

IN THE INCOME-TAX APPELLATE TRIBUNAL "K" BENCH MUMBAI  
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER  
ITA No.4406/Mum/2012 (Assessment Year 2007-08)

DCIT-9(2) Room No. 218, 2 <sup>nd</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s. Morgan Stanley Advantage Services Pvt. Ltd. Athena Building No.5, Sector-30, Mindscape, Goregaon (W), Mumbai-400074. <b>PAN: AAACA3400B</b>
Appellant		Respondent

ITA No.4479/Mum/2012 (Assessment Year 2007-08)

M/s. Morgan Stanley Advantage Services Pvt. Ltd. Athena Building No.5, Sector-30, Mindscape, Goregaon (W), Mumbai-400074. <b>PAN: AAACA3400B</b>	Vs.	DCIT, CC-3(4) Aayakar Bhavan, M.K. Road, Mumbai-400018.
Appellant		Respondent

Appellant by : Shri Jayant Kumar (DR)  
Respondent by : Shri Sunil M. Lala with  
Shri Tushar Hathiramani (AR)  
Date of Hearing : 10.05.2019  
Date of Pronouncement : 10.07.2019

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. These cross appeal are directed against the order of Id. Commissioner of Income-Tax (Appeals)-15, Mumbai [the Id. CIT(A)] dated 03.04.2012, which in turn arises from the assessment order passed under section 143(3)

on 14.01.2011. The Assessing Officer passed the assessment order in pursuance of order of Transfer Pricing Officer (TPO) passed under section 92CA(3) dated 26.10.2010. The revenue in its appeal has raised the following grounds of appeal:

1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the relevant transaction of M/s Mold-Tech technology Ltd as one of the comparable without appreciating the fact that the TPO while calculating the ALP has considered the segmental operating profit of KPO sector only of Mold-Teck Tecnology Ltd.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the relevant transaction of M/s ICRA Techno Analytics Ltd. As one of the comparable without appreciating the fact that M/s ICRA Techno Analytics Ltd. is also in the business of ITes Services.

3. The appellant prays that the order of CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

2. Vide application dated 11.05.2018, the revenue has raised the following additional grounds of appeal:

1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in not directing the A.O. to obtain the ITES segment details u/s 133(6) of the Act, in respect of M/s ICRA Techno Analytics Ltd.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in applying certain parameters selectively to certain comparables to exclude the same in contravention of the principles laid down under 10B(2) of IT rules, which provides that a comparability parameters should be applied uniformly to all the comparables for the determination of ALP u/s 92C of the Income Tax Act, 1961.

3. The appellant prays that the order of CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

3. The assessee in its cross appeal has raised the following grounds of appeal:

Aggrieved by the order passed by the Commissioner of Income-tax (Appeals)-15, Mumbai [hereinafter referred to as the learned CIT(A)], under section 250 of the Income-tax Act, 1961 (Act) and based on the facts and circumstances of the case, Morgan Stanley Advantage Services Private Limited [hereinafter referred to as 'the Appellant'] respectfully submits that the learned CIT(A) erred in partly upholding the order of the Assistant Commissioner of Income-tax - Range 9(2), Mumbai [hereinafter referred to as 'the learned AO'], on the following Grounds:

1. In holding that the transfer pricing analysis undertaken by the Appellant for computing the arm's length price (hereinafter referred to as 'ALP') in relation to the Information Technology Enabled Services (hereinafter referred to as 'ITES') provided by the Appellant is not in accordance with the provisions of section 92C(1) and 92C(2) of the Act and is liable to be rejected.
2. In upholding the learned AO's action of including an additional set of 19 comparable companies identified through a separate process.
3. Without prejudice to Ground 3, in partly rejecting the Appellant's contention that the additional set of 19 companies provided by the learned AO were not comparable due to one or more of the following reasons:
  - Functionally incomparable companies
  - Supernormal profits
  - Exceptional year of operations
  - Financial information not available in public domain
4. In upholding the rejection of one of the Appellant's comparable companies, viz. Saven Technologies Limited, engaged in the provision of ITES provided by the Appellant.
5. In upholding the use of single year data for Financial Year 2006-2007 for the transaction pertaining to ITES and rejecting the data for Financial Year 2005-2006 and 2004-2005 used by the Appellant for computing the ALP for ITES.
6. In upholding the identification of comparables selected by the learned AO based on data available at the time of the assessment, i.e. use of non-

contemporaneous data which was not available to the Appellant at the time of complying with the transfer pricing provisions, for computing the ALP for ITES.

