assessee's appeal, the assessee is making request for exclusion of five comparables i.e.
- i) Bodhtree Consulting Limited
  - ii) Tata Elxsi Limited
  - iii) Sasken Communication Technologies Limited
  - iv) Persistent Systems Limited
  - v) Larsen & Toubro Infotech Limited in Software Development services segment

5. Regarding the second segment i.e. ITES segment, the assessee is requesting for exclusion of four comparables i.e.
  - i) Infosys BPO Limited
  - ii) Accentia Technologies Limited
  - iii) Cosmic Global Limited
  - iv) Eclerx Services Limited
6. He also submitted that in the appeal of the revenue, the revenue is aggrieved regarding exclusion of M/s. Infosys Ltd. as per ground no. 2 of the appeal filed by the revenue. He submitted that the grievance of the revenue is this that CIT(A) has excluded Infosys Ltd. without any discussion. He submitted that even if while deciding the appeal of the revenue, it is held that Infosys Ltd. is not validly excluded by CIT(A) because of this reason that there is no discussion in the order of CIT(A) on this issue, it is the request of the assessee that the exclusion of Infosys Ltd. should be upheld by way of a speaking and reasoned order. He submitted that therefore, the assessee's request is for exclusion of six comparables in software development segment and regarding the basis of assessee's request for exclusion of these comparables, he submitted that Id. AR of assessee has filed a chart in this regard and reliance is placed on the Tribunal order rendered in the case of M/s. Trianz Holdings Pvt. Ltd. Vs. DCIT in IT (TP)A No. 199/Bang/2014 dated 25.01.2019, copy available on pages 3280 to 3298 in case law compendium. It was pointed out that for the exclusion of these six comparables in software development segment, it was held that all these six comparables should be excluded and while holding so, the Tribunal has followed another Tribunal order rendered in the case of Planet Online Pvt. Ltd. Vs. ACIT in ITA No. 464/Hyd/2014 dated 30.01.2015 and relevant Para of that Tribunal order has been reproduced by the Tribunal. In reply, the Id. DR of revenue supported the orders of authorities below. She also submitted that Id. CIT(A) has excluded Infosys Ltd. without any discussion and hence, it should be held that exclusion of Infosys Ltd. is not justified. She also drawn our attention to page no. 10 of the TPO's order and pointed out that a specific finding has been given by the TPO that during 1997 to 2010, the turnover of Infosys Ltd. has increased 150 times.

But the operating margin was in the range of 35% to 40%. On this basis, the TPO has drawn to this conclusion that turnover has no linkage with the margins. She submitted that therefore, Infosys Ltd. should not be excluded from the list of comparables.

7. We have considered the rival submissions. First of all, we decide regarding this aspect as to whether the exclusion of Infosys Ltd. by CIT(A) is proper or not because as per ground no. 2 of revenue's appeal, this is the grievance of the revenue that Id. CIT(A) has excluded M/s. Infosys Ltd. without any discussion. We find that it is noted by CIT (A) that in Para 8.2 on page no. 4 of his order that TPO selected 11 comparables including Infosys Ltd. But while deciding the issue about exclusion of some comparables as per Para 12.2.5 of his order, the Id. CIT (A) has examined only 10 comparables excluding Infosys Ltd. and thereafter, in Para 12.2.6 of his order, it is held that only 10 comparables excluding Infosys Ltd. shall form the final comparables of which the ALP adjustment needs to be carried out by the TPO. Hence, it is seen that Infosys Ltd. stood excluded without any discussion and such exclusion cannot be approved. Hence, we hold that exclusion of Infosys Ltd. by CIT (A) is not proper. But in the facts of present case, instead of restoring back to the file of CIT(A) for deciding about exclusion of Infosys Ltd. by way of a speaking and reasoned order, we feel it proper to decide about the exclusion of Infosys Ltd. at our level because we find that the turnover of Infosys Ltd. is Rs. 20,264 Crores and the turnover of assessee company is only Rs. 34 Crores and moreover, as per Para 26.2 of the Tribunal order rendered in the case of Planet Online Pvt. Ltd. Vs. ACIT (supra), as reproduced in Para no. 15 of the Tribunal order rendered in the case of M/s. Trianz Holdings Pvt. Ltd. Vs. DCIT (supra), it was held that Infosys Ltd. has been considered functionally different from a company providing simple software development services as this company owns significant intangibles and has huge revenues from software products. Hence it is seen that Infosys Ltd. is being excluded in so many cases not on this basis alone that this company has huge turnover but this is also one of the reasons for excluding Infosys Ltd. that this company owns significant intangibles and has huge revenues from software products and therefore, it

cannot be compared with company providing simple software development services. In the case of M/s. Trianz Holdings Pvt. Ltd. Vs. DCIT (supra), it was noted by the Tribunal in Para no. 16 that this company was engaged in providing software development services to its AE. In the present case also, we are examining the exclusion of these six comparables in respect of software development services segment of the assessee. This is also seen that this Tribunal order is for same Assessment Year i.e. Assessment Year 2009-10 and hence, in our considered opinion, this Tribunal order is applicable in the present case particularly when no difference in facts could be pointed out by Id. DR of revenue. For ready reference, we reproduce Para nos. 14 to 16 of this Tribunal order from pages 3288 to 3298 of case law compendium. The same are as under.

*“14. Remaining grounds i.e. 12 to 15 are in respect of assessee’s claim for exclusion of various comparables i.e.*

- 1) Bodhtree Consulting Ltd.*
- 2) Tata Elxsi Ltd. (segment)*
- 3) Sasken Communication Technologies Ltd. (segment)*
- 4) Persistent Systems Ltd.*
- 5) Mindtree Ltd. (segment)*
- 6) Larsen and Toubro Infotech Ltd.*
- 7) Infosys Ltd.*

*In course of hearing before us, it was submitted by Id. AR of assessee that exclusion of comparable Mindtree Ltd. as per ground no. 14 raised by assessee is not pressed and accordingly this part of ground no. 14 is rejected as not pressed. In respect of exclusion of remaining comparables as requested by the assessee, it was submitted in the chart that the assessee’s request for exclusion of these five comparables i.e. 1) Bodhtree Consulting Ltd., 2) Infosys Ltd., 3) Persistent Systems Ltd., 4) Sasken Communication Technologies Ltd. and 5) Tata Elxsi Ltd. is as per the Tribunal order rendered in the case of Planet Online Pvt. Ltd. Vs. ACIT in ITA No. 464/Hyd/2014 dated 30.01.2015 copy of which is available in Paper Book no. II on pages 315 to 341. In particular, our attention was drawn to Para nos. 10.1 and 10.2 of this Tribunal order. It is also pointed out that in this Tribunal order, the Tribunal has followed another Tribunal order rendered in the case of CISCO Systems (India) Pvt. Ltd. Vs. DCIT in IT(TP)A No. 130/Bang/2014 dated 14.08.2014. It was submitted that Para 10.3 of this Tribunal order is relevant regarding exclusion of Persistent Systems Pvt. Ltd. Para no. 10.10 of this Tribunal order is relevant regarding exclusion of Sasken Communication Technologies Ltd. Regarding Larsen & Toubro Infotech Ltd., it was submitted that this comparable company fails turnover filter because onsite revenue*

*of this company is only about 55%. The ld. DR of revenue supported the order of AO and DRP.*

*15. We have considered the rival submissions. First of all, we reproduce Para nos. 10.1, 10.2, 10.3 and 10.10 of the Tribunal order rendered in the case of Planet Online Pvt. Ltd. Vs. ACIT (supra).*

*“10.1 As far as comparables at Sl. Nos. 1 to 5 are concerned, the issues are more or less covered by decisions of the coordinate benches for the self-same AY i.e. 2009-10. In case of M/s CISCO Systems (India) Pvt. Ltd. Vs. DCIT, IT(TP) No. 130/Bang/14 dated 14/08/14, the coordinate bench after examining in detail, excluded Bodhtree consulting Ltd., Infosys Ltd., Kals Information Systems and Tata Elxsi Ltd. (Seg.) The relevant observations of the ITAT, Bangalore Bench in respect to each of the aforesaid companies are reproduced hereunder for the sake of clarity:*

