

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1025/Del/2016
(Assessment Year: 2011-12)

Kaplan India Pvt. Ltd, 226, Tribhuvan Complex, Ishwar Nagar, Friends Colony (West),New Delhi PAN: AAICS9919F	Vs.	ITO, Ward-14(2), New Delhi
(Appellant)		(Respondent)

ITA No. 1022/Del/2017
(Assessment Year: 2012-13)

Kaplan India Pvt. Ltd, 226, Tribhuvan Complex, Ishwar Nagar, Friends Colony (West),New Delhi PAN: AAICS9919F	Vs.	Addl. CIT, Special Range-5, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Nageswar Rao, Adv Shri Sandeep S. Karhail, Adv
Revenue by:	Shri Sandeep Kr. Mishra, Sr. DR
Date of Hearing	12/02/2019
Date of pronouncement	10/05/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are the 2 appeals preferred by the assessee, M/s Kaplan India Private Limited for assessment year 2011 - 12 and 2012 - 13 involving common transfer pricing issues with respect to the international transactions entered into by the assessee, arm's-length price of which is determined by the learned transfer pricing officer and partly upheld by the learned Dispute Resolution Panel, therefore final assessment order u/s 143 (3) read with section 144C of The Income tax Act [the Act] has been passed by the learned AO, therefore assessee is in appeal before us. As the common

issues are involved, both parties argued these appeals together, and therefore, this common order is passed disposing these appeals.

2. The assessee has raised the following grounds of appeal in ITA No. 1025/Del/2016 for the Assessment Year 2011-12:-
 - “1. *The learned TPO /AO/DRP have erred in making an addition of INR 13,129,292 to the total income of the Appellant in respect of international transaction pertaining to provision of content support services and back office support services by the Appellant to its Associated Enterprises (“AEs”)*
 2. *The learned TPO/AO/DRP has erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 (‘the Rules’), and modifying the same for the determination of the Arm’s Length Price (‘ALP’) of the impugned transaction to hold that the same are not at arm’s length without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section (3) of section 92C of the Act.*
 3. *The learned TPO/AO/DRP have erred in:*
 - a. *Not accepting the use of multiple year data, as adopted by the Appellant in its Transfer Pricing (‘TP’) documentation; and*
 - b. *Determining the arm’s length margins / prices using data pertaining only to financial Year (‘FY’) 2010-11 which was not available to the Appellant at the time of complying with the Indian TP documentation requirements.*
 4. *The learned TPO/AO/DRP have erred in rejecting certain comparable companies selected by the Appellant by applying inappropriate comparability criteria such as :*
 - a. *Turnover less than INR 5 crore;*
 - b. *Export turnover less than 75 percent of operating revenues;*
 - c. *Different accounting year; and*
 - d. *Employee cost less than 25 percent of operating cost*
 5. *The learned TPO/AO/DRP have erred in erroneously rejecting the comparable companies selected by the Appellant and adding certain companies to the final set of comparable companies on an ad-hoc basis, thereby resorting to cherry picking of comparables to determine the ALP.*
 6. *The learned TPO/AO/DRP have erred in selecting certain companies (which are earning super normal profits) as comparable to the Appellant.*
 7. *The learned TPO/AO/DRP has erred in treatment of operating and non-operating items while computing the margins of the Appellant and comparable companies.*

8. *The learned TPO/AO/DRP have erred in not making suitable adjustments to account for differences in the risk profile of the Appellant vis-a-vis the comparable companies.*
9. *The learned AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act.”*
3. Brief facts of the case shows that assessee is a company engaged in business of providing software maintenance and support services to its associates. Assessee filed its return of income for Rs. 450403/- on 29/11/2011 after claiming deduction under section 10 A of INR 24679018/-. It paid taxes under the provisions of section 115JB of the act.
4. During the year under consideration, assessee has undertaken international transaction to the tune of Rs. 194144723/- with the associated enterprise. Therefore, ld AO referred matter to learned transfer pricing officer for determination of the arm's-length price of international transaction under the provisions of section 92CA of the income tax act.
5. Brief of the International Transactions entered by the assessee shows that It has entered into the international transaction of the provision of software development and support services of INR 76362835/-, provision of content support services of INR 86875893/- and provision of back-office support services of INR 30905966/-. The assessee benchmarked them adopting Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM) and adopted profit level indicator (PLI) of operating profit by total cost (OP/TC), selected 22 comparables, used multiple year data and found the average margin of those comparable at 10.72 %. The assessee's margins were 15% and therefore as per T P Study report the assessee contented that its international transactions are at arm's-length.
6. The ld TPO , While examining the provision of software development and support services international transactions amounting to INR 76362835/-, issued show cause notice stating that the filters, the comparable selected by the assessee found that they are not appropriate and therefore he carried out fresh search of the database and proposed 14 comparables. Subsequently, on comparable as well as their margins, assessee was given an opportunity to comment upon. After considering the same, learned transfer pricing officer reached a dataset of 16 comparables whose average

profit level indicator of operating profit by operating cost was determined at 21.33 percentage, computed the arm's-length price at INR 80566111/- of the international transactions of 76362835/- and proposed an adjustment under section 92CA of Rs. 4203276/-

7. While examining the content support and back-office support services of INR 868758933/- and INR 30905966/- respectively, aggregating to INR 117781889/-. The learned TPO held that comparable selected by assessee and filters adopted are incorrect and therefore ultimately selected 9 comparables whose average profit level indicator of operating profit by operating cost was determined at 32.40 percentage and determine ALP at Rs. 135602800/- and proposed an adjustment u/s 92CA of INR 17820911/-. Consequently, the learned TPO passed an order under section 92CA (3) of the Act determining the adjustment of INR 17820911/-. Consequently, the draft assessment order was passed by the learned assessing officer.
8. The assessee aggrieved with the draft of the proposed assessment preferred objection before the learned Dispute Resolution Panel – 1, New Delhi, who passed a direction on 13/11/2015, wherein, addition on account of the transfer pricing adjustment was reduced to Rs. 13129292/-. Consequently the assessment order under section 143 (3) read with section 144C of the income tax act was passed on 30/12/2015 by the learned Income Tax Officer, Ward – 14 (2), New Delhi determining total income of the assessee at INR 13579695/- against the returned income of Rs. 4050403/-. Therefore assessee aggrieved with the order of the learned AO has preferred this appeal before us.
9. The learned authorised representative firstly submitted that adjustment of INR 13129292/- to the total income of the assessee in respect of the international transactions pertaining to the provision of content support services and back-office support services only and there is no adjustment is surviving of Software Development segment. He further submitted that there are some comparables which are challenged and requested for the exclusion from the comparability analysis. Those are

(1) E- Clrex services Ltd

(2) Infosys BPO Ltd and

- (3) TCS E serve limited.
10. He further submitted that assessee requests for inclusion of 3 comparables
- (1) CG Vak software and exports Ltd (segment),
 - (2) R systems international Ltd (segment) and
 - (3) Coral Hub limited.
11. He immediately referred to the provisions of rule 10 B (3) of The Income Tax Rules and stated that any uncontrolled transactions shall be comparable to an international transaction, if none of the differences, if any, between the transactions being compared or between the enterprise entering into such transactions are likely to materially affect the prices are cost, charges paid in or the profit arising from such transaction in the open market or reasonably accurate adjustment can be made to eliminate the material effects of such differences. He also submitted that when judicial precedents for the same AY for ITeS segment decided the exclusion or inclusion of any comparable, than one does not have to go to the functional comparability and on principle basis, they should be considered for exclusion/inclusion based on that judicial precedents. He therefore requested that in case if any of the comparables challenged by the assessee for inclusion/ exclusion, if there are judicial precedents available, then it should be excluded/included, without looking at the functional comparability of the assessee with those comparables. He further referred to the decision of the honourable Supreme Court in case of Berger paints Ltd vs Commissioner of income tax (2004) 12 Supreme Court cases (42) dated 17/02/2004 and submitted that if the revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the revenue to challenge its correctness in the case of other assessee without just cause. Meaning thereby, if a comparable is excluded in one case, he is excluded for all the cases of that segment. With respect to the exclusion and inclusion of the comparables, He submitted a detailed chart wherein he tabulated the arguments before the lower authorities, their findings, contentions before us, reference to the annual report of the comparable companies and reasons