7. In upholding the application of certain inappropriate filters by the learned TPO for identifying comparable companies

8. Without prejudice to the above Grounds, in not granting working capital adjustment to the average Profit Level Indicator of identified comparable companies.

9. Without prejudice to the above Grounds, by not allowing the adjustment for difference in the level of risk assumed by the Appellant vis-a-vis the risk of identified comparable companies.

10. Without prejudice to the above Grounds, in not adopting the ALP after considering an amount varying by 5 percent of the arithmetic mean of the margins of identified comparable companies

11. Without prejudice to the above Grounds, in rejecting, out of 19 additional companies selected by the learned AO, only one company as not being comparable, resulting In an enhancement of the assessment without adequate opportunity being provided to the Appellant as required under the provisions of section 251 of the Act.

12. Without prejudice to the above Grounds, by ignoring the fact that since the Appellant is availing tax holiday under section 10A of the Act, there is no motive or reason to shift profits out of India, or curbing of taxes which is the basic intention of introducing the transfer pricing provisions.

4. Further, the assessee vide its application dated 16.01.2018 has raised the following additional grounds of appeal:

Morgan Stanley Advantage Services Pvt Ltd (hereinafter referred to as the 'Appellant') craves leave to prefer an appeal on the following additional ground against the order of the Commissioner of Income-tax (Appeals) -15 ['CIT(A)'] under section 250 of the Income-tax Act, 1961 (hereinafter referred to as the Act):

On the facts and in the circumstances of the case and in law, the learned CIT(A) and the Ld Transfer Pricing Officer erred in considering **Triton Corp Ltd** as a

comparable. It is submitted that since the company / directors of the company were involved in fraud the financial results of the company were not reliable and therefore the same could not be considered as a comparable.

5. Brief facts of the case are that the assessee-company is a subsidiary of M/s. Morgan Stanley International Holdings Inc and Morgan Stanley incorporated USA. The assessee-company was set up by the Morgan Stanley in India to support front office and infrastructure unit functions in their operations of various group entities globally. The assessee-company filed its return of income for Assessment Year 2007-08 on 22.10.2007 declaring total income at Rs. 1,12,32,492/-. Along with the return of income, the assessee furnished report under Form 3CEB. The return was selected for scrutiny. During the scrutiny assessment the assessing officer noted that the assessee in the report under Form 3CEB reported the following international transactions:

S.No.	Nature of Transactions	FY 2006-07	Method used by the assessee	FY 2005-06
1	Provision of ITES (Revised)	174,12,36,675	TNMM	123,97,44,681
2	Reimbursement of personnel cost to AEs (paid)	20,79,24,950	Actuals	16,87,00,654
	Total	194,91,61,625		140,84,45,335

6. The assessee bench marked its ALP under Transaction Net Margin Method (TNMM), the assessee selected 9 companies as comparable and computed

the margin on the basis of two years and average margin in the following manner:

<b>Sr No.</b>	<b>Name of comparable</b>	<b>Margin (Avg of two years)- PB 1/180</b>	<b>Margin (for the relevant year)-PB 1/206 and TPO/3</b>
1	Ace Software	11.29%	-7.04%
2	Allsec Technologies	27.36%	27.21%
3	CS Software Enterprises Ltd.	13.61%	23.73%
4	Flextronics Software Systems Ltd.	3.24%	-0.89%
5	Genesys International Corporation Ltd.	-1.46%	12.52%
6	Nucleus Netsoft & GIS India Ltd.	42.21%	30.52%
7	Saven Technologies Ltd. [rejected by TOP & CIT(A)]	61.57%	-37.31%
8	Spanco Telesystems and Solutions Ltd.	16.12%	24.82%
9	Triton Corp Ltd.	20.65%	34.49%
	<b>Arithmetic Mean</b>	<b>21.62%</b>	<b>12.01%</b>

7. The margin on comparable based on average of two years was 21.62% and the assessee's margin for international transaction was 21.76%. Thus, the assessee claimed its transaction at the Arms Length. The Assessing Officer made a reference to Transfer Pricing officer (TPO) under section 92CA for computation of Arms Length Price (ALP). During the proceedings before TOP, the TPO rejected one of the assessee's comparable i.e. Seven Technologies Ltd., and accepted remaining 8 comparable. However, the TPO carried out its own research and included the following 19 comparable:

1. Eclerx Services Ltd.

2. Mold Tek Technologies,
  3. Accentia Technologies Ltd.
  4. I Services India Pvt. Ltd.
  5. Bodhtree Consulting Ld.
  6. Vishal Information Technologies Ltd.
  7. Cosmic Global Ltd.
  8. Informed Technologies Ltd.
  9. HCL Comnet Systems & Services Ltd.
  10. Infosys BPO Ltd.
  11. Wipro Ltd.
  12. Maple Esolutions Ltd.
  13. ICRA Techno Analytics Ltd.
  14. Aditya Birla Minacs Worldwide (Transworks Information Services Ltd.)
  15. Apex Knowledge Solutions Ltd.,
  16. Apollo Healthstreet Ltd.
  17. Caliber Point Business Solutions Ltd.,
  18. Datamatics Financial Services Ltd. and
  19. R Systems International Ltd.
8. The TPO after including 19 comparable worked out Arithmetic mean of Profit Level Indicator (PLI) of 27 comparable company and arrived at margin of 28.87% against PLI of 21.76% of the assessee and worked out difference between ALP of sales and value of international transaction and made adjustment of Rs. 10,16,77,010/- in the following manner:

S.No.	Particulars	As per assessee (Form 3CEB)	(Amount in Rs.) ALP determined by Department

1	Value of ITES provided to the AE	174,12,36,675	184,29,13,685
2	Operating Cost (OC)	143,00,56,402	143,00,56,402
3	Operating Profit(OP)	31,11,80,273	41,28,57,283
4	OP/OC	21.76%	28.87%
	95% of the value of the ALP can be accepted as ALP under Section 92C(2) of the Act.		175,07,68,001
	Difference between ALP of sales and value of international transaction (184,29,13,685-174,12,36,675)		10,16,77,010

Accordingly, the ALP of the international transaction is made at Rs. 184,29,13,685/-, as against Rs. 174,12,36,675/- shown by the assessee. Therefore, the necessary adjustment in the ALP comes to Rs. 10,16,77,010/- - Rs. 174,12,36,675/-).

9. On receipt of report of TPO, the Assessing Officer made upward adjustment/addition of Rs. 10,16,77,010/- to the total income of assessee vide assessment order dated 24.01.2011 passed under section 143(3). The assessee instead of filing objections before Dispute Resolution panel (DRP), exercised its option to file appeal before the Id. CIT(A). The Id. CIT(A) after considering the material placed before him and considering the submissions of assessee directed to exclude the ICRA Techno Analytics Ltd. from set of comparable and further directed to consider only IT (KPO) Division of Mold-Tek Technologies Ltd. for the purpose of comparability and bench marking and confirmed the inclusion of 19 additional comparable included by TPO while making ALP. Further, aggrieved by the order of Id. CIT(A), the revenue has filed appeal challenging the action of Id. CIT(A) for inclusion of ICRA Techno Analytics Ltd. and Mold-Tek Technologies Ltd. from the set of comparable. Similarly, the assessee has challenged the

order of Id. CIT(A) and in sustaining the inclusion of 19 comparables included by TPO.

10. We have heard the submission of Id. Departmental Representative (DR) for the revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record. On the admission of additional grounds of appeals the Id. DR for the revenue submits that no new facts are required to be brought on record, all facts are emanating from the orders of the authorities below. During the hearing of appeal on 24/05/2018, the Id. AR for the assessee submits that he has no objection if the additional ground of appeal raised by the revenue is allowed. Accordingly, additional ground of appeal raised by the revenue is allowed. Similarly, the assessee has also raised additional ground of appeal; we have noted that no new facts are required to be brought on record for deciding the additional ground raised by the assessee, therefore, the additional ground of appeal raised by assessee is also allowed.

11. On the various grounds of appeal raised by the assessee. The Id. AR of the assessee submits that the assessee is engaged in providing IT Support (ITES), account reconciliation services etc to Morgan Stanley group entities/its AEs. In the international transaction of assessee was accepted at the ALP in earlier years. During the year under consideration, the assessee provided ITES/Support services to its AE and received a fee of Rs. 174,12,36,675/-. The assessee benchmarked its ALP under Transaction Net

Margin Method (TNMM), the assessee selected 9 companies as comparable and computed the margin on the basis of two years data and average margin. During the proceedings before TOP, the TPO rejected one of the assessee's comparable i.e. Seven Technologies Ltd., and accepted remaining 8 comparable. The TPO carried out its own research and selected additional 19 comparable. The TPO suggested the ALP on the basis of 27 comparables.