*“26.1 Bodhtree Consulting Ltd.:- As far as this company is concerned, it is not in dispute that in the list of comparables chosen by the assessee, this company was also included by the assessee. The assessee, however, submits before us that later on it came to the assessee’s notice that this company is not being considered as a comparable company in the case of companies rendering software development services. In this regard, the ld. counsel for the assessee has brought to our notice the decision of the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. v. ITO, ITA No.7633/Mum/2012, order dated 6.11.2013. In this case, the Tribunal followed the decision rendered by the Mumbai Bench of the Tribunal in the case of Wills Processing Services (I) P. Ltd., ITA No.4547/Mum/2012. In the aforesaid decisions, the Tribunal has taken the view that Bodhtree Consulting Ltd. is in the business of software products and was engaged in providing open & end to end web solutions software consultancy and design & development of software using latest technology. The decision rendered by the Mumbai Bench of the Tribunal in the case of Nethawk Networks Pvt. Ltd. (supra) is in relation to A. Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it prevailed in AY 08-09 as far as this comparable company is concerned. Following the aforesaid decision of the Mumbai Bench of the Tribunal, we hold that Bodhtree Consulting Ltd. cannot be regarded as a comparable. In this regards, the fact that the assessee had itself proposed this company as comparable, in our opinion, should not be the basis on which the said company should be retained as a comparable, when factually it is shown that the said company is a software product company and not a software development services company.*

*26.2 Infosys Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered to be functionally different from a company providing simple software development services, as this company owns significant intangibles and has huge revenues from software products. In this regard, we find that the Bangalore Bench of the Tribunal in the case of M/s. TDPLM Software Solutions Ltd. v. DCIT, ITA No.1303/Bang/2012, by order dated 28.11.2013 with regard to this comparable has held as follows:-*

*“11.0 Infosys Technologies Ltd.*

*11.1 This was a comparable selected by the TPO. Before the TPO, the assessee objected to the inclusion of the company in the set of comparables, on the grounds of turnover and brand attributable profit margin. The TPO, however, rejected these objections raised by the assessee on the grounds that turnover and brand aspects were not materially relevant in the software development segment.*

*11.2 Before us, the learned Authorised Representative contended that this company is not functionally comparable to the assessee in the case on hand. The learned Authorised Representative drew our attention to various parts of the Annual Report of this company to submit that this company commands substantial brand value, owns intellectual property rights and is a market leader in software development activities, whereas the assessee is merely a software service provider operating its business in India and does not possess either any brand value or own any intangible or intellectual property rights (IPRs). It was also submitted by the learned Authorised Representative that :-*

*(i) the co-ordinate bench of this Tribunal in the case of [24/7 Customer.Com Pvt. Ltd.](#) in ITA No.227/Bang/2010 has held that a company owning intangibles cannot be compared to a low risk captive service provider who does not own any intangible and hence does not have an additional advantage in the market. It is submitted that this decision is applicable to the assessee's case, as the assessee does not own any intangibles and hence Infosys Technologies Ltd. cannot be comparable to the assessee;*

*(ii) the observation of the ITAT, Delhi Bench in the case of Agnity India Technologies Pvt. Ltd. in ITA No.3856 (Del)/2010 at Para 5.2 thereof, that Infosys Technologies Ltd. being a giant company and market leader assuming all risks leading to higher profits cannot be considered as comparable to captive service providers assuming limited risk ;*

*(iii) the company has generated several inventions and filed for many patents in India and USA ;*

*(iv) the company has substantial revenues from software products and the break up of such revenues is not available ;*

*(v) the company has incurred huge expenditure for research and development;*

*(vi) the company has made arrangements towards acquisition of IPRs in 'AUTOLAY', a commercial application product used in designing high performance structural systems.*

*In view of the above reasons, the learned Authorised Representative pleaded that, this company i.e. Infosys Technologies Ltd., be excluded from the list of comparable companies.*

*11.3 Per contra, opposing the contentions of the assessee, the learned Departmental Representative submitted that comparability cannot be decided merely on the basis of scale of operations and the brand attributable profit margins of this company have not been extraordinary. In view of this, the learned Departmental Representative supported the decision of the TPO to include this company in the list of comparable companies.*

*11.4 We have heard the rival submissions and perused and carefully considered the material on record. We find that the assessee as brought on record sufficient evidence to establish that this company is functionally dis-similar and different from the assessee and hence is not comparable and the finding rendered in the case of Trilogy E-Business Software India Pvt. Ltd. (supra) for Assessment Year 2007-08 is applicable to this year also. We are inclined to concur with the argument put forth by the assessee that Infosys Technologies Ltd is not functionally comparable since it owns significant intangible and has huge revenues from software products. It is also seen that the breakup of revenue from software services and software products is not available. In this view of the matter, we hold that this company ought to be omitted from the set of comparable companies. It is ordered accordingly."*

*The decision rendered as aforesaid pertains to A. Y. 2008-09. It was affirmed by the learned counsel for the Assessee that the facts and circumstances in the present year also remains identical to the facts and circumstances as it*

*prevailed in AY 08-09 as far as this comparable company is concerned. Respectfully following the decision of the Tribunal referred to above, we hold that Infosys Ltd. be excluded from the list of comparable companies.*

*26.3 KALS Information Systems Ltd.:- As far as this company is concerned, it is not in dispute before us that this company has been considered as not comparable to a pure software development services company by the Bangalore Bench of the Tribunal in the case of M/s. Trilogy e-business Software India Pvt. Ltd. (supra). The following were the relevant observations of the Tribunal:-*

*“(d) KALS Information Systems Ltd.*

*46. As far as this company is concerned, the contention of the assessee is that the aforesaid company has revenues from both software development and software products. Besides the above, it was also pointed out that this company is engaged in providing training. It was also submitted that as per the annual report, the salary cost debited under the software development expenditure was Rs. 45,93,351. The same was less than 25% of the software services revenue and therefore the salary cost filter test fails in this case. Reference was made to the Pune Bench Tribunal’s decision of the ITAT in the case of Bindview India Private Limited Vs. DCI, ITA No. ITA No 1386/PN/10 wherein KALS as comparable was rejected for AY 2006-07 on account of it being functionally different from software companies. The relevant extract are as follows:*

*“16. Another issue relating to selection of comparables by the TPO is regarding inclusion of Kals Information System Ltd. The assessee has objected to its inclusion on the basis that functionally the company is not comparable. With reference to pages 185-186 of the Paper Book, it is explained that the said company is engaged in development of software products and services and is not comparable to software development services provided by the assessee. The appellant has submitted an extract on pages 185-186 of the Paper Book from the website of the company to establish that it is engaged in providing of I T enabled services and that the said company is into development of software products, etc. All these aspects have not been factually rebutted and, in our view, the said concern is liable to be excluded from the final set of comparables, and thus on this aspect, assessee succeeds.”*

*Based on all the above, it was submitted on behalf of the assessee that KALS Information Systems Limited should be rejected as a*

*comparable.*

*47. We have given a careful consideration to the submission made on behalf of the Assessee. We find that the TPO has drawn conclusions on the basis of information obtained by issue of notice u/s. 133(6) of the Act. This information which was not available in public domain could not have been used by the TPO, when the same is contrary to the annual report of this company as highlighted by the Assessee in its letter dated 21.6.2010 to the TPO. We also find that in the decision referred to by the learned counsel for the Assessee, the Mumbai Bench of ITAT has held that this company was developing software products and not purely or mainly software development service provider. We therefore accept the plea of the Assessee that this company is not comparable.”*

*Following the aforesaid decision of the Tribunal, we hold that KALS Information Systems Ltd. should not be regarded as a comparable.*

*26.4 Tata ElxsiLtd.:- As far as this company is concerned, it is not in dispute before us that in assessee’s own case for the A. Y. 2007-08, this company was not regarded as a comparable in its software development services segment in ITA No. 1076/Bang/201 1, order dated 29.3.2013. Following were the relevant observations of the Tribunal:-*

## *II. UNREASONABLE COMPARABILITY CRITERIA :*

*19. The learned Chartered Accountant pleaded that out of the six comparables shortlisted above as comparables based on the turnover filter, the following two companies, namely (i) Tata Elxsi Ltd; and (ii) M/s. Flextronics Software Systems Ltd., deserve to be eliminated for the following reasons :*

*(i) Tata Elxsi Ltd., : The company operates in the segments of software development services which comprises of embedded product design services, industrial design and engineering services and visual computing labs and system integration services segment. There is no sub-services break up/information provided in the annual report or the databases based on which the margin from software services activity only could be computed. The company has also in its response to the notice u/s. 133(6) stated that it cannot be considered as comparable to any other software services company because of its complex nature. Hence, Tata Elxsi Ltd., is to be excluded from the list of comparables.*