- seeking their inclusion or exclusion making reference to the judicial precedents. We will deal with each of the comparables at appropriate time.
12. The learned departmental representative has also made a detailed note on each of the comparables objecting to their inclusion or exclusion as requested by the assessee. He supported order of the learned transfer pricing officer and the dispute resolution panel.
 13. We have carefully considered the rival contention and perused the orders of the lower authorities. Though we agree with the contention of the learned authorised representative, that if the issue about the exclusion or inclusion of the comparable has been decided in one of the cases for the same year, then it should be followed for inclusion or excision of that comparable, with a rider that there was a complete identity of functionality between the assessee's business operation and that of the entity in case of which such inclusion or exclusion of the comparable has been decided. Therefore, in transfer pricing comparability analysis, It is of utmost importance whenever judicial precedent is relied upon, to first show that there is a complete identity of functionality between the assessee in whose case judicial precedent is relied upon and, in case of the assessee in whose case the judicial precedent is decided. Such is the mandate of the decision of the honourable Delhi High Court in *The Principal Commissioner Of Income Tax Vs St Microelectronics Private Limited* in ITA number 913/2017 dated 30/10/2017 where the honourable High Court recorded this rule in para number 5 of the order. If the argument of the ld AR is accepted, then it will result in to a situation, that if a comparable is excluded in one case, that particular comparable will always be excluded from transfer pricing database, irrespective of its identity of functionality. No such judicial precedents are drawn to our notice by the ld AR. Such is not also the mandate of the law. Merely on the basis of some judicial precedents without satisfying the basic condition of the complete identity of the functionality between the assessee and those persons in whose case, the judicial precedents are relied upon, no comparable can be included or excluded. It is also important to note here that the provisions of rule 10 B (2) clearly provides that the comparability of an international transactions with in uncontrolled transactions shall be judged with reference to:-

- (1) Specific characteristic of the property transferred or services provided,
- (2) Functions performed taking into account the assets employed or to be employed and the risk assumed by the respective parties to the transaction,
- (3) contractual terms of the transactions which laid down explicitly or implicitly how the responsibilities, risk and benefits are to be divided between the respective parties to the transactions and, lastly
- (4) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geography and location and size of the market, including the laws and government orders in force, cost of labour and capital in the market, overall economic development and level of competition and whether the markets are wholesale or retail.

Therefore, for the purpose of the comparability all these factors are of paramount importance. Hence, before relying upon any judicial precedent for exclusion or inclusion one has to cross the threshold of rule 10 B (2) of IT Rules, to ensure that the conditions specified therein are similar as decided by the honourable court. In view of this, the argument of the learned authorised representative cannot be accepted at the threshold itself that the comparables challenged by the assessee before us should be excluded based on judicial precedents without looking at the functional identity of assessee vis a vis comparable

14. Now we come to the functional profile of the assessee with respect to the content support services and the provision of back-office support services as recorded by the assessee in its transfer pricing study report which is not disputed by the learned transfer pricing officer.

“4.3 Provision of content support services

4.3.1. Nature and terms of the international transaction identified

KIPL has entered into an Agreement, dated 01 June 2005, with DF Institute Inc. pursuant to which, KIPL is responsible for providing content support services to its AE.

Summarized below is a brief analysis of the nature and terms of the identified international transaction:

Associated enterprise	Terms & conditions
DF Institute Inc.	<p>The Agreement is effective from 01 June 2005;</p> <ul style="list-style-type: none"> ▶ KIPL provides services in the nature of content support services to its AE; *- KIPL is remunerated on a cost plus mark-up basis, where costs include all direct and indirect costs incurred in connection with provision of

4.3.2. Functional analysis

Based on our discussions with KIPL, summarised below are the functions performed by KIPL and its AE in relation to provision of content support services by KIPL to its AE.

▶ Marketing and business development

Being a captive unit, KIPL does not undertake any marketing or business development functions.

▶ Project management

KIPL is responsible for project management and the various services to be provided to the AE. Since it provides content support services for internal use by the AE, therefore the ultimate responsibility of the work undertaken by KIPL rests with the AE.

▶ Human resources

KIPL undertakes the recruitment/ hiring process and is responsible for day-to-day supervision and control of its employees. It is also responsible for training of employees with suitable inputs from the AE.

▶ Quality control

In respect of the aforementioned services, KIPL is responsible for ensuring that requisite quality/ performance standards are met while rendering services. KIPL would also ensure that the services are rendered as per the requirements laid out in the statement of work issued by the AE. In case the services are not as per the standards laid down by the AE, KIPL would re-work on the deliverables to align them with the group's standards. Therefore, the responsibility to maintain quality is jointly of KIPL and the AE.

Briefly tabulated are the functions performed by KIPL and its AE in relation to provision of content support services by KIPL to its AE

Type of functions	KIPL	AE
Marketing and business development	No	Yes
Project management	Limited	Yes
Human resources	Yes	Limited
Quality control	Limited	Yes

4.3.3. Risk analysis

Briefly summarised below are some of the key risks, faced by KIPL and its AE, in relation to provision of content support services by KIPL to its AE.

▶ *Business risk*

KIPL is not exposed to business risk since it provides back office support services only to its AE and is assured of a specified return on its costs.

▶ *Market risk*

Since KIPL is a captive unit, therefore it is not exposed to any direct market risk.

▶ *Capacity utilisation risk*

KIPL is compensated on a cost plus mark up basis by the AE and is, accordingly, assured of recovery of costs of any underutilised/unutilised resources. Thus, it is not exposed to any utilisation risk.

▶ *Service liability risk*

Since the services rendered by KIPL are used by the AE for its internal purposes; therefore there is no contractual liability of these entities with the end customers for the services rendered.

Further, KIPL is responsible for ensuring that requisite quality/performance standards are met while rendering services. In case the services are not as per the standards set by the AE, KIPL would re-work on the deliverables to align them with the group's standards. However, since KIPL renders services only to its AE and is compensated on a cost plus mark-up basis by the AE, the service liability risk along with the re-work risk is not borne by KIPL.

▶ *Credit and collection risk*

KIPL does not bear any credit and collection risk since it only invoices its AE.

▶ *Foreign exchange risk*

KIPL invoices its AE for services in USD, which is different from its functional currency, INR. To that extent, KIPL is exposed to foreign exchange risk arising from any adverse movement in the exchange rate, Further, the functional currency of its AE is USD. Accordingly, it is not exposed to foreign exchange risk in this transaction.

Briefly tabulated below are the risks, which are faced by KIPL and its AE in relation to provision of content support services by KIPL to its AE.

Type of risks	KIPL	AE
<i>Business risk</i>	No	Yes
<i>Market risk</i>	No	Yes
<i>Capacity utilisation risk</i>	No	Yes
<i>Service liability risk</i>	No	Yes

<i>Credit and collection risk</i>	<i>No</i>	<i>No</i>
<i>Foreign exchange risk</i>	<i>Yes</i>	<i>No</i>

4.4 *Provision of back office support services*

4.4.1 *Nature and terms of the international transaction identified*

KIPL has entered into an Agreement, dated 01 June 2005, with DF Institute Inc. pursuant to which, KIPL is responsible for providing back office support services to its AE.