12. The TPO worked out Arithmetic mean of PLI of 27 comparable company and comes to PLI of 28.87% against PLI of 21.76% of the assessee and worked out adjustment of Rs. 10,16,77,010/-. The Id. CIT(A) excluded the ICRA Techno Analytics Ltd. as comparable as the said company is engaged in the software and development and sale of software product as well as ITES services. The Id. CIT(A) also directed to consider only the KPO Division of Mold-Tek Technologies Ltd. for the purpose of bench marking. The Id. CIT(A) accepted the remaining 17 comparable selected by TPO.

13. The Id. AR of the assessee further submits that he is not pressing for inclusion of 6 comparable consisting of (i) Aditya Birla Minacs Worldwide (Transworks Information Services Ltd.), (ii) Apex Knowledge Solutions Ltd., (iii) Apollo Health street Ltd., (iv) Caliber Point Business Solutions Ltd., (v) Datamatics Financial Services Ltd. & (vi) R. Systems International Ltd. from the comparable selected by TPO and confirmed by Id. CIT(A).

14. The Id. AR of the assessee further submits that he is disputing the inclusion of 14 comparables which are (i) Eclerx Services Ltd., (ii) Mold Tek Technologies, (iii) Accentia Technologies Ltd., (iv) I Services India Pvt. Ltd., (v) Bodhtree Consulting Ltd., (vi) Vishal Information Technologies Ltd. (now known as Coral Hubs Ltd.), (vii) Cosmic Global Ltd., (viii) Informed Technologies Ltd., (ix) HCL Comnet Systems & Services Ltd., (x) Infosys BPO Ltd., (xi) Wipro Ltd., (xii) Maple Esolutions Ltd., (xiii) Triton Corp Ltd (in additional Grounds of appeals) and ICRA Technology Analytics Ltd (in Revenue's appeal).

15. For exclusion, each of the comparable, the Id. AR of the assessee furnished the chart showing the case laws/ decisions of Tribunal or High Courts, wherein the comparable were not considered as good comparable with the companies engaged in providing ITES Services, which are referred in subsequent paras.

16. For **Eclerx Services Ltd.**, the Id. AR of the assessee submits that Eclerx Services Ltd. has not considered as a comparable in earlier years. Eclerx Services Ltd. is a Knowledge Process Outsourcing (KPO) Service provider which is not comparable to assessee; assessee is engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi High Court in Rampgreen Solution P Ltd Vs CIT (2015) ITR 533 (Delhi), decisions of Tribunal in Wills Processing Services (India) P. Ltd. vs. ACIT [2017] 83 taxmann.com

198 (Mum. Trib.), Hinduja Global Solutions Ltd. vs. DCIT [2017] 78 taxmann.com 199 (Mum Trib.), Stream International Services (P.) Ltd. vs. ACIT [2015] 152 ITD 664 (Mum), DCIT vs. Everest Business Advisory India (P) Ltd. (ITA No. 41/Del/2013 & 1191/Del/2013, H&S Software Development & Knowledge Management Centre (P.) Ltd. vs. ACIT [2017] 78 taxmann.com 159 (Del. Trib.) & BNY Mellon International Operations (India) (P.) Ltd. vs. Dy CIT [2015] 173 TTJ 354 (Pune).

17. For **Mold Tek Technologies Ltd.**, the ld. AR of the assessee submits that Mold Tek Technologies Ltd. has been excluded by ld. CIT(A) for Assessment Year 2008-09 and department is not in appeal against such exclusion. The Mold Tek Technologies Ltd. provides engineering design, detailing services, website design services etc. It provides highly technical and specialized engineering service which comes in the category of KPO and cannot be compared to the assessee engaged in providing back office support services. The ld AR for the assessee relied on the decision of Delhi High Court in PCIT Vs Evalueserve.com Pvt Ltd (ITA No. 921/2017), Wills processing services(India) P Ltd Vs ACIT (2017) 38 taxmann.com 198 (Mumbai-Trib), Hinduja Global Solution Ltd Vs DCIT [2017] 78 taxmann.com 199(Mumbai-Trib).