*(ii) Flextronics Software Systems Ltd. : The learned TPO*

*has considered this company as a comparable based on 133(6) reply wherein this company reflected its software development services revenues to be more than 75% of the "software products and services" segment revenues. Flextronics has a hybrid revenue model and hence should be rejected as functionally different. Based on the information provided under "Revenue recognition" in its annual report, it can be inferred that the software services revenues are earned on a hybrid revenue model, and the same is not similar to the regular models adopted by other software service providers. The learned representative pleaded that a regular software services provider could not be compared to a company having such a unique revenue model, wherein the revenues of the company from software/product development services depends on the success of the products sold by its clients in the marketplace. Hence, it would be inappropriate to compare the business operations of the assessee with that of a company following hybrid business model comprising of royalty income as well as regular software services income, for which revenue break-up is not available. He finally submitted that this was a good reason to exclude this company also from the list of comparables.*

*20. On the other hand, the learned DR supported the order of the lower authorities regarding the inclusion of Tata Elxsi and Flextronics Software Systems Ltd., in the list of comparables. He reiterated the contents of Para 14.2.25 of the TPO's order. He also read out the following portion from the TPO's order:*

*"Thus as stated above by the company, the following facts emerge:*

*1. The company's software development and services segment constitutes three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs.*

*2. The product design services sub-segment is into embedded software development. Thus this segment is into software development services.*

*3. The contribution of the embedded services segment is to the tune of Rs.230 crores in the total segment revenue of Rs.263 crores. Even if we consider the other two sub-segments pertain to IT enabled services, the 87.45% (>75%) of the segment's revenues is from software development services.*

*4. This segment qualifies all the filters applied by the TPO."*

*Regarding Flextronics Software Systems, the following extract from page 143 of TPO's order was read out by him as his submissions :*

*"It is very pertinent to mention here that the company was considered by the taxpayer as a comparable for the preceding assessment year i.e., AY 2006-07. When the same was accepted by the TPO as a comparable, the same was not objected to it by the taxpayer. As the facts mentioned by the taxpayer are the same and these were there in the earlier FY 2005-06, there is no reason why the taxpayer is objecting to it. How the company is functionally similar in the earlier FY 2005-06 but the same is not functionally similar for the subsequent FY 2006-07 even when no facts have been changed from the preceding year. Thus the taxpayer is arguing against this comparable as the company was not considered as a comparable by the taxpayer for the present FY 2006-07."*

*21. We have heard the rival submissions and considered the facts and materials on record. After considering the submissions, we find that Tata Elxsi and Flextronics are functionally different from that of the assessee and hence they deserve to be deleted from the list of six comparables and hence there remains only four companies as comparables, as listed below:"*

*26.5. Following the aforesaid decision of the Tribunal, we hold that M/S.TataElxsi Ltd. should not be regarded as a comparable."*

*10.2 ITAT, Hyderabad Bench following the aforesaid decision of the ITAT, Bangalore Bench also excluded these four companies in case of M/s Kenexa Technologies Pvt. Ltd. Vs. DCIT in ITA No. 243/Hyd/2014 dt. 14/11/2014. Respectfully following the decisions of the ITAT, we direct AO/TPO to exclude these four companies. As far as Comp-U Learn Global Tech India Ltd. is concerned, ITAT, Hyderabad Bench in case of M/s Kenexa Technologies Pvt. Ltd. Vs. DCIT (supra) observed as under:*

*"39. The assessee submitted before the DRP that Comp-U-Learn Tech India Ltd. was engaged in the development of new software (product development) (page 7 of the Annual Report) in ITES call centre and BPO services (page 11 of Annual Report). It was further submitted that schedule XIII of the Annual Report shows software development expenditure at only 25% of the total expenditure. The TPO extracted the 133(6) notice and held that the company has*

*nil onsite revenue and satisfied all the filters applied by the TPO. We are of the opinion that some more analysis has to be done and we direct the TPO to look into the financial statement of the company and also provide an opportunity to the assessee to submit relevant details to substantiate its claim that Comp-U-L earn Tech India Ltd. is not a comparable company.”*

*Consistent with the view expressed by the coordinate bench, we also remit the issue of comparability of this company to AO/TPO with similar directions.*

*10.3 As far as Persistent Systems Pvt. Ltd. is concerned, it is the contention of the learned AR that this company cannot be a comparable as it is engaged in development of software product and product designing. On a perusal of the extracts of annual report of this company for the FY 2008-09 submitted by ld. AR, it is noticed that the company has claimed that it was formed mainly to provide software development services. However, the P&L account for the year ended 31/03/2009, a copy of which has been submitted before us, indicates that it has shown income from sale of software services as well as products. Therefore, unless segmental details are available, the company cannot be treated as comparable. Moreover, in case of M/s 3DPLM Software Solutions Ltd. Vs. DCIT, IT(TP) No. 1303/Bang/2012, the ITAT Bangalore Bench held as under:*

*“We have heard the rival submissions and perused and carefully considered the material on record. It is seen from the details on record that this company i.e. Persistent Systems Ltd., is engaged in product development and product design services while the assessee is a software development services provider. We find that, as submitted by the assessee, the segmental details are not given separately. Therefore, following the principle enunciated in the decision of the Mumbai Tribunal in the case of Telecordia Technologies India Pvt. Ltd. (supra) that in the absence of segmental details / information a company cannot be taken into account for comparability analysis, we hold that this company i.e. Persistent Systems Ltd. ought to be omitted from the set of comparables for the year under consideration. It is ordered accordingly.”*

*Though, the aforesaid finding of the coordinate bench relates to the AY 2008-09, but, in our view, it will also equally apply to AY under consideration as facts are identical. Therefore, respectfully following the view expressed by the coordinate bench, we exclude this company*

*as comparable.”*

*16. We find that this Tribunal order is for the same Assessment Year i.e. Assessment Year 2009-10 and in that case also, this company was engaged in providing software development services to its AE and hence, it is seen that the business profile of assessee is similar and Assessment Year is same and therefore, we hold that this Tribunal order is relevant in the present case. As per Para nos. 10.1 and 10.2 of this Tribunal order in that case, the Tribunal has excluded 3 comparables i.e. Bodhtree Consulting Ltd., Infosys Ltd. and Tata Elxsi Ltd. In Para 10.3 of this order, the Tribunal in that case has excluded M/s. Persistent Systems Pvt. Ltd. and as per Para 10.10 of that Tribunal order, another comparable M/s. Sasken Communication Technologies Ltd. was excluded. Respectfully following this Tribunal order, these five comparables i.e. 1) Bodhtree Consulting Ltd., 2) Infosys Ltd., 3) Persistent Systems Ltd., 4) Sasken Communication Technologies Ltd. and 5) Tata Elxsi Ltd. are excluded. Regarding assessee's request for exclusion of Larsen & Toubro Infotech Ltd., we find that regarding this comparable company, page no. 24 of the DRP directions is relevant. We find that on page no. 24 of its directions, it is noted by DRP that this was the claim of the assessee before DRP that turnover of this company is Rs. 2081.49 Crores whereas the assessee's turnover is Rs. 33.94 Crores. It was also the objection before DRP that about 55% of total exports of this company are from onsite services whereas in the present case, the transactions with the AE are on offshore model. Regarding high turnover of this company Larsen and Toubro Infotech Ltd. of Rs. 2081.49 Crores as against turnover of assessee company of Rs. 33.94 Crores and in view of this fact that 55% of total exports in that case are from onsite services whereas in the present case the export to AE is on offshore model, we find force in the contention of ld. AR of assessee that this is not a good comparable and therefore, we direct the AO / DRP to exclude this comparable Larsen and Toubro Infotech Ltd. also. Hence these six comparables are excluded. Accordingly ground nos. 12 and 13 are allowed and ground no. 14 is partly allowed.”*

8. We have gone through these paras of the Tribunal order and we find that in the facts of present case, this Tribunal order is applicable and in this Tribunal order, exclusion of following six comparables is approved.

- i) Bodhtree Consulting Ltd.
- ii) Infosys Ltd.
- iii) Persistent Systems Ltd.
- iv) Sasken Communication Technologies Ltd.
- v) Tata Elxsi Ltd.
- vi) Larsen and Toubro Infotech Ltd.

Respectfully following this Tribunal order, we hold that in the present case also, these six comparables should be excluded from the final list of comparables.