Summarised below is a brief analysis of the nature and terms of the identified international transaction:

<i>Associated enterprise</i>	<i>Terms & conditions</i>
<i>DF Institute Inc.</i>	<ul style="list-style-type: none"> ▶ <i>The Agreement is effective from 01 June 2005;</i> ▶ <i>KIPL provides back office support services in the nature of data processing and support centres to its AE;</i> ▶ <i>KIPL is remunerated on a cost plus mark-up basis, where costs include all . direct and indirect costs incurred in connection with provision of such services; and</i> ▶ <i>KIPL raises invoice on its AE on a monthly basis in USD.</i>

4.4.2 *Functional analysis*

Based on our discussions with KIPL, summarised below are the functions performed by KIPL and its AEs in relation to provision of back office support services by KIPL to its AE.

▶ *Marketing and business development*

Being a captive unit, KIPL does not undertake any marketing or business development functions. All activities pertaining to solicitation of customers and development of business are performed by the AE itself.

▶ *Project management*

KIPL is responsible for project management and the various services to be provided to the AE. Since it provides back office support services for internal use by the AE, therefore the ultimate responsibility of the work undertaken by KIPL rests with the AE.

▶ *Human resources*

KIPL undertakes the recruitment/ hiring process and is responsible for day-to-day supervision and control of its employees. It is also responsible for training of employees with necessary inputs from the AE.

▶ *Quality control*

In respect of the aforementioned services, KIPL is responsible for ensuring that requisite quality/ performance standards are met while rendering services. KIPL would also ensure that the services are rendered as per the requirements laid out in the statement of work issued by the AE. In case the services are not as per the standards laid down by the AE, KIPL would re-work on the deliverables to align them with the group's standards. Therefore, the responsibility to maintain quality is jointly of KIPL and the AE.

Briefly tabulated are the functions performed by KIPL and its AE in relation to provision of back office support services by KIPL to its AE.

Type of functions	KIPL	AE
<i>Marketing and business development</i>	<i>No</i>	<i>Yes</i>
<i>Project management</i>	<i>Limited</i>	<i>Yes</i>
<i>Human resources</i>	<i>Yes</i>	<i>Limited</i>
<i>Quality control</i>	<i>Limited</i>	<i>Yes</i>

4.3.4. Risk analysis

Briefly summarised below are some of the key risks, faced by KIPL and its AE, in relation to provision of back office support services by KIPL to its AE.

► Business risk

KIPL is not exposed to business risk since it provides back office support services only to its AE and is assured of a specified return on its costs.

► Market risk

KIPL does not assume any market risk since it is a captive unit and provides services only to the AE. The AE, on the other hand, is responsible for soliciting business and is, therefore, exposed to market risk.

► Capacity utilisation risk

Since KIPL is remunerated on the basis of a cost plus markup basis by its AE. It is assured of recovery of costs of any underutilised/ unutilised resources and is not exposed to any utilisation risk.

► Service liability risk

Since the AE uses the services of KIPL for internal purposes only; therefore there is no contractual liability of these entities with the end customer for the services rendered.

Further, KIPL is responsible for ensuring that requisite quality/ performance standards are met while rendering services. In case the services are not as per the standards set by the AE, KIPL would re-work on the deliverables to align them with the group's standards. However, such re-work cost is also recoverable from the AE. Therefore, service liability risk along with re-work risk is not borne by KIPL.

► *Credit and collection risk*

KIPL does not bear any credit and collection risk since it only invoices its AE.

► *Foreign exchange risk*

KIPL invoices its AE for services in USD, which is different from its functional currency, INR. To that extent, KIPL is exposed to foreign exchange risk arising from any adverse movement in the exchange rate. Further, the functional currency of its AE is USD. Accordingly, it is not exposed to foreign exchange risk in this transaction.

Briefly tabulated below are the risks, which are faced by KIPL and its AE in relation to provision of back office support services by KIPL to its AE.

Type of risks	KIPL	AE
<i>Business risk</i>	<i>No</i>	<i>Yes</i>
<i>Market risk</i>	<i>No</i>	<i>Yes</i>
<i>Capacity utilisation risk</i>	<i>No</i>	<i>Yes</i>
<i>Service liability risk</i>	<i>No</i>	<i>Yes</i>
<i>Credit and collection risk</i>	<i>No</i>	<i>Yes</i>
<i>Foreign exchange risk</i>	<i>yes[^].</i>	<i>No</i>

4.5 *Assets employed*

The assets employed by KIPL after depreciation (as on 31 March 2011) are as under:-

Type of Assets	Amount (INR)
<i>Improvement to Leasehold property</i>	<i>8,380,014</i>
<i>Furniture and fixtures</i>	<i>5,106,861</i>
<i>Computer</i>	<i>18,837,666</i>
<i>Office equipment</i>	<i>3,771,913</i>
<i>Trademark</i>	<i>6,107,514</i>
<i>Goodwill</i>	<i>2,222,039</i>
Total	44,426,007

4.6 *Characterisation of entity*

Based on the results of the functional, risk and asset analysis documented in the preceding paragraphs, it is concluded that KIPL can be characterised as a routine service provider operating in a low-risk environment. These services are in the nature of software maintenance and support services, content support services and back office support services.

4.7 Budgets and Forecasts

KIPL does not prepare economic and market analyses in the form of forecasts. It only prepares annual budgets for the sole purpose of internal management reporting. However, the same do not have a bearing on the pricing of the international transactions entered into during FY 2010-11.”

15. The learned DRP in para number 5.1 of its direction considered the functional profile of the assessee. It is mentioned in para number 2 at page number 34 of the direction that assessee was directed to file a copy of the agreement however assessee filed incomplete copies despite repeated opportunities granted to assessee. On the basis of the incomplete copy of the agreement the learned DRP recorded the functions performed by the assessee for this segment. The learned dispute resolution panel noted that the learned transfer pricing officer has aggregated the 2 segment of content support services and ITeS whereas the assessee has given separate information. Such aggregation was not disputed before the learned dispute resolution panel as well as before us. The learned dispute resolution panel further noted that whether the assessee is in this aggregated segment is a BPO or a KPO and the selection of the comparables will depend upon that. On the basis of the consideration of the function as well as the safer rules the learned dispute resolution panel reached at the conclusion that the aggregated segment consist of content support services of INR 86,900,000 and back office support services is INR 30,900,000 therefore it largely consist of content support services only. It further noted that even the back office support services are actually in the nature of knowledge process outsourcing (KPO) rather than business process outsourcing (BPO) which is evident from the description of the services given in the assesses agreement. Therefore the DRP classified the assessee as knowledge process outsourcing unit and based on that the functional, similar it of the comparable was examined
16. In above circumstances, 1st comparable challenge by the assessee is E Clerxs Services Limited. Assessee contested the same before the learned transfer pricing officer stating that it is functionally not comparable. The learned transfer pricing officer rejected the argument of the assessee stating that the services offered by this company in data analytical and processing are part and parcel of ITeS segment. He further referred to certain

snapshots from the annual report of the company to show that it is an ITeS company which is in the same segment in which the assessee company is working. Such snapshots referred by the learned transfer pricing officer are with respect to the segment reporting and revenue recognition policy of that company. Accordingly, the learned transfer pricing officer held that the above company is retained as a suitable comparable.