18. For **Accentia Technologies Ltd.** The ld. AR of the assessee submits that this comparable has neither been selected as comparable in earlier years nor in subsequent Assessment Year in 2008-09. The Accentia Technologies Ltd.

is engaged in developing its own Software products and rendering Medical transcription services and cannot be compared to the assessee engaged in providing back office support services. Further, it has undertaken extraordinary events during the year under review which have an impact on its financials. In support of his contention, the ld. AR of the assessee relied upon the decisions of (1) Wills Processing Services (India) P Ltd. vs. ACIT [2017] 83 taxmann.com 198 (Mum. Trib.) (2) Stream International Services (P.) Ltd. vs. ACIT [2015] 152 ITD 664(Mum) (3) H&S Software Development & Knowledge Management Centre (P.) Ltd. vs. ACIT [2017] 78 taxmann.com 159 (Del. Trib.) (4) Vishay Components (P.) Ltd. vs. ACIT [2017] 83 taxmann.com 319 (Pune Trib.) (5) Global e:business Operations (P.) Ltd. vs. Dy.CIT [2015] 63 taxmann.com 282 (Bangalore Tribn.) (6) Symphony Marketing Solutions India (P.) Ltd. vs. ITO [2013] 38 taxmann.com 55 (Bangalore Trib.) (7) BNY Mellon International Operations (India) (P.) Ltd. vs. Dy.CIT [2015] 173 TTJ 354 (Pune) and Rampgreen Solutaion P Ltd Vs CIT (2015) 377 ITR 533 (Delhi).

19. For **I services**, the ld. AR of the assessee submits that this company is in divergent high end services like web hosting, email services, spam filtering, domain names and DNS hosting, web hosting, email services, spam filtering, domain names and DNS hosting is also providing web design services, domain management services and email management services which cannot be compared to the assessee engaged in providing back office

support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi Tribunal in DCIT vs. Everest Business Advisory India (P.) Ltd. (ITA No. 41/Del/2013 & 1191/Del/2013).

20. For **Bodhtree Consulting Ltd.**, the Id. AR of the assessee submits that Bodhtree Consulting Ltd. is a software solution company, is engaged in providing open-end to end web solution, software consultancy, design and development of solutions, using the latest technology, without adequate segmental information and therefore cannot be compared with the assessee engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of H&S Software Development & Knowledge Management Centre (P.) Ltd. vs. ACIT [2017] 78 taxmann.com 159 (Del.Trib.) & Societe Generale Global Solution Centre (P.) Ltd. vs. Dy.CIT [2016] 69 taxmann.com 336 (Bangalore Trib.).

21. For **Coral Hubs Ltd. (Vishal Information)**, the Id. AR of the assessee submits that Coral Hubs Ltd. (Vishal Information) was outsourcing a significant part of its operations which is evident from its low employee cost and thus had a substantially different business model as compared to the assessee and therefore could not be considered as comparable. The Id. AR of the assessee relied upon the decision of Tribunal in Wills Processing Services (India) Pvt Ltd ACIT (2017) 83 taxmann.com 198 (Mumbai-Trib).

22. For **Cosming Global Ltd** the Id AR for the assessee submits that the said comparable was not considered as comparable in the earlier years and has been excluded as comparable by TPO itself in assessment year 2008-09. The business model of Cosmic Global is not similar to the business model of the assessee. The employee cost of Cosmic Global is merely 15.15% of its total cost and in assessee's case is 58.49%. Therefore, the said company is not comparable. The Id AR has taken support of case laws in United Health Group Information Services (P) Ltd Vs ACIT and BNY Mellon International Operations (India) (P) Ltd Vs DCIT (2015) 173 TTJ 354 (Pune).

23. For **Informed technologies Ltd.**, the Id. AR for the assessee submits that the said comparable has neither been selected as comparable in the earlier years nor in AY 2008-09. Informed Technologies Ltd. having low employee cost to sales (21.77%) as compared to the assessee (i.e. 48.85%) cannot be considered as comparable. The Id. AR has taken support of case laws in Stream International Services (P.) Ltd. vs. ACIT [2015] 152 ITD 664 (Mum).