9. Now we discuss and decide about the assessee's request for exclusion of four comparables in ITES segment. As per the chart filed by the assessee in respect of this request for exclusion of four comparables in ITES segment, reliance has been placed on Tribunal order rendered in the case of Target Corporation India Pvt. Ltd. Vs. ACIT in IT(TP)A Nos. 184 & 228/Bang/2014 dated 31.08.2017, copy available on pages 3181 to 3201 of case law compendium and in particular, our attention was drawn to Para nos. 12 and 13 of this Tribunal order available on pages 3192 to 3201 of case law compendium. The Id. DR of revenue supported the orders of authorities below.
10. We have considered the rival submissions. For ready reference, we reproduce paras 12 and 13 of this Tribunal order which read as under.

*“12.Regarding exclusion of four comparables in ITES segment 1) Accentia Technologies Ltd., 2) Infosys BPO Ltd., 3) Cosmic Global Ltd. and 4) Eclerx Services Ltd., we reproduce paras 11.1 to 11.4 of the tribunal order rendered in the case of e4e Business Solutions India Pvt. Ltd. vs. DCIT in IT (TP) A No. 1845/bang/2013 dated 10.11.2015 copy on pages 49 to 80 of case law compilation and relevant pages being pages 61 to 75. These paras are as under:-*

**“11.1 Accentia Technologies Ltd.**

*The learned AR of the assessee has submitted that though the TPO has recorded the business profile of the assessee, however, the international transactions of the assessee are carried out only in respect of service of contact centre outsourcing to its AE as per the service agreement. The learned AR of the assessee has referred to Annual report of Accentia Technologies Ltd., and submitted that this company has acquired M/s.Oak Technologies Inc, USA during the year under consideration and therefore, there is an extraordinary event of acquisition of another company. He has thus submitted that in view of the extraordinary event of acquisition, this company cannot be considered as a good comparable of the assessee. Apart from this objection, learned AR of the assessee has submitted that even otherwise this company is not functionally comparable with the assessee so far as services provided to the AE. He has referred to various business transactions and services provided by Accentia Technologies Ltd., and submitted that this company is in the various*

*segments of activities like medical transcription, medical coding, medical billing, etc. The activity of medical transcription and medical coding is entirely different from the service of contact centre service provided by the assessee to its AE and therefore, this company cannot be considered as functionally comparable with the assessee. The learned AR of the assessee has referred to the revenue earned by the said company and submitted that substantial revenue has been earned by the said company from the business activity of medical transcription apart from billing and collection as well as medical coding activity.*

- (i) *On the other hand, learned Departmental Representative has submitted that this company satisfies the filter test applied by the TPO for selecting companies in the category of Information Technology Service (ITES) company. The assessee is also engaged in the activity of providing ITeS to its AE and therefore, both the assessee as well as Accentia Technologies Ltd., are engaged in the similar business activity. He has referred to the findings of the TPO and the DRP and submitted that the DRP has rejected the objections raised by the assessee against this company. Therefore, this company is a good comparable for determination of the ALP in respect of international transactions of the assessee.*
- (ii) *We have considered the rival submissions as well as relevant material on record. The first objection has been raised by the learned AR of the assessee on account of extraordinary event of acquisition/purchase of business by Accentia Technologies Ltd., whereby M/s. Oak Technologies Inc, USA has been acquired by this company during the year under consideration. Though the extraordinary event of merger or acquisition, if influenced the business as well as the revenue of a company then said company is not considered as a good comparable for the purpose of determination of the ALP however, in this case, it is not clear from the Annual Report whether the business of M/s. Oak Technologies Inc has been acquired and merged with the said company during the year under consideration. It appears that Accentia Technologies Ltd., has purchased up to 96% of the share holding of M/s. Oak Technologies. If it is only a transaction of purchase of shares of the said company then it may be a case of purchase of ongoing business and may not be a case of merging the same with the business of Accentia Technologies Ltd. In the absence of the relevant fact that the business of the said company has been merged with Accentia Technologies Ltd., it may be a case of acquiring the shares and M/s. Oak Technologies still remains an independent entity and business activity. Therefore, in the*

*absence of complete relevant facts, it cannot be held that the so-called acquisition of M/s. Oak Technologies can be considered as an extraordinary event having impact on the revenue as well as business activity of Accentia Technologies Ltd. Accordingly, this argument of the learned AR of the assessee is rejected for want of complete facts.*

- (iii) *As regards the functional dissimilarity, we note that Accentia Technologies Ltd is engaged in diversified activity of medical transcription, medical coding, billing, receivable management. Thus it is clear that the said company is engaged in the healthcare activity and providing BPO service in the healthcare sector, that too by providing specific services of medical transcription, medical coding, medical billing etc. We note that these activities are quite different from the service of contact centre provided by the assessee to its AE which is purely in the nature of call centre. Therefore, we are of the view that the company Accentia Technologies Ltd cannot be considered as a functionally comparable company with the services provided by the assessee to its AE. The TPO is directed to exclude this company from the set of comparables.*

### **11.2 Eclerx Services Ltd.**

*The learned AR of the assessee has submitted that this company is engaged in the high-end services and therefore, this company is basically a KPO and not a BPO. He has referred to Annual Report of this company at page 26 of the paper book -II and submitted that as it is clear from the Annual Report that this company is a knowledge process outsourcing (K. P. O) providing data analytics and data process solutions to global enterprise clients. This company supports core and complex activities for its clients using proprietary processes and a scalable offshore delivery model. This company has access to the capital market and therefore, this company is a public listed KPO company in India. The company is also engaged in consulting services and process outsourcing as well as in the activity of process re-engineering and automation apart from middle office and back office support to capital market. Therefore, keeping in the diversified high-end services, this company cannot be considered as functionally comparable with the assessee. In support of his contention, he has relied upon the decision of the Special Bench of the Mumbai Tribunal in the case of Maersk Global Centres (India) (P.) Ltd. v. Asstt. CIT [2014] 43 taxmann.com 100/147 ITD 83.*

- (i) *On the other hand, learned Departmental Representative has submitted that this company is undisputedly in the business of ITeS and therefore, the nomenclature that of KPO will not make it functionally*

*different from the assessee. He has relied upon the orders of the authorities below.*

- (ii) *We have considered the rival submissions as well as relevant material on record. We find that the company Eclerx Services Ltd. is engaged in diversified activity of providing services including analytic services and data process solutions to its global clients. The service provided by Eclerx Services Ltd., is in various areas including capital market and therefore, the services are in the nature of consultancy and end to end support through trade centre including trade confirmation, settlement, transaction, maintenance and analytic and reporting. Thus it is apparent from the nature of the activity of this company that it is not providing a simple service of data processing but it is engaged in the activity of providing high-end services involving decision making analysis which requires thought process and evaluation of various facts and factors. Functional comparability of this company with that of simple BPO's service providing company has been examined by the Special Bench in the case of Maersk Global Centres (India) (P.) Ltd. (supra) in paras.82 & 83 as under :*

*82. In so far as M/s eClerx Services Limited is concerned, the relevant information is available in the form of annual report for financial year 2007-08 placed at page 166 to 183 of the paper book. A perusal of the same shows that the said company provides data analytics and data process solutions to some of the largest brands in the world and is recognized as experts in chosen markets-financial services and retail and manufacturing. It is claimed to be providing complete business solutions by combining people, process improvement and automation. It is claimed to have employed over 1500 domain specialists working for the clients. It is claimed that eClerx is a different company with industry specialized services for meeting complex client needs, data analytics KPO service provider specializing in two business verticals financial services and retail and manufacturing. It is claimed to be engaged in providing solutions that do not just reduce cost, but help the clients increase sales and reduce risk by enhancing efficiencies and by providing valuable insights that empower better decisions. M/s eClerx Services Pvt. Ltd. is also claimed to have a scalable delivery model and solutions offered that include data analytics, operations management, audits and reconciliation, metrics management and reporting*

*services. It also provides tailored process outsourcing and management services along with a multitude of data aggregation, mining and maintenance services. It is claimed that the company has a team dedicated to developing automation tools to support service delivery. These software automation tools increase productivity, allowing customers to benefit from further cost saving and output gains with better control over quality. Keeping in view the nature of services rendered by M/s eClerx Services Pvt. Ltd. and its functional profile, we are of the view that this company is also mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field and the same cannot be compared with the assessee company which is mainly engaged in providing low-end services to the group concerns.*