17. The objections filed before the learned dispute resolution panel also did not meet any success. The learned dispute resolution panel as per para number 5.2.3 of the order held that the assessee is a high-end KPO as stated in para number 5.1 on discussion of the functional profile of the assessee, and considered that comparable company is also TPO in terms of the safe harbour rules and therefore it is a valid comparable.
18. The learned authorised representative placed at page number 1 – 128 of the paper book volume 2, wherein, he referred to page number 67 of annual report and drew our attention to the General And Administrative Expenses therein and referring to the 1st item the ‘contract for services’ amounting to INR 437.15 millions incurred by that company during the year, he submitted that the comparable company is engaged in outsourcing model and contract for services expenditure is payment made to outside contractor for carrying out the work. Therefore, he submitted that there is a basic difference between the business modalities of the assessee as well as this comparable company as a comparable is engaged in getting work done through outside contract work. To support his contention, he relied very heavily on the decision of the coordinate bench in B C Management Services (P) Ltd vs Deputy Commissioner Of Income Tax (2017) 83 taxmann.com 346 (Delhi) (Tribunal) dated 25/05/2017 wherein this comparable company was considered and coordinate bench excluded it. He further submitted that that the comparable company is a high-end knowledge process outsourcing unit where the assessee is not carrying on the functions of the knowledge process outsourcing. He further submitted that the comparable company has assumed the significant risk whereas the assessee is a risk and ensure to entity. The next argument on this comparable was that it has a super not profit. It was further contended that it is a high turnover and its revenue being 29 times higher than the assessee it should be excluded. He

further h submitted that revenue of the comparable company has increased at the rate of 33% whereas the industry growth rate was nearly 14%. Therefore his argument was that on the basis of the above decision the above comparable company should be excluded.

19. The learned DR vehemently opposed the arguments of the learned AR. He submitted that at the outset it may be noted that the assessee had not raised any of the grounds listed above [except ground no i. (functionally different)] before TPO as is evident from the submission of the assessee before TPO appearing in assessee's paper book Vol-1, page no 335-389. All the grounds mentioned are new grounds being raised before ITAT. These should not be considered or it should be sent back to TPO for fresh consideration. He submitted that Assessee did not raise any of the grounds except functional dissimilarity, before DRP either. DRP considered the ground of Supernormal Profits. DRP also relied upon the judgments of Hon'ble Delhi High Court in the case of Chryscapital Investment Advisors and in the case of Ramp green Solutions Pvt Ltd Vs CIT (2015-TII-33-HC-Del-TP) and held that assessee failed to establish that the comparables with high profit margins are functionally very different so as to render them unsuitable even for TNMM comparison and that TPO had given valid reasons for his decision. Considering the above, DRP held that super profit companies can be taken as comparable (page 14 of DRP order). he submitted that It is trite law that the assessee should submit all the evidences and should take all the grounds at the first opportunity (before TPO, in this case) itself. Therefore, grounds/contention raised above, should not be considered at this stage of appellate proceedings.
20. Without prejudice to the above, submission on each of the contention of the assessee, he submitted a written note on this comparable as under-

- a. Functional Difference: Argument that E Clerx provides high end KPO services whereas assessee provides low end services do not hold in the light of the following:

As per the TP Study of the assessee (page no 23 and 24 of the paper book), the assessee designs and develops educational content with appropriate media elements and graphics which are used for imparting online education at various levels in more than 70 campuses in USA and higher educational schools in UK, Ireland, Asia and Africa. It cannot be argued that the quality of educational content

being used for imparting knowledge in such reputed educational institutions abroad does not require knowledge and expertise for its design and development. It cannot be argued that KIPL develops its content by plagiarism or violation of copy rights or other intellectual property rights. Therefore, it follows that subject/domain knowledge as well as technical expertise (to make it online with proper graphics and media elements) is an imperative in designing and developing online educational content. Therefore, the functional profile of the assessee itself, as noted in its own TP study, establishes that assessee is into providing value added services.

Hon'ble DRP has noted that the assessee had provided incomplete copy of its agreements with AEs (paper book vol-1, page 175 to 185) in respect of 'Content Development Services' and Back Office Support Services', that too after repeated opportunities given to assessee (para 5.1(2) of DRP order).

After considering the agreement and all the relevant facts of the case DRP has concluded that the assessee is also providing value added services and hence can be compared with a company providing KPO services (page 41 to 44 of appeal set, conclusion at para 5. page 44).

- b. Assessee (KIPL) is risk insulated entity: Assessee, in its TP report admits of Forex risk (Page 44 of Paper Book Vol-1). It also admits to provide project management, manage human resources, and ensure quality. These functions entail project management risk, HR risk and quality risk respectively. Besides these risks, the assessee being a captive service provider has huge risk in the nature of 'single customer risk' and this risk doesn't get eliminated just by getting assured remuneration at cost plus model from the only customer(AE). if the AE fails or for any reason doesn't get business or doesn't give work to the assessee in India, not only this assured return loses its significance but leaves the assessee with zero business. Thus assessee has huge business and market risk. Besides, the assessee also assumes common risks such as capital risk, asset risk, regulatory risk, law and order related risk and other business risks etc. Therefore, it cannot be held that the assessee is risk-insulated entity.
- c. Supernormal profit: The entire exercise of determination of ALP by using TNMM seeks to determine the profit that comparable uncontrolled enterprises would make. Therefore, supernormal profit cannot be a criteria for elimination of any comparable as held by Hon'ble Delhi High Court in the case of in the case of Chryscapital Investment Advisors and in the case of Rampgreen Solutions Pvt Ltd Vs CIT (2Q15-TI!-33-HC-Del-TP) unless the assessee, with tangible evidences demonstrates that the superprofit has been earned by a

company owing to functional difference (or FAR differences). The assessee has abjectly failed to demonstrate the same not only before the lower authorities but also before this Hon'ble Tribunal. This issue has also been considered and rejected by Hon'ble DRP as stated above.

- d. High Turnover/Scale of Operations: Turnover doesn't impact profitability/profit margins which have been used as PLI for TNMM analysis it only means higher revenue and more often than not higher revenue comes at a lower profit margins. In service industry, due to absence of huge fixed cost (unlike manufacturing); profit margins do not improve with increasing turnover as there is direct relationship between employee cost and the turnover. More revenue means more employees cost. Variable costs (of which employee cost is a major portion) increases with turnover.
- e. Increase in company's revenue being higher than industry average:
This is same as saying that the company earned super profits and hence this issue has been dealt as above. This issue has also been dealt in the orders of TPO and DRP in detail and I rely on the same.
- f. E Clerx outsourced its work: This is a new ground being raised for the first time. Ld AR argued, by referring to Page 67 of Paper Book Vol-II wherein an amount of Rs 437.15 million was mentioned against 'Contract For Services', that e Clerx had outsourced its work whereas the assessee used its own employees for delivering the services.

This is not born out of the facts as discussed below:

- i. As per P&L account of e clerx (Page 59 of Paper Book Vol-II) the employee related expenses were Rs 1189.62 which is sufficient enough to conclude that the company had used its employees to render services.
- ii. Page 32 of the annual report of the company (Page 34 of Paper Book Vol- II) gives an overview of the Expenditure. It says that operating expenses comprise of employee costs, general & administrative expenses, selling and marketing expenses. There is no mention of outsourcing expenses as part of operating expenses. It further says that employee cost increased from Rs 1476.53 million from Rs 1077.81 million in earlier year due to increase in head count by 28%. Possibility of outsourcing of work to outsiders becomes very remote in the backdrop of such an increase in number of in-house employees and employee cost.
- iii. It may be noted from Page 67 of Paper Book Vol-II that the sub-head 'contract for services' has been classified by e clerx itself under the broad head 'L' 'general and administrative expenses'

and not under the head 'K' which captures 'employee compensation and related expenses'. Therefore, it is clear that the sub-head 'contract for services' is related to 'general and administrative expenses' and not to 'employee compensation and related expenses' unless we hazard a highly unsafe presumption that the company had erroneously put this sub-head under 'wrong' broad-head despite availability of appropriate head.