24. For **HCL Comnet Ltd.** the Id. AR for the assessee submits that the said comparable has neither been selected as comparable in the earlier years nor in AY 2008-09. HCL Comnet Ltd having different financial year ending i.e. June ended and therefore cannot be considered as comparable n light of Rule 10B(2). The Id AR has taken support of case laws in H&S Software

Development & Knowledge Management Centre (P.) Ltd. vs ACIT-[2017] 78 taxmann.com 159 (Del. Trib.) and DCIT vs Everest Business Advisory India (P.) Ltd. (ITA No. 41/Del/2013 & 1191/Del/2013).

25. For **Infosys BPO Ltd.** the ld. AR for the assessee submits that the said comparable has neither been selected as comparable in the earlier years nor in AY 2008-09. Infosys PBO Ltd will not qualify on FAR analysis owing to various factors including its brand value, size, owing of intangibles, etc. The company has also incurred selling and marketing expenses. Accordingly, it cannot be considered as comparable to the assessee, a captive service provider. The ld. AR has taken support of case laws in Hinduja Global Solution Ltd. Vs DCIT [2017] 78 taxmann.com 199 (Mumbai Trib.).

26. For **Wipro Ltd.** the ld. AR for the assessee submits that the said comparable has neither been selected as comparable in the earlier years nor in AY 2008-09. Wipro Ltd will not qualify on FAR analysis owing to various factors including its brand value, size, owning of intangibles, expenditure on R&D, etc and cannot be considered as comparable as the assessee a captive service provider. The ld AR has taken support of case laws in Hinduja Global Solution Ltd. vs Dy.CIT [2017] 78 taxmann.com 199 (Mumbai Trib.).

27. For **Maple ESolutions Ltd.** the ld. AR of the assessee submits that the said comparable has neither been selected as comparable in the earlier years nor in AY 2008-09. Maple ESolutions is a part and parcel of Rastogi Group

which is under serious indictment and therefore the financial results of the company was distorted and, accordingly, cannot be relied upon. The Id. AR has taken support of case laws in Stream International Services (P.) Ltd. vs. ACIT [2015] 152 ITD 664 (Mum), DCIT Vs Everest Business Advisory India (P) Ltd. (ITA no. 41/Del/ 2013& 1191/Del/2013 and iQuor India Services (P) Ltd Vs ITO (2015) 69 SOT 37 (Delhi).

28.For **Triton Corp Ltd. ( in additional ground of appeal)**, the Id. AR for the assessee submits that the said comparable has been rejected by the TPO itself in AY 2008-09. Triton Corp Ltd is a part and parcel of Rastogi Group which is under serious indictment and therefore the financial results of the company was distorted and, accordingly, cannot be relied upon. Further, the company also acquired Maple ESolutions. The Id AR has taken support of case laws in Stream International Services (P.) Ltd. vs. ACIT [2015] 152 ITD 664 (Mum).

29.For **ICRA Techno Analytics Ltd. (Department's Ground of Appeal)**, the Id. AR for the assessee submits that the said comparable has been rejected by the TPO itself in AY 2008-09. ICRA was engaged in processing and providing software development and consultancy and engineering services/web development services and no segmental data was available and therefore the same cannot be compared to the assessee engaged in providing back office support services. The Id. AR has taken support of case laws in

Pr CIT Vs BC Management Services P Ltd. [2018] 89 taxmann.com 68 (Delhi.).

30. On the other hand the ld. DR for the revenue supported the order of the TPO/ AO. The ld. DR for the revenue opposed the exclusion all the comparable as argued by ld. AR for the assessee. The ld DR further submits that while excluding ICRA Techno Analytics Ltd the ld CIT(A) has not followed the principles provided under Rule 10B(2) of Income Tax Rules. The ld DR further submits that as per Rule 10B(2) there should be uniformity to all comparables while determining the ALP under section 92C of the Act. The ld DR for the revenue further submits that ld CIT(A) also erred in excluding the relevant transaction of Mold- Tech technology ltd, without appreciating the facts that TPO has considered the segmental operating profit of KPO sector only while determining ALP. In support of his submissions the ld DR for the revenue also relied on the decision of Delhi High Court in PCIT Vs BC Management services (P) ltd [2018] 98 taxmann.com 68(Delhi). However, for Bodhtree Consulting Ltd., Infosys BPO Ltd and Wipro Ltd. the ld. DR for the revenue that these three companies are not comparable with the assessee.