*83. For the reasons given above, we are of the view that if the functions actually performed by the assessee company for its AEs are compared with the functional profile of M/s eClerx Services Pvt. Ltd. and Mold-Tec Technologies Ltd., it is difficult to find out any relatively equal degree of comparability and the said entities cannot be taken as comparables for the purpose of determining ALP of the transactions of the assessee company with its AEs. We, therefore, direct that these two entities be excluded from the list of 10 comparables finally taken by the AO/TPO as per the direction of the DRP.*

*Thus it is clear that the Special Bench found that this company is not comparable with BPO company which are engaged only in low end services of data processing. Accordingly, we direct the AO/TPO to exclude Eclerx Services Ltd. from the list of comparables for the purposes of determining ALP.*

### **11.3 Infosys BPO Ltd.**

*The learned AR of the assessee has referred to the Annual Report of this company at page 57 of the paper book and submitted that though this company was initially selected by the assessee, however, the assessee has raised objections against this company even before the TPO and further before the DRP. Therefore, this company, if found functionally different, has to be excluded from the list of comparables. The learned AR of the assessee has pointed out that this company is having more than 17000 employees in comparison to only 6 employees of the assessee. Therefore, even on the parameter of the scale and strength of employees, this company cannot be considered as functionally comparable with that of the assessee. Further, he has referred to the Annual Report of the company and submitted that during the year under consideration, there is*

*amalgamation of PAN Financial Services India Pvt. Ltd. w.e.f. 1/4/2008. The scheme of amalgamation has been approved by the Hon'ble High Court on 6/4/2009 and 10/3/2009. Therefore, there is an extraordinary event of amalgamation during the year under consideration and hence this company cannot be considered as a good comparable for the purpose of determining the ALP. Apart from the above objections, learned AR of the assessee has further submitted that this company is engaged in providing business process management services to organizations with outsourcing their business process. Therefore, this company is in a different kind of business activity in providing the management service of business processes and is not directly providing any business process outsource services. Thus, this company cannot be considered as a functionally comparable.*

(i) *On the other hand, the learned Departmental Representative has submitted that this company is in the business activity of providing ITeS and therefore, it satisfies all the tests and filters applied by the TPO. The functional comparability has been examined by the DRP and it was found that this company is in the same line of activity under the category of ITeS. He has relied upon the order of the authorities below.*

(ii) *We have considered the rival submissions as well as relevant material on record. We note that in Para 16.2.15 of the Annual Report of this company, it has been reported that there was amalgamation w.e.f. 1/4/2008. The relevant part of the information provided in the Annual Report reads as under:*

*"Amalgamation of PAN Financial Services India Private Limited*

*The Board of Directors in their meeting held on October 6, 2008, approved, subject to the approval of the Honorable High Courts of Karnataka and Chennai, a Scheme of amalgamation ("the Scheme") to amalgamate PAN Financial Services India Private Limited ("PAN Financial"), a wholly owned subsidiary of the Company engaged in providing business process management of services, with the Company with effect from April 1, 2008 ("effective date"). The approval of the High Court was received on April 6, 2009 and filed with the respective Registrar of Companies of Karnataka and Tamilnadu on April 6, 2009 and March 10, 2009 respectively. Accordingly on the scheme becoming effective, the financial statement of PAN Financial has been merged with the company."*

*It is clear that there was extraordinary event of amalgamation during the year under consideration. Therefore, in view of the extraordinary development of amalgamation of another company, this company*

*cannot be considered as a good comparable for the assessment year under consideration. Apart from this, we further note that as per the segment reporting in para.16.2.21 this company is providing business process management services as under:*

*"Segment reporting*

*The company's operations primarily relate to providing business process management services to organizations that outsource their business processes. Accordingly, revenues represented along industry classes comprise the primary basis of segmental information set out in these financial statements. Secondary segmental reporting is performed on the basis of the geographical location of customers.*

*The accounting principles consistently used in the preparation of the financial statements are also consistently applied to record income in individual segments. These are set out in the note on significant accounting policies."*

*Thus it is clear that the revenue earned by this company is from the activity inclusive of operation primarily relates to providing business process management services to other organization engaged in outsourcing business process. This company is not engaged in direct activity of BPO but it provides service to BPOs and that too management service to BPO. Therefore, in our considered view, this company is engaged in a different nature of activity to that of the assessee provided to its AE. Accordingly, we direct the AO/TPO to exclude this company from the list of comparables.*

#### **11.4 Cosmic Global Ltd.**

*The learned AR of the assessee submitted that the assessee raised objection against inclusion of this company in the list of comparables before the TPO on the ground that this company has major revenue from translation services. Therefore, this company is functionally different from the services provided by the assessee to its AE. The learned AR of the assessee has referred to the Annual report of this company and submitted that that out of the total revenue of Rs. 7,37,02,584/-, this company has earned revenue from translation charges to the tune of Rs. 6,99,35,756/-. Therefore, substantial part of the revenue has been earned from the activity of translation. The learned AR of the assessee has further pointed out that even otherwise this company is outsourcing the work of translation as it is evident from the profit and loss account of this company that an amount of Rs. 3,00,25,326/- has been paid on account of translation charges. Thus, learned AR of the assessee has submitted that this company cannot be considered as functionally comparable with the assessee for the purpose of determining the ALP. In support of his contention, he has relied upon the decision of the co-ordinate bench of this Tribunal in the case of Lam Research (India) (P.) Ltd. v. Dy. CIT in ITA No. 1437/Bang/2014 dated 30/4/2015.*

- (i) *On the other hand, learned Departmental Representative has submitted that the comparability of this company has been examined by the TPO as well as*

by the DRP. The TPO has rejected the objections raised by the assessee in respect of this company by holding that the translation service are in the nature of ITeS and therefore, it qualifies all the filters applied by the TPO. He has relied upon the orders of the authorities below.

- (ii) We have considered the rival submissions as well as the relevant material on record. There is no dispute that this company is in the business of providing service of medical transcription and consultancy services, translations services and accounts BPO. The segmental revenue from the operations are given in schedule 8 to the Profit & Loss account which reveals that major revenue of Rs. 6,99,35,756/- out of total revenue of Rs. 7.37 crores has been earned by this company from the activity of translation services. We further note that the company has debited an expenditure of more than Rs. 3 crore on account of translations charges paid. Thus it is clear that this company is outsourcing its services of translation work which is the main activity of this company yielding major revenue earned during the year. Thus it is manifest from the record that this company is in the entirely different nature of activity and cannot be compared with the activity of providing contact centre of the assessee to its AE. In the case of Lam Research (India) (P.) Ltd. (supra) the co-ordinate bench of this Tribunal had occasion to examine the comparability of this company in Para. 34 as under:

"34. With respect to Cosmic Global Ltd., Hyderabad bench of ITAT in the case of Capital IQ Information Systems (India) P. Ltd., in Para 19 of its order, had held as under

*Cosmic Global Ltd.*

19. The main objection of assessee with reference to the inclusion of this company is with reference to outsourcing of its main activity. Even though this company is in assessee's TP study, it has raised objection before the TPO that this company's employee cost is less than 21.30% and most of the cost is with reference to the outsourcing charges or translation charges, and as such this is not a comparable company. The TPO, though considered these submissions, rejected the same, on the reason that this does not impact the profit margin of the company. Opposing the view taken by the TPO, it is submitted that this company cannot be selected as comparable, as

*M/s. Capital IQ Information systems (India) Pvt. Ltd., Hyderabad similar issue was discussed by the coordinate Bench of the Tribunal(Delhi) in the case of Mercer Consulting (India) P. Ltd. (supra), vide paras 13.2 to 13.3 which read as under-*

*13.2. Now coming to the factual matrix of this case, we find from the material on record that outsourcing charges of this case constitute 57.31% of the total operating costs. This does not appear to us to be a valid reason for eliminating this case from the list of comparables. On going through the Annual accounts of Cosmic Global Limited, a copy of which has been placed on record, we find that its total revenue from operations are at Rs. 7.37 crore divided into three segments, namely, Medical transcription and consultancy services at Rs. 9.90 lacs, Translation charges at Rs. 6.99 crore and Accounts BPO at Rs. 27.76 lac. The Id. AR has made out a case that outsourcing activity carried out by this company constitutes 57% of total expenses. The reason for which we are not agreeable with the Id. AR is that we have to examine the revenue of this case only from Accounts BPO segment and not on the entity level, being also from Medical transcription and Translation charges. When we are examining the results of this company from the Accounts BPO segment alone, there is no need to examine the position under other segments. The entire outsourcing is confined to Translation charges paid at Rs. 3.00 crore, which is strictly in the realm of the Translation segment, revenues from which are to the tune of Rs. 6.99 crore. If this segment of Translation is not under consideration for deciding as to whether this case is comparable or not, we cannot take recourse to the figures which are relevant for segments other than accounts BPO. Thus it is held that this case cannot be excluded on the strength of outsourcing activity, which is alien to the relevant segment.*