- iv. There is nothing in the annual report to suggest that the sub-head 'contract for services' was related to outsourcing of work in relation to services rendered to its AEs. The probability of outsourcing by e Clerx, which itself is a KPO and gets to do the work outsourced by its clients on the strength of its competent and professional employees, is close to zero. No client makes payment to e Clerx for getting work done by any employee of any company; rather they make payment to e-Clerx for obtaining the professional/technical/knowledge intense services of the employees of e- Clerx itself.
 - v. E clerx had huge fixed assets (Page 62 of Paper Book Vol-1) in the nature of computers, computer software, office equipment and others which require maintenance. It is not uncommon to have Maintenance Contracts for maintenance of such assets. There is nothing to suggest that the subhead 'contract for services' was not for any such maintenance contract or for any other thing (and there can be several such things) totally unrelated to employee cost.
 - vi. In any case this argument doesn't stand as the company had passed employee cost filter of 25% used by TPO, upheld by DRP and not objected to by the assesse in respect of this comparable. So, even if it is presumed that expenses under this sub-head are related to employee cost, the fact remains that its much lower than the employee cost of Rs 1189.62 million. Therefore, this insignificant amount of 'hypothetical outsourcing' doesn't change the FAR of the company so as to vitiate the comparability.
 - vii. There is no mention, at all, of outsourcing model in the Annual Report of the company.
21. In rejoinder, the learned authorised representative vehemently opposed all the arguments raised by the learned departmental representative. He submitted that the legal grounds can be raised at any time. Even otherwise he stated that now this issue cannot be sent back to the file of the learned transfer pricing officer to give him a 2nd inning and this comparable itself is

required to be excluded here by the coordinate bench itself. For this proposition he relied on the decision of the honourable Gujarat High Court in *Rajesh Babubhai Damania vs Income Tax Officer 122 taxmann 614 (2002) (Gujarat) (251 ITR 541)*. He also submitted that issue is squarely covered in favour of the assessee by the decision of the coordinate bench in case of *BC management services (supra)* wherein this comparable company has been excluded from the comparability analysis.

22. We have carefully considered the rival contention and perused the orders of the lower authorities. Admittedly the functional profile of the assessee is accepted by the learned transfer pricing officer however the learned dispute resolution panel has held that it is a high-end KPO. Admittedly there is no challenge to the functional profile stated by the learned dispute resolution panel. Admittedly the coordinate bench in *B C Management Services (P) Ltd vs Deputy Commissioner Of Income Tax (2017) 83 taxmann.com 346 (Delhi) (Tribunal) dated 25/05/2017* has held as under:-

“12. However without entering into the semantics of arguments as to what kind of functions constitutes low-end ITeS service provider or high-end ITeS or KPO service provider, we would like to confine our finding on FAR analysis. Because, at times when host of services are performed under ITeS, likes of assessee's, there becomes very thin line distinction between functions performed by the low-end ITeS service provider and high-end ITeS service provider and it is quite difficult to analyse in such situations as to how much value additions are there in deliverables in rendering of such kind of host of services. At the outset, on a perusal of the Financials and annual report of E-clerx for the relevant financial year as pointed out to us during the course of the hearing, ***we find that the E-clerx has outsourced most of its services to outsiders which is evident from the fact that the expenses under the head 'contract for the services' is more than Rs. 43.71 Crores during the year out of total expenses debited to profit & loss account of Rs.***

91.29 Crores. The major operations appears to be based on outsource model, which is evident from the quantum of expenditure and notes to the financial account (the copy of which is appearing at page 840 of the assessee's paper book). In an outsourcing model, the assets deployed in the form of human resources, infrastructure and other intangibles differ from an entity which operates from its own resources. Whence, in the case of E-clerx, substantial work has been outsourced to various parties, as compared to the assessee, where the entire back office support services have been provided by the assessee itself, then on this ground alone, it would be very difficult to put E-clerx in the comparable basket. Another important fact which is borne out from the annual accounts is that, E-clerx is performing financial services as well as sales and marketing services for which there is no separate segmental information. It reflects only one primary segment which is data analytics and process outsourcing services. Sales and marketing activities again is a different function altogether which cannot be compared with the assessee which is performing purely back office support services. Under these circumstances also it would be very difficult to find out as to what is the profit margin from the sales and marketing services which is entirely a different from the functions carried out by the assessee. Further before us, the learned counsel has relied upon catena of decisions of this Tribunal and also High Courts, wherein E-clerx has been held to be incomparable with the companies providing purely back office support services. In view of aforesaid cumulative factors, we hold that E-clerx cannot be held to be a good comparable for bench marking the

assessee's margin to arrive at ALP and accordingly, we direct the AO/TPO to remove this comparable.”

[Underline supplied by us]

23. On reading of above decision, it is apparent, that on reading the head ‘contract for the services’, coordinate bench noted that it appears that main operations are based on outsource model of this company. Then the coordinate bench discussed that if the assessee does not have an outsourcing model but the comparable company has outsourcing model, then they are not comparable. We fully agree with the ratio laid down by the coordinate bench. However ld DR has raised serious arguments on the issue that above comparable has no outsourcing activities by referring to various pages of the annual report of the comparable company, therefore we are duty bound to examine these facts. we have also analyzed the annual report of the comparable company and also requested the learned authorised representative to show us that how the comparable company is stated to be engaged in outsourcing model. The learned authorised representative merely made the reference to the coordinate bench decision and also the general administrative expenditure of the comparable company. On careful analysis of the decision of the coordinate bench, it is apparent that it appeared to the bench that major operations of the comparable company are based on outsourcing model. We are also conscious of the fact that the decision of the coordinate bench has made an observation on the functionality of the comparable. It is also clear on reading para number 12 of the order of the coordinate bench as reproduced earlier that outsourcing model is not the only reason for which the comparable company was excluded in that particular decision. It is a fact that assessee has never contested before the lower authority that this comparable company has an outsourcing model and therefore it should be excluded. As this argument is raised before us for the 1st time and that too merely relying on the decision and not supporting it with the annual report of the comparable company, we are duty-bound to examine the annual report of the comparable company and 1st strive to decide the issue here itself to not to put either the assessee or the revenue in any inconvenience. No doubt in schedule ‘L’ In ‘General And Administrative Expenses’ grouping

the comparable company has incurred the expenditure of Rs 437,150,000 towards 'contract for services'. Therefore now it is important for us to note that whether the contract for service expenditure incurred by the comparable company are whether for outsourcing expenditure or any other expenditure. On careful analysis of schedule K, which is employee compensation and related expenditure, the comparable company has incurred Rs. 1,189,620,000 towards the employee cost. Therefore it is now apparent that assessee has incurred the huge employee cost which is 3 times more than the contract for services, therefore, even if the contract for services is outsourcing expenditure, it is only 25% of the employee cost. Then we looked at the schedule to the financial statements, wherein 'related party transactions' are mentioned. On careful analysis. It was found that assessee has paid Rs. 192,120,000 as a contract for services to its United Kingdom associated enterprises. It was further noted that Rs. 222,300,000 were paid as contract for services to its USA AE company. Further, a sum of Rs. 22,730,000 was also paid to a Singapore associated enterprise. These details are available at page number 73 of the annual report. Total sum paid on contract for services is Rs. 437150000/which equals to the amount paid to this associated enterprises. Thus amount paid to all these 3 associated enterprises equals to the amount of contract for services debited in the general expenditure. Therefore, it is apparent that the 'contract for services' expenditure debited to the General Management Expenditure And Administrative Expenditure debited by the comparable under the head contract for services of Rs. 437,150,000 is not outsourcing charges but various charges paid to its related parties for different services. In the complete annual report for the relevant financial year examined by us, There is no mention of any outsourcing model employed by the comparable company. Contrary to that in the Management Discussion And Analysis, It is apparent that comparable company is hugely relying on its human resource assets. On looking at the functional profile of the comparable company also where it is engaged in a specialized activity, It is highly unusual that it is engaged in providing services to its clients through outsourcing model. Therefore, now the dilemma before us is how to resolve the dispute between the assessee and the revenue where assessee contends