31. We have considered the rival submissions of the parties have gone through the orders of the authorities below and perused the record carefully. We have also deliberated on various case laws relied by the ld. AR/DR for the parties and the case laws relied by them. Considering the submissions of

both the representatives of the parties, now we are require only to consider the exclusion or inclusion of 11 comparable.

**(1) Eclerx Services Ltd.**

32. As noted earlier the Id AR for the assessee submitted that the assessee submits that Eclerx Services Ltd. has not considered as a comparable in earlier years. Eclerx Services Ltd. is a Knowledge Process Outsourcing (KPO) Service provider which is not comparable to assessee; assessee is engaged in providing back office support services. In support of his submission, the Id. AR of the assessee relied upon the decision of Delhi High Court in Rampgreen Solution P Ltd Vs CIT (2015) ITR 533 (Delhi). The TPO included this comparable by taking his view that this company is in date process and analytical services. The Id CIT(A) confirmed the action of the TPO by taking his view that this comparable company is into the health care receivable management and therefore renders ITeS services. The Hon'ble Delhi Court in Rampgreen Solution (P) Ltd (supra) held entities rendering voice call center services for customer support and a KPO service provider employ IT-based delivery systems, but characteristics of services, functional aspects, business environment, risks and quality of human resource employed are materially different; and therefore, benchmarking international transactions on basis of comparison of PLI of high-end KPO service providers with PLI of Voice Call Centers, would be unreliable. Further,

Mumbai Tribunal in Wills Processing Services (India) Ltd Vs. ACIT

(supra) on considering similar contentions excluded this comparable

holding as under:

- “(5) We have heard the Ld. Representatives of both the parties, perused the orders of the lower authorities and the records made available before us. We have given a thoughtful consideration to the facts of the case and are of the considered view that though we find ourselves to be in agreement with the contention of the Ld. D.R and have not found favor with the contention of the assessee that as the aforesaid comparable had carried out an acquisition of a U.K based company, therefore simpliciter on the said count, without establishing that such acquisition had rendered the aforesaid comparable functionally different, could not be accepted as a factor for exclusion of the said comparable, but then we are of the considered view that the fact as averred by the Ld. A.R before us that the aforesaid comparable, viz. Eclerx Services Limited was providing high end data analytics and customized process solution and was a leading Indian provider of KPO services, which substantially varies from a low end ITES service provider, while for the assessee was engaged in providing BPO services, viz-processing of insurance claims and insurance premiums and data processing service for which it employed ordinary graduates, therefore the aforesaid comparable, viz. Eclerx Services Limited was functionally different from the assessee company, and as such could not be selected as a comparable. We find that the DRP had vide its order dated 27.11.2015 passed in the case of assessee for AY 2011-12 had accepted the contention of the assessee and rejected the aforesaid comparable company, viz. Eclerx Services Limited on the basis that it was engaged in KPO service, and the department by accepting the said order of the 'DRP' for A.Y. 2011-12 by not carrying the matter in further appeal before the Tribunal, had thus allowed it to attain finality. We further find that in the assessee's own case for the immediately succeeding year, i.e A.Y 2009-10, the DRP as well as the Tribunal had held that companies engaged in KPO services cannot be compared to the routine BPO services provided by the assessee. That still further the Tribunal while disposing of the appeal of the assessee for AY 2010-11 had held that as the assessee was a routine BPO service provider, therefore it cannot be compared to high end KPO service providers such as Eclerx Service Limited. We further find that the 'Special bench' of the Tribunal in the case of *Maersk Global Centres (India) (P.) Ltd. (supra)*, had specifically rejected the aforesaid comparable, viz. Eclerx Services Limited, on the basis that companies predominantly engaged in KPO services cannot be considered as a comparable to a company predominantly engaged in BPO activities. We are thus of the considered view that in the backdrop of the view taken by the Tribunal while disposing of the appeals of the assessee for A.Y(s): 2009-10 & 2010-11, therein concluding that the aforesaid comparable, viz. Eclerx Services Limited which was a KPO could not be taken as a

comparable as against the assessee company which is providing BPO services, coupled with the fact that in the assessee's own case for A.Y 2011-12 the exclusion by the DRP of the aforesaid comparable, viz. Eclerx Services Limited from the list of comparables had been accepted by the department, and last but not the least the 'Special bench' of the Tribunal in the case of *Maersk Global Centres (India) (P.) Ltd. (supra)* had therein held that the aforesaid comparable, viz. Eclerx Services Limited which is a KPO cannot be compared as against the assessee which is providing BPO services, we thus finding no reason to take a different view and being of the considered view that the aforesaid comparable, viz. Eclerx Services Limited was functionally different from the assessee company, therefore hold that it cannot be accepted as a comparable and hence is directed to be excluded from the list of comparables.”