*13.3 However, we find this case to incomparable on the alternative argument advanced by the Id. AR to the effect that total revenue of the Accounts BPO segment of Cosmic Global Limited is very low at Rs. 27. 76 lacs. We have discussed this aspect above in the context of CG-VAK's case and held that a captive unit cannot be compared with a giant case and thus excluded CG-VAK with turnover from Accounts BPO segment at Rs. 86.10 lacs. As the segmental revenue of BPO segment of Cosmic Global Limited at Rs. 27. 76 lac is still on*

*much lower side, the reasons given above would fully apply to hold Cosmic Global Limited as incomparable. This case is, therefore, directed to be excluded from the list of comparables.*

*In view of the detailed analysis of the coordinate Bench of the Tribunal in the above referred case, in this case also we accept the contentions of assessee and direct the Assessing Officer/TPO to exclude this comparable for the same reasons.*

*Accordingly, we direct that Cosmic Global Ltd., also be excluded from the list of comparables."*

*In view of the above discussion as well as the order of the coordinate bench of this Tribunal, we direct the AO/TPO to exclude this company from the list of comparables for the purpose of determining the ALP.*

*13.Learned DR of the revenue could not point out any difference in facts. Therefore, respectfully following these two tribunal orders, we decline to interfere in the order of DRP in respect of this issue regarding exclusion of 1) Bodhtree Consulting Ltd., 2) Tata Elxsi Ltd., 3) Persistent Systems Ltd. and 4) Infosys Ltd. in IT segment and in ITES segment, we uphold the exclusion of 1) Accentia Technologies Ltd., 2) Infosys BPO Ltd., 3) Cosmic Global Ltd. and 4) Eclerx Services Ltd. Remaining grounds on TP issues are rejected as not pressed as no argument was advanced on that account."*

11. We find that in that case, the Tribunal has followed another Tribunal order rendered in the case of e4e Business Solutions India Pvt. Ltd. Vs. DCIT in IT(TP)A No. 1845/Bang/2013 dated 10.11.2015 and the relevant paras of this Tribunal order has been reproduced by the Tribunal. The Id. DR of revenue could not point out any difference in facts in the present case and in the case of Target Corporation India Pvt. Ltd. Vs. ACIT (supra) or in the case of e4e Business Solutions India Pvt. Ltd. Vs. DCIT (supra). Hence we hold that this Tribunal order is applicable in the present case. As per this Tribunal order, it was held that these four comparables 1) Accentia Technologies Limited, 2) Infosys BPO Limited, 3) Cosmic Global Limited and 4) Eclerx Services Limited are to be excluded from the final list of comparables. Respectfully following this Tribunal order, we hold that in present case also, these four comparables should be excluded from the final list of comparables in ITES segment. Ground no. 4 is allowed.

12. Now we discuss and decide ground no. 15. As per this ground, the assessee's grievance is this that two comparable companies in respect of software development services segment i.e. Thinksoft Global Services Limited and F C S Software Solutions Limited should not be excluded and the same should be included. Regarding this ground, reliance has been placed on the Tribunal order rendered in the case of M/s. TE Connectivity Global Shared Services India Pvt. Ltd. Vs. ITO in IT(TP)A No. 1280/Bang/2014 dated 13.12.2017, copy available on pages 3078 to 3118 of case law compendium. Reliance is also placed on another Tribunal order rendered in the case of ARM Embedded Technologies P. Ltd. Vs. DCIT in IT(TP)A No. 1659/Bang/2014 dated 31.08.2015, copy available on pages 3249 to 3267 of case law compendium. The Id. DR of revenue supported the orders of authorities below.
13. We have considered the rival submissions. Our attention was drawn to Para no. 13.5.2 of the Tribunal order rendered in the case of M/s. TE Connectivity Global Shared Services India Pvt. Ltd. Vs. ITO (supra) and it was pointed out that in this case, the Tribunal has followed the earlier Tribunal order rendered in the case of ARM Embedded Technologies P. Ltd. Vs. DCIT (supra). For ready reference, we reproduce paras 13.1 to 13.5.2 of this Tribunal order from pages 3102 to 3107 of the case law compendium.

**“Assessee's Plea for Inclusion of 2 companies in the list of comparables -Software Development Services Segment.**

*13.1 In the revised grounds raised (supra), the assessee has sought inclusion of the following two companies in the final set of comparables :-*

- (i) Thinksoft Global Services Ltd. and*
- (ii) FCS Software Solutions Ltd.*

*13.2 On a perusal of the TPO's order under Section 92CA of the Act at para 13.1 (b), we find that the TPO himself in the show cause notices has proposed the aforesaid two companies for inclusion in the final set of comparables, but had thereafter come to the view that the working capital adjustment for both these companies exceeded 4% of profits and therefore these two companies could not be taken as proper comparables. At para 13.1 (b), the TPO has rendered the*

following reasoning for excluding these two companies as under :-

“13.1 (b) Two companies proposed in the show cause notice are functionally similar to the taxpayer. However, when the working capital of these companies is considered, the profit margin gets distorted. It may not be out of context to mention that our search for comparables is primarily focused on those companies whose profit margin is predominantly from operating business and not from financial activities. This prerequisite is not different in case of software development companies as they do not need any interest bearing funds to manage their working capital requirement. Therefore, with the purpose to identify only those uncontrolled comparables who are having profit margin from core operating activities and not from financial activities, the following two companies having working capital impact of more than 4% on profit have been excluded.

1. Thinksoft Global Services Limited.
2. FCS Software Solutions Limited.”

13.3 Before us, the learned Authorised Representative submitted that in similar factual circumstances, as those prevailing in the case on hand with respect to the aforesaid companies, for the same assessment year 2009-10, a co-ordinate bench of this Tribunal in its order in the case of ARM Embedded Technologies P. Ltd. in IT(TP)A No.1659/Bang/2014 dt.31.8.2015; where the assessee was engaged in, inter alia, provisions of software development and maintenance services to its AEs; just as in the case on hand, the Tribunal directed inclusion of the aforesaid two companies in the final set of comparables and set aside to the file of the TPO the computation of working capital adjustment on actual basis for working out the correct PLI of the final comparables.

13.4 Per contra, the learned Departmental Representative for revenue supported the orders of the authorities below in excluding the above two companies from the list of comparables.

13.5.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncement cited. We find the very same issue, in similar circumstances of inclusion of the aforesaid two companies i.e. (i) Thinksoft Global Services Ltd. and (ii) FCS Software Solutions Ltd. in the final list as comparables to an assessee providing software development services to its AEs; just as in the case on hand, was considered by a co-ordinate bench of this Tribunal in the case of ARM Embedded Technology P. Ltd. for Assessment Year 2009-10 (supra). In its order, at paras 20 to 25 thereof, the co-ordinate bench (i) directed inclusion of the aforesaid two companies in the final set of comparables and (ii) set aside to the file of the TPO/A.O., the issue of working out the correct PLI of the final set of comparables

by computing and allowing working capital adjustment on actual basis; holding as under :

“20. Coming to the ground for inclusion of M/s. Thinksoft Global Solutions Ltd and FCSSoftware Solutions Ltd, we find that TPO herself had suggested these in the show cause notice, but had thereafter come to a conclusion that working capital adjustment required for these two companies exceeded 4% of profits and could not be therefore taken as proper comparables. Reasons given by the TPO for excluding these two companies, appear at paras 3.6.5.1, of her order which reads as under :

b) Two companies proposed in the show-cause notice are functionally similar to the taxpayer. However, when the working capital of these companies is considered, the profit margin gets distorted. It may not be out of context to mention that our search for comparable is primarily focus on those companies whose profit margin is predominantly from operating business and not from financial activities. This prerequisite is not different in case of software development companies as they do not need any interest bearing funds to manage their working capital requirement. Therefore, with the purpose to identify only those uncontrolled comparables who are having profit margin from core operating activities and not from financial activities, the following two companies having working capital impact of more than 4% on profit have been excluded.