that company is carrying on business through outsourcing model and revenue refutes the above argument. The assessee is relying upon a judicial precedent of the coordinate bench of equal strength and very forcefully argues that this coordinate bench is bound to follow the above decision and cannot sit into the correctness of the judgment now, revenue relies upon the annual accounts placed before us. The facts are also telling us that this is altogether a new argument raised before the ITAT. We are very conscious about the decision of the coordinate bench which is cited before us and our duty to follow that. However, where on factual analysis, it is found that, the comparable company is not engaged in the outsourcing model as per the financial report of comparable company; we are also duty-bound to examine the correct facts as the coordinate bench is the final fact-finding authority. Therefore, On careful analysis of all these arguments, and respectfully following the decision of the coordinate bench, wherein a ratio has been laid down stating that a comparable company carrying on its services through outsourcing model substantially is not comparable with a company providing services on its own, we set aside the comparability suitability of this comparable company back to the file of the learned assessing officer/transfer pricing officer with a direction to examine the above fact by issue of notice under section 133 (6) of the act to the comparable company and ascertain whether the sum of INR 437,150,000/- spent on 'contract for services' debited under the General And Administration Expenses are relating to Outsourcing Services or not. If, it is found that these are outsourcing expenditure, then TPO is directed to delete/exclude the above comparable company from the comparability analysis. Even otherwise, it is found that these expenditure are not for the outsourcing services, the learned transfer pricing officer is directed to decide the issue after giving assessee a opportunity of contesting this comparable on this issue of outsourcing model as well as any other issue, and then decide it on merits. Accordingly, we decide the issue of exclusion of each clerk services as above.

24. The learned authorised representative has also relied upon the decision of the honourable Gujarat High Court in 251 ITR 541 and stated that the setting aside the issue back to the file of the learned transfer pricing officer will give a 2nd lease of life to the issue when everything is on record. We

have carefully considered the facts of that particular case and note that in that particular decision the fact shows that a businessman had received deposit from 6 parties and repaid all of them. The learned AO of disregarding the evidences produced by the assessee regarding the identity, genuineness and financial capacities of the parties made the addition of the amount. On appeal the Commissioner appeals deleted the addition and the tribunal restore the matter back to the file of the assessing officer holding that the ends of the justice would be to fresh innings were given to the assessing officer to cross examine the creditors in the light of the statements and affidavits and other evidences on record. It is apparent that in the present case the learned dispute resolution panel has categorically noted that the assessee has not given the complete agreements. Further the assessee has raised the new argument which was not raised before the lower authorities for exclusion of the above comparable. Additionally the assessee is contending that comparable is carrying on outsourcing model business which is not justified from the financial records and annual reports produced by the assessee before us. In view of these facts it is in the interest of the assessee that it may be examined by the learned assessing officer by issue of notice u/s 133 (6) of the act that whether the comparable company is carrying on an outsourcing business model or not. Therefore the reliance placed by the learned authorised representative on the above decision does not support the case of the assessee.

25. The next comparable contested is Infosys BPO Ltd. Assessee raised objection before the learned TPO about the inclusion of the above company stating that it is not functionally comparable, it has an incomparable scale of operation, and it has a brand value and the presence of intangibles. The learned TPO rejected the contention of the assessee stating that on the issue of brand profits, assessee has failed to demonstrate how the profit margin of 17.86%, which is less than the average of the comparable, is influenced by brand profits. The learned DRP has simply rejected the argument of the assessee stating that this comparable was selected by the assessee and has been accepted by the TPO.
26. The assessee contested the above comparable on the same arguments which were raised before the learned TPO.

27. Ld DR vehemently opposed the arguments of the ld AR . It was submitted that this was a comparable selected by the assessee itself after considering all the grounds being raised, in its own TP Study. Moreover, assessee had never objected to its inclusion before TPO. Assessee shouldn't be allowed to delete this comparable, unless of course the entire search process of assessee is declared invalid and unreliable and de novo search for New comparables are undertaken by this Tribunal (either itself or by issuing such direction to TPO).
28. We have carefully considered the rival contentions for exclusion of the above comparable. Assessee has submitted the copy of the annual report of Infosys BPO Ltd, which is placed at page number 129 – 265 of the paper book. Undoubtedly the comparable company belongs to Infosys group and therefore it has the support and backing of the Infosys brand which will have its own impact on the profitability and price of this comparable company. It is also not necessary that the comparable company must have spent for the brand value. In the present case of comparable is not required to do so as it belongs to as such one of the largest group in the IT segment “Infosys”. As per page number 281 in schedule 12 selling and marketing expenses shows that comparable company has spent approximately INR 7,500,000 towards the brand building and advertisement expenditure. Coupled with the fact that the comparable company belongs to an Infosys group, has incurred the expenditure on the brand building and on the annual report itself shows the imprint of being part of the large IT segment group, it is apparent that the functional profile, the assets utilized by the comparable company are not comparable with the assessee company. Therefore, for this reason only, we direct the learned transfer pricing officer, AO to exclude the above comparable from comparability analysis.
29. The next comparable contested by the assessee is the exclusion of TCS E serve limited on the ground that this company is performing though ITeS services however it has a brand behind it and therefore the same is not comparable with the assessee. In nutshell assessee challenged that this comparable is required to be excluded for the brand value of the TCS and functional the similarities. The assessee challenged its exclusion for the reason of the functional dissimilarity as the comparable companies engaged

in transaction processing and technical services like software testing, verification and validation of the software.

30. The learned authorised representative also challenged it has its own intangibles, pays for Tata brand equity and non availability of the segment information. He also submitted that it is also not comparable on the ground of incomparable scale of operations.
31. The Id DR vehemently supported the orders of the lower authorities.
32. We have carefully considered the contentions and find the annual account of the above comparable company placed in paper book. Apparently TCS E serve is a subsidiary of Tata consultancy services Ltd. Behind the above comparable company, there is a Tata brand. On the perusal of schedule to the profit and loss account there is a payment of towards the Tata brand equity contribution. For this reason that it belongs to Tata group and has also contributed to Tata brand which is one of the largest brand in the information technology segment, there is a definite impact on the pricing capacity of the comparable which the assessee lacks. Hence, we find that TCS E serve Ltd deserves to be excluded. Accordingly we direct the learned TPO - AO to exclude the above comparable.
33. Now we come to the comparable CG Vak software and exports Ltd where the assessee contends that it should be included in the comparability analysis. The learned authorised representative submitted that it is functionally comparable and therefore the comparability analysis is paramount hence same should be included.
34. The learned departmental representative vehemently opposed the argument of the assessee and submitted that segmental details given at page 396 of P3 I and page 26 of annual report 2010 shows that it has persistent losses in this segment in past three years (Rs 3.43 lakhs, 2.21 lakhs, 15.34 lakhs respectively for year ending 31 st March 2009, 2010 and 2011). That FAR of this company has not been examined either by TPO or DRP owing to different FY ending and unavailability of reliable data. Even till today the assessee has not filed complete annual report of the company to establish FAR comparability. It is reiterated that onus was on assessee to establish FAR similarity as he wants this comparable to be included. He failed to discharge his onus. From the part of annual report submitted (page 395 of

PB II), it may be seen that it has off site as well as onsite model which is not with the assessee. Moreover this company is engaged in low end medical transcription which is drastically different from the high end content development and high end value added services being provided by the assessee. In view of the above, the order of the AO should be upheld and appeal of the assessee be dismissed.