33. Considering the decision of Delhi High Court in *Rampgreen Solution P Ltd (supra)* and Tribunal in *Wills Processing Services (supra)*, we direct to exclude Eclerx Services from the comparables.

**(2) Mold Tek Technologies Ltd**

34. The Id. AR of the assessee submitted that Mold Tek Technologies Ltd. has been excluded by Id. CIT(A) for Assessment Year 2008-09 and department is not in appeal against such exclusion. It was further submitted that the Mold Tek Technologies Ltd. provides engineering design, detailing services, website design services etc. It provides highly technical and specialized engineering service which comes in the category of KPO and cannot be compared to the assessee engaged in providing back office support services. The Id. DR for revenue opposed to excluded this company. The TPO included this comparable by taking view that this company is in ITES (Engineering solution). The Id CIT(A) directed to consider the IT (KPO) division of the company for the purpose of benchmarking. Before us the revenue has challenged action for considering the IT (KPO) division and

the assessee is against the inclusion of the comparable. The co-ordinate bench of Tribunal in Wills Processing Services (India) P. Ltd. (*supra*) while considering for exclusion of Mold-Tek Technology on similar arguments excluded Mold-Tek Technology holding as under:

We have heard both the Ld. Representatives, perused the orders of the lower authorities and the records made available before us. We find that the aforesaid comparable, viz. Mold-Tek Technologies Limited was engaged in high end knowledge process outsourcing (KPO) services, and therein providing high end structural engineering consulting services, which is a high end segment service, as in comparison to the assessee company which was engaged in providing routine IT enabled services. We find that that the said comparable, viz. Mold-Tek Technologies Limited was rejected by the TPO himself in the assessee's own case for AY 2006-07 for the reason that the said company was an extreme outlier, and hence could not be compared with the assessee company. That still further the Tribunal in assessee's own case for AY 2010-11, has held that as the assessee company is a routine BPO service provider, therefore it cannot be compared to high end KPO service providers. We further find that the 'Special bench' of the Tribunal in the case of *Maersk Global Centres (India) (P.) Ltd. (supra)*, had specifically rejected the aforesaid comparable, viz. Mold-Tek Technologies Limited, on the basis that companies predominantly engaged in KPO services cannot be considered as a comparable to a company predominantly engaged in BPO activities. We are of the considered view that as the aforesaid comparable, viz. Mold-Tek Technologies Limited is a leading KPO in Engineering and Design Services, specializing in Civil, Structural and Mechanical Engineering Services, with a strong team of Skilled resources with world class resources and skill sets complemented by two subsidiaries in USA - CROSSROADS DETAILING, INC. Indianapolis, IN & RMM Global LLC Akron, OH, therefore the same being substantially functionally different from the assessee company which is a routine BPO service provider, therefore cannot be taken as a comparable. We find that the 'Special bench' of the Tribunal in the case of : *Maersk Global Centres (India) (P.) Ltd. (supra)* rejected the aforesaid comparable on the basis that it was engaged in KPO

services, and as such could not be compared to a company predominantly engaged in BPO services. We thus are of the considered view that the aforesaid comparable, viz. Mold-Tek Technologies Limited which is a KPO cannot be compared as against the assessee which is providing BPO services, and as such being functionally different from the assessee company, therefore cannot be accepted as a comparable and is thus directed to be excluded from the list of comparables. That as the aforesaid comparable, viz. Mold-Tek Technologies Limited being found to be functionally different, has been directed to be excluded from the list of the comparables, therefore the remaining issues on the basis of which the inclusion of the said comparable had been assailed before us are rendered as infructuous and are thus not being adjudicated upon.

35. The Hon'ble Delhi High Court in PCIT vs. Evalueserve.com Pvt. Ltd.

(supra) also upheld the exclusion of Mold-Tek Technology holding that it provides engineering design, detailing services, website design services etc. cannot be compared with the assessee which provides back office research services in IT Sector. Considering the decision of Mumbai Tribunal and the Hon'ble Delhi High Court