21. TPO has accepted that these companies were functionally similar to that of the assessee. However, according to her, the margins of these companies had not come from its core operating activities but from financial activities. Profit and Loss account of M/s. Thinksoft Global Solutions for the relevant previous year is placed at paper book page 247. Software service revenues of the said company came to Rs. 92,092,1452/-. Other income of the said company came to Rs. 35,738,801/-. Break-up of the other income as given at schedule 10 placed at paper book page 256 show that out of such amount Rs. 26,536,978/- was exchange gain. Interest received from deposits with banks and others came to Rs. 29,15,080/- only. For better clarity this break-up is given hereunder :

*Other income*

Interest received on deposits with banks..	2,371,740
Interest received from others ..	543,310
Profit on sale of fixed assets ..	6,276,773
Exchange gain (Net) ..	26,536,978
Miscellaneous income ..	<u>10,000</u>
	35,738,801

We cannot say that the ‘other income’ arose out of any financial services done by the assessee and would take away the sheen of its software services income. The amount, in our opinion, was

*insignificantly small and not enough to warrant a conclusion that its operating margins had come not from its core operational activities.*

*22. Coming to FCS Software Solutions Ltd, profit and loss account placed at paper book page 321 shows that its revenue from software development and other services was Rs.1902547907/-. As against this, miscellaneous income was only Rs.7875588/-. Break-up of such miscellaneous income as given at schedule M, placed at paper book page. 328 reads as under :*

<i>Interest</i>	<i>..</i>	<i>2,875,685</i>
<i>Rent income</i>	<i>..</i>	<i>4,515,000</i>
<i>Amount W/Back</i>	<i>..</i>	<i>484,902</i>
		<u><i>7,875,588</i></u>

*23. Compared to the software development services income, interest received by M/s.FCS Software Solutions Ltd, was in our opinion, insignificantly small. Thus the reasoning given by TPO for rejecting these two companies as proper comparables, was in our opinion, incorrect. We set aside the orders of the lower authorities in this regard and direct these two companies to be included in the list of comparables for working out the average PLI.*

*24. Now coming to the issue of working capital adjustment, findings of the TPO in this regard as it appears at para 3.7, reads as under :*

**3.7. Working Capital Adjustment:**

*The working capital adjustment is computed as per the formula given in Annexure to the OECD Guidelines, 2009. In this case, the average PLR adopted by SBI the largest scheduled bank, for short term working capital loans for the relevant FY 2008-09 is considered. The average PLR of 12.50% p.a was adopted by the TPO while computing the working capital adjustment. The working capital adjustment is restricted to the average cost of capital computed at 1.71% in the case of the uncontrolled comparables selected by the TPO. Hence, the working capital adjustment in the case of the taxpayer is allowed as per the calculation in annexure -C or the average cost of capital to the comparables whichever is the least. The detailed discussion on this is given in the Annexure-D to the order. The computation of the working capital adjustment is annexed to this order as Annexure C.*

*TPO had restricted the cost of capital to 1.71%. Rationality for such an upper limit being placed on working capital adjustment was an issue which had come up before this Tribunal in the case of M/s. Rambus Chip Technologies (India) P. Ltd v. DCIT [IT(TP)A.23/Ban/2015, dt.22.07.2015. Coordinate bench had held as under at para 13 and 14 of its order :*

13. As regards ground No.3(f), learned counsel for the assessee submitted that the AO/TPO while considering the working capital adjustment, has arrived at the working capital adjustment in the case of the assessee at 5.97%, but while giving effect to the working capital adjustment, has restricted the said adjustment to 1.71% in case of uncontrolled comparables selected by the TPO. The learned counsel for the assessee submitted that the TPO has not given any basis for such restriction of the working capital adjustment. He submitted that the CIT(A) also has not applied his mind to this issue but has summarily confirmed the order of the AO and therefore it has to be set aside.

14. On going through the TPO's order as well as annexure D referred to in the transfer pricing order on working capital adjustment, we find that the AO has not given any basis for restricting the adjustment to 1.71%. In all the cases relating to transfer pricing adjustment, this Tribunal has been directing to give working capital adjustment on actual basis and the TPO having arrived at 5.97% ought to have adopted the same instead of restricting it to 1.71%. In view of the same, we deem it proper to remand this issue to the file of the AO/TPO for working out the ALP after giving adjustment of working capital as per the calculation of the AO in annexure D annexed to the transfer pricing order. This ground of appeal is accordingly allowed.

25. Accordingly we direct the AO / TPO to correctly work out the PLI of the final comparables after giving due adjustment for the working capital on actual basis. Related ground of the assessee is therefore allowed."

13.5.2 Respectfully following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of ARM Embedded Technologies P. Ltd. for Assessment Year 2009-10, we hold and direct the TPO that the following two companies i.e. (i) Thinksoft Global Services Ltd. and (ii) FCS Software Solutions Ltd. be included in the final set of comparables and set aside to the file of the TPO the issue of working out the correct PLI of the final set of comparables by computing and allowing working capital adjustment on actual basis."

14. The Id. DR of revenue could not point out any difference in facts and hence, respectfully following this Tribunal order we hold and direct the TPO that following two companies i.e. Thinksoft Global Services Limited and F C S Software Solutions Limited be included in the final list of comparables. Ground no. 15 is also allowed.
15. Now we discuss and decide ground nos. 20 and 21. In this regard, it was submitted by Id. AR of assessee that as per ground no. 6 raised before CIT(A), this was the grievance of the assessee that export receipts for the

months of January, February and March 2009 should also be considered as part of export turnover because the AO has excluded the turnover of these three months for the purpose of computing deduction allowable to assessee u/s. 10A of IT Act. He also submitted that the issue regarding allowability of deduction u/s. 10A was decided by CIT(A) as per Para 3 of his order and in the same, the only issue decided by him is this as to whether the value of telecommunication expenses reduced from export turnover by the AO should also be reduced from total turnover or not. But the issue raised by assessee in ground no. 6 raised before CIT(A) was not decided by him. Hence the matter should be restored back to his file for deciding this issue. The Id. DR of revenue supported the orders of authorities below.

16. We have considered the rival submissions. First of all, we reproduce ground no. 6 raised by assessee before CIT(A).

*“6. The learned AO has erred in law, by not considering export receipts for the months of January, February and March 2009 as part of export turnover and accordingly reducing the same from export turnover for computing the deduction under section 10A of the Act on the ground that the Appellant was unable to produce the softex forms for the said months during the assessment proceedings.*

*• The learned AO has erred in facts, by not considering the softex form for March 2009 which was submitted by the Appellant during the assessment proceedings.”*

17. Now we reproduce Para nos. 3 and 4 of the order of CIT(A) because only these two paras contain the decision of CIT(A) in respect of corporate tax issue.

**“CORPORATE TAX:**

*3. In the grounds taken, the assessee objects to the curtailment of deduction u/s. 10A on account of adjustment of export turnover by the AO. The AO excluded the value of telecommunication expenses from export turnover. The assessee contended that it should be reduced from export turnover also. This issue is squarely covered by the Jurisdictional High Court in the case of CIT Vs. Tata Elxsi Ltd. (349 ITR 98) (Kar). The Judgement of the Jurisdictional High Court is binding precedent and respectfully following the same, the AO is directed to follow the ratio laid down by the Hon'ble Court while computing deduction u/s.10A in the order giving effect to this appellate order.*

*4. With regard to levy of interest u/s. 234B and initiation of penalty u/s. 271(1)(c) it is stated that the actions are mandatory and premature, respectively, therefore no adjudication is required.”*