35. On careful analysis of the arguments of the both the parties we found that the assessee has enclosed the annual report for financial year 2011 at page number 388 – 399 of the paper book. The learned TPO has considered the ANP at para number 10 of his order. He has rejected the comparable selected by the assessee stating that the appropriateness of filters and arguments in favour of high turnover and abnormal margins has already been discussed earlier and then he proceeded to discuss the arguments of the assessee against rejection and inclusion of the comparables. On careful analysis of the determination of a LP of this segment we find that the learned transfer pricing officer has not discussed at all why he is excluding the comparable selected by the assessee. The learned DRP vide para number 5.3 of his order has rejected the objection of the assessee with respect to inclusion of the comparables stating that all these comparable selected by the assessee and rejected by the learned TPO have been rejected because the file filter used by the learned transfer pricing officer. These filters have been discussed by the learned DRP and therefore the exclusion of the companies which fill these filters was justified and the appellant. We find it is not the reason for rejection of any of the comparable selected by the assessee without finding the functional dissimilarity is between them.
36. Further R system International Ltd is also rejected by the learned transfer pricing officer stating that it has a different financial year ending.
37. The ld AR submitted that it is functionally comparable and quarterly results are available in public domain. He also supported it with several judicial precedents.
38. The ld DR vehemently opposed its inclusion submitting that assessee is seeking inclusion of this comparable though this company is into products and ITES sector constitutes only 20% of its revenue(Page 12 of the annual report), it says that this company has three groups/sectors, namely-

- i. 15V or Independent software vendors: contributes 55% of revenue.
- ii. Product Group: contributes 25% of revenue.
- iii. BPO/ITES group: contributes the remaining 20% of the revenue.

He submitted that it may be seen that there is a full fledged product group which consists of a suite of Lending Solutions for retail loans for banks and financial institutions. Company also sells its own Supply Chain Management Solutions.

Under iSV sector also the company has developed following products:

- a. Niche ERP products,
- b. IT products

He referred to several pages of Annual report stating that Page 21 of the annual report mentions celebrated products of the company namely-'Avalanche', "convergent charging" and "MVNO in a White Box". Page 23 of the annual report mentions two products namely "Indus Solutions' which is a multi-portfolio lending suite and "Indus iPerSyst" which is a product for insurance companies to streamline their business process for policy renewals. Page 81 and 93 of annual report mentions that the company is into sale of software as well as hardware. He also submitted that Different Accounting Year i.e. December 2010 therefore PLI of the ITES segment cannot be worked out. He submitted that Company has only 20 % revenue from the ITES segment. Further, segmental expenditure of this segment is not available. Unavailability of segmental information coupled with different accounting year ending makes it impossible to reliably work out PLI of ITES segment separately. With respect to Significant RPT he referred to Page 98-99 of the annual report reveals that the company had significant related party transactions (RPT) during the year. He also submitted that R System is not a captive service provider submitting that this company is not a captive service provider (unlike assessee). It provides its services from several centres spread across the globe. He referred to Page 5 of the annual report gives global footprint of the company which is much wider than assessee. As per page no 14 of the annual report, the company has 13 delivery centres spread from west coast of America to Singapore in Asia Pacific Region. Thus the market risk, geographical risk, foreign exchange

risk and human resource risk and the cost of providing the services are vastly different from the assessee. In the end he submitted that assessee is seeking inclusion of this comparable; therefore the primary onus was on him to establish its functional comparability by filing relevant documents to establish comparability, which he failed to do. He also submitted that there are enough number of comparables even without R Systems. Hence, there will be no improvement in the comparability exercise by including this comparable unless inclusion of the low PLI of this comparable so as to bring down the ALP itself is regarded as an improvement. In respect of case laws relied upon by the assessee it is submitted that none of the judgments being relied upon by the assessee have been given in assessee's own case. A judgment decides as per the facts of that case. Since assessee was not a party to any of the judgments being relied, assessee's FAR was not compared with any of the comparables discussed in these judgments. As per the scheme of the Act and Rules relating to TP analysis as upheld by Hon'ble Delhi High Court, in the case of ST Microelectronics (copy submitted during hearing), blind reliance on judicial precedent without looking at the FAR comparability is not lawful. Therefore, FAR comparability of the assessee with the comparables, in the relevant year, has to be seen before accepting or rejecting a comparable.

39. We have carefully considered the rival contentions. It is true that by application of only the filter of different financial year this comparable is rejected. Therefore it is clear that all other filters have not been tested on this comparable. Further the functional analysis of this comparable is also not made by TPO. However, it has been pointed out before us that R system International Ltd as a listed company which has the quarterly results available. Therefore if such a quarterly results can be constructed with reliable information then, if it is found to be functionally comparable, crosses all other filters, then it should be included in the comparability analysis.
40. Further with respect to Coral hub Ltd, the fact shows that same is also been rejected by the learned transfer pricing officer stating that the annual report is not available in the public domain.

41. Ld AR submitted the arguments as advanced in the chart submitted before us and also submitting copy of show cause notice where in this comparable is rejected by the ld TPO.
42. The ld DR submitted that assessee in its TP Study for AY 2012-13 had rejected this comparable (despite the search process throwing it to be a comparable) by saying that it's functionally different (page 129 paper book 1 for AY 2012-13). This company has taken up sale of goods(around 75% of revenue) as its primary business during this year(Page 459, 452 of PB-II). Therefore, it has lost its character as BPO in this year. Revenue from ITES is only 20% approximately. This company has huge Intellectual property, goodwill and technical know how (Page 456 of PBII). Huge RPT: This company appears to have huge related party transactions (page 479 of PB II). Alternatively, the related party transactions are not given (page 463 of PBII) As seen from chart of AR, this company is functionally different. Therefore, its not a suitable comparable.
43. We have carefully considered the above contentions. This comparable selected by the assessee and therefore the assessee is directed to submit the copy of the annual report of the relevant data from the database to the learned transfer pricing officer. Further there is also a fact that this comparable is found to be functionally dissimilar to assessee by assessee itself as per argument of the ld DR. Therefore The learned TPO is directed to include the above company in the comparability analysis if it is functionally similar and crosses all other filters. In view of above facts we also direct the ld TPO to examine this comparable.
44. Accordingly all 3 comparables which have been included by the assessee but rejected by the learned transfer pricing officer for comparability analysis are set aside to the file of the learned transfer pricing officer to consider them for the comparability analysis if they are found functionally comparable, passes all the filters applied by the TPO, and reliable information has furnished by the assessee in the form of quarterly results and annual reports.
45. In the result ground number 1 – 8 of the appeal of the assessee are allowed.

46. The ground number 9 of the appeal of the assessee is against the initiation of penalty proceedings u/s 271 (1) (C) of the act. The above ground of appeal is premature and therefore same is dismissed.
47. In the result appeal of the assessee for assessment year 2011 – 12 in ITA number 1025/del/2016 is partly allowed.