18. It is seen that ground no. 6 raised by assessee before CIT(A) was not decided by CIT(A) and hence, we restore this matter back to the file of CIT(A) for a decision in respect of ground no. 6 raised by assessee before CIT(A) after providing reasonable opportunity of being heard to both sides. Accordingly ground nos. 20 and 21 raised before us stands allowed for statistical purposes.
19. In the result, the assessee's appeal stands partly allowed in the terms indicated above.
20. Now we take up the revenue's appeal. It was submitted by Id. DR of revenue that ground no. 1 is general and regarding ground no. 2, she submitted that as per Para nos. 12.2.5 and 12.2.6 of his order, the Id. CIT(A) has excluded one comparable i.e. Infosys Ltd. without any discussion. While deciding the appeal of assessee, we have already held that exclusion of Infosys Ltd. by CIT(A) in this manner is not proper but we have excluded this comparable by way of a detailed discussion by following the Tribunal order rendered in the case of M/s. Trianz Holdings Pvt. Ltd. Vs. DCIT (supra). Since this comparable company i.e. Infosys Ltd. stands excluded on merit, this ground of revenue's appeal is rejected.
21. Regarding ground nos. 3,4 and 5 of the revenue's appeal, it was submitted by Id. DR of revenue that foreign exchange loss / gain should not be considered as operating gain / loss. As against this, the Id. AR of assessee submitted that the same is operating gain / loss. At this juncture, it was pointed out by the bench that if the exchange fluctuation gain / loss is in relation to turnover of the present year then only the same can be considered for TP analysis of the present year because for TP analysis, we are not comparing the operating profit of the tested party and of the comparables and we are comparing the profit percentage of tested party and that of comparable companies and for that purpose, only those gain / loss should be considered in the numerator if the corresponding turnover is forming part of denominator. The bench pointed out that this issue was decided by CIT(A) as per paras 12.5 to 12.5.3 and in these paras, there is

no discussion about this aspect as to whether exchange fluctuation gain / loss is in respect of current year's turnover or of earlier year's turnover. The bench put out a proposition that this matter may be restored back to the file of CIT(A) for fresh decision after examining this aspect as to whether such foreign exchange gain / loss is in connection with the turnover of the present year of or an earlier year and if it is found that the gain / loss is in respect of present year then the same can be considered for TP analysis and if it is for earlier year then it should not be considered for TP analysis. Both sides agreed to this proposition put forward by the bench.

22. We have considered the rival submissions and gone through the orders of authorities below. We find that Id. CIT(A) has followed various Tribunal orders and held that foreign exchange fluctuation gain / loss is operating profit / operating loss. To this extent, there is no quarrel but whether such foreign exchange fluctuation gain / loss should be considered for the purpose of TP analysis, it has to be ascertained as to whether such gain / loss is in respect of current year's turnover or in respect of earlier year's turnover because for TP analysis, we are not comparing the operating profit alone of the tested party with the operating profit of the comparables. We are comparing the profit percentage of tested party with profit percentage of comparable companies. The profit percentage is worked out on the basis of operating profit divided by turnover and hence, if any part of the operating profit is computed by considering the item of income or loss, which is not arising out of the present year's turnover, it will give absurd result because such exchange fluctuation gain / loss will increase or decrease the operating profit being the numerator but the corresponding turnover will not be part of denominator if the same is not in relation to the current year's turnover. Hence we set aside the order of CIT(A) on this issue and restore back the matter to his file for fresh decision in the light of above discussion after providing reasonable opportunity of being heard to both sides. Accordingly, ground nos. 3, 4 and 5 are allowed for statistical purposes.
23. Regarding ground no. 6, it was submitted by Id. DR of revenue that the only grievance of the assessee before CIT(A) was regarding this that the AO / TPO have erred in law as well as facts by rejecting certain comparable

companies identified by the assessee using export earnings greater than 75% of the sales as a comparability criterion and this issue was raised by assessee before CIT(A) as per ground no. 12.(c) and this issue was decided by CIT(A) against the assessee and for that, the assessee is in appeal before the Tribunal. She drawn our attention to Para nos. 15.1.8 to 15.1.9 of the order of CIT(A) and submitted that the Id. CIT(A) has suo moto decided the issue and directed the TPO that in ITES sector also, the export sales filter of 75% should be applied as has been applied in software development sector and therefore, this is not proper. The Id. AR of assessee supported the order of CIT (A). He also accepted that this was not the grievance raised by assessee before CIT(A).

24. We have considered the rival submissions. First of all, we reproduce Para nos. 15.1.8 to 16 of the order of CIT(A) for ready reference. These are as under.

*“15.1.8. I find this action of the TPO arbitrary in the sense that different criteria cannot be applied under the same set of circumstances. The export earning filter has been applied to exclude predominantly domestic companies or comparables catering to the domestic market. The reasons provided by the TPO are the same while applying this filter without providing the basis for alteration from 75% to 25% in the two sectors.*

*15.1.9. As per the TPO, both sectors are deriving income from the US market exclusively, But the distinction as to why the filter should be altered in case of both sectors has not been clarified by the TPO. It is not open to the TPO to blow hot & cold under the same set of circumstances. Therefore, it is directed that the TPO shall apply export sales filter in the BPO sector as has been applied to the software sector i.e. to say only companies having export sales less than 75% of operating revenues shall be excluded. It is ordered accordingly.*

**15.2.(ii) Turnover filter:**

*15.2.1. Not pressed by the assessee's representative.*

**15.3.(iii) Functional dissimilarity :**

*15.3.1 In light of my reasoning in software sector, functionality of all the comparables are examined as under :-*

<b>Sl.No.</b>	<b>Company Name</b>	<b>Function</b>
1.	Accentia Technologies Ltd.	It offers services and solutions for Healthcare Receivables Cycle

		<i>Management and Software Products for Business Process Outsourcing.</i>
2.	<i>Aditya Birla Minacs Worldwide Ltd.</i>	<i>Customer support services, Procurement solution, financial solutions, customer support services, information management and infrastructure management.</i>
3.	<i>Allsec Technologies Ltd.</i>	<i>Provider of outsourced solutions in customer engagement, sale &amp; retention and quality assurance for business.</i>
4.	<i>Cosmic Global Ltd.</i>	<i>Provides translation services, Localisation and DTP services, Transcription outsourcing business, Accounting operations.</i>
5.	<i>Eclerx Services Ltd.</i>	<i>Data content management, data analysis and process improvement task, trade support and validation, settlements and clearing, asset servicing, risk management and reconciliation.</i>
6.	<i>Informed Technologies Ltd.</i>	<i>Development &amp; assessment of telecommunication, network.</i>
7.	<i>Infosys BPO Limited</i>	<i>Business platforms, customer service outsourcing, finance and accounting, human resource outsourcing, legal process outsourcing.</i>
8.	<i>Microland Ltd.</i>	<i>Infrastructure management and modernisation, end-user services, Cloud Computing, Collaboration and Mobility.</i>

*15.3.2. In view of the aforesaid, I see no reason to exclude any further comparables on the ground of functional dissimilarity. as the business of the comparables vis-à-vis the assessee company falls within the same sector. Thus. the 08 comparables mentioned above shall form the final comparables on which the ALP adjustment needs to be carried out by the TPO. This is subject to the earlier ruling with respect to application of export earning filter which may include some of the assessee's comparables. It is ordered accordingly.*

*16. In the result, it is ordered that the TPO shall apply export earning filter at 75% in the ITES sector & include comparables of the assessee and shall include forex gain/loss in operating margins as directed in the software sector, accordingly. The assessee's appeal stands allowed*

*in part.”*

25. We find that there is no finding of CIT(A) as to which comparables are affected by change in the export earnings filter in ITES segment. Hence it amounts to setting aside of the matter to the AO and as per the provisions of section 251(1A) of IT Act, the CIT(A) can confirm, reduce or enhance the assessment but he cannot remand the matter to the file of AO. Hence on this issue, the order of CIT(A) is not sustainable and therefore, we reverse the same and restore to the order of AO on this issue. Accordingly ground nos. 6 and 7 of revenue's appeal are allowed.
26. Regarding ground nos. 8 and 9 of revenue's appeal, it was agreed by both sides that this issue is covered in favour of the assessee by the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Tata Elxsi Ltd. as reported in 349 ITR 98. As per this ground, this is the grievance of the revenue that telecommunication charges / freight charges incurred in foreign currency and reduced by the AO from export turnover should not be reduced from total turnover for the purpose of computing deduction allowable u/s. 10A of IT Act. As per the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Tata Elxsi Ltd. (supra), it was held that total turnover is sum total of export turnover and domestic turnover and if an amount is reduced from export turnover then the total turnover also goes down by the same amount automatically. Respectfully following this judgment of Hon'ble Karnataka High Court, we decline to interfere in the order of CIT(A) on this issue. Ground nos. 8 and 9 of revenue's appeal are rejected.
27. In the result, the appeal filed by the revenue is partly allowed.
28. In the combined result, both the appeal of the assessee and revenue are partly allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-  
(LALIET KUMAR)  
Judicial Member

Sd/-  
(ARUN KUMAR GARODIA)  
Accountant Member

Bangalore,  
Dated, the 25<sup>th</sup> April, 2019.  
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,  
Income Tax Appellate Tribunal,  
Bangalore.