ITA No 1022/Del/2017

AY 2012-13

48. Both the parties submitted that facts in the present case are similar to the facts in AY 2011-12. Their arguments in the form of a chart for inclusion and exclusion of the comparable are also similar. It was also pleaded that there is no change in the functional profile and Risk and assets of the assessee. Except comparables for its exclusion and inclusion, no other arguments were advanced.
49. The assessee has raised the following grounds of appeal in ITA No. 1022/Del/2017 for the Assessment Year 2012-13:-

- “1. *The learned TPO / AO / DRP have erred in making an addition of INR 10,691,690 to the total income of the Appellant in respect of international transaction pertaining to provision of content support services and back office support services by the Appellant to its Associated Enterprises (‘AEs’) [hereinafter referred to as ‘impugned transaction’].*
2. *The learned TPO / AO / DRP has erred by not accepting the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 (‘the Rules’), and modifying the same for determination of Arm’s Length Price (‘ALP’) of the impugned transaction to hold that the same are not at arm’s length without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section (3) of section 92C of the Act.*
3. *The learned TPO / AO / DRP have erred in:*
 - a. *Not accepting the use of multiple year data, as adopted by the Appellant in its Transfer Pricing (‘TP’) documentation; and*
 - b. *Determining the arm’s length margins / prices using data pertaining only to financial Year (‘FY’) 2011-12 which was not available to the Appellant at the time of complying with the Indian TP documentation requirements.*
4. *The learned TPO / AO / DRP have erred in rejecting certain comparable companies selected by the Appellant by applying inappropriate comparability criteria such as :*
 - a. *Turnover less than INR 1 crore;*
 - b. *Export turnover less than 75 percent of operating revenues;*

- c. *Different accounting year; and*
 - d. *Employee cost less than 25 percent of operating cost*
5. *The learned TPO / AO / DRP have erred in erroneously rejecting the comparable companies selected by the Appellant and adding certain companies to the final set of comparable companies on an ad-hoc basis, thereby resorting to cherry picking of comparables to determine the ALP of the impugned transaction.*
 6. *The learned TPO/AO/DRP have erred in selecting certain companies (which are earning super normal profits) as comparable to the Appellant to benchmark the impugned transaction.*
 7. *The learned TPO/AO/DRP have erred in treatment of certain operating and non operating items while computing the margins of the Appellant and comparable companies in respect of the impugned transaction.*
 8. *The learned TPO / AO / DRP have erred in not making suitable adjustments to account for differences in risk profile of the Appellant vis-a-vis the comparable companies in respect of the impugned transaction.*
 9. *The learned AO has grossly erred in initiating penalty proceedings under section 271 (1)(c) of the Act.*
 10. *The learned AO has erred in not granting the relief available to the Appellant in view of directions passed by the Hon'ble DRP while passing the final assessment order.*
 11. *The learned AO has erred in not granting the Minimum Alternate Tax ("MAT") credit available to the Appellant in terms of section 115JAA of the Act and also erred in charging consequential interest under section 234B and section 234C of the Act."*
50. As stated that facts are similar to the case of the assessee for assessment year 2011 – 12. In the present case the assessee has challenged the following comparables which have been selected by the learned transfer pricing officer and objecting requesting that those should be excluded from the comparability analysis.
- i. E Clerks services Limited
 - ii. Infosys BPO Limited
 - iii. TCS E Serve Limited
 - iv. Accentia Technologies Limited
51. with respect to the first 3 comparables we have already decided the issue in appeal of the assessee for assessment year 2011 – 12, wherein we have directed the learned transfer pricing officer to verify the facts with respect to E Clerx Services Limited and to exclude Infosys BPO Ltd and TCS E serve limited from the comparability analysis. Therefore for the reasons given by

us therein, we also direct the learned transfer pricing officer/AO accordingly.

52. With respect to the last comparable Accentia technology Ltd, it is submitted that it is functionally dissimilar as it is engaged into products such as Insta Kare, Insta PMS, insta EMR. It is further stated that it has insufficient segmental information and is having significant intangible assets such as Good will. He further referred to the decision of Inductis India private limited in ITA number 01/02/2003/del/2017 for assessment year 2012 – 13 dated 20/8/2018 wherein for assessment year 2012 – 13.
53. The learned the learned departmental representative vehemently objected to the submission of the assessee and supported the orders of the lower authorities.
54. On careful consideration of the annual report of the above comparable company it is stated that the comparable company provides healthcare and receivable management services involving medical transcription, medical coding, billing and receivables management (collections). In the annual Report description of the medical transcription services have been provided with shows brief process of the medical transcription giving the process flowchart and in the end it is stated that medical transcription profession is considered very much a skilled work which can be done only after undergoing 6 to 8 months of rigorous training as it involves the identifying the generic name and trade name of the various drugs. That can be done only after reference to the pharmacology reference books which should always be a part of the library of a medical transcription profession. Further medical coding has also been explained by way of a flowchart. The company says that it has a sizeable number of certified coders which is assigning codes to diagnosis and procedures which help in financial reimbursement from insurance companies and government companies etc. It is further stated that medical coders are specialized in coding after thorough training program and certification. Further the assessee has contended that it has a significant amount of brands and software for providing IT services. For this proposition we look management discussion and analysis it is submitted that it is the one of first company to offer SaaS[Software as s service] model in MHRC service segment. There are also references to the various

products at page number 28 – 42 of the annual accounts. It is also entering into the legal process outsourcing segment. It is also using Immaculate business process outsourcing management solutions for healthcare, financial and insurance sector and health the dox - cutting-edge offshore MHRC solutions for healthcare sector are provided by this company. Hence, looking to the functions performed by the Accentia technology and the various kinds of advanced assets in the form of software et cetera utilized, it is apparent that functionally the above company is not comparable with the assessee company. Hence we direct the learned transfer pricing officer /learned AO to exclude the above company from the comparability analysis.

55. As assessee has requested for including R Systems International Ltd which has been rejected by the learned transfer pricing officer stating that it has a different financial year ending and therefore it fails the filter of the similar financial year. Identical we have decided this issue in the case of the assessee for assessment year 2011 – 12 wherein we have directed the assessee to submit the quarterly information of the above company to the learned transfer pricing officer. The learned transfer pricing officer if he found that it is functionally comparable then merely because it does not pass the same financial year filter it cannot be rejected. Therefore on verification of the requisite detail, the above comparable company should be included in the comparability analysis by the learned transfer pricing officer.
56. In view of this ground number 1 – 8 of the appeal of the assessee is allowed with above directions.
57. Ground number 9 assessee has challenged the initiation of proceedings u/s 271 (1) (C) of the act, in ground number 10 the assessee has challenged that the learned AO has not granted proper relief in accordance with the direction of the DRP and in ground number 11 the assessee has challenged for granting of the MAT credit.
58. We have carefully considered the argument of the learned authorised representative and the learned senior departmental representative and found that ground number 9 is premature and therefore same is dismissed.
59. Adjudicating ground number 10 we direct the learned AO/TPO grant the proper relief as directed by the ld learned dispute resolution panel to the

assessee as it binds him. However it was not made available to us that what are those concessions, relief which has not been granted by the TPO/AO. We direct the assessee to submit details of those concessions and relief, TPO is directed to examine the same and then decide it on merit and grant relief to the assessee.

60. With respect to ground number 11 we direct the learned assessing officer to grant the proper minimum alternate tax credit available to the assessee after proper verification.

61. Accordingly appeal filed by the assessee for assessment year 2012 – 13 in ITA number 1022/Del/2017 is partly allowed.

Order pronounced in the open court on 10/05/2019.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 10/05/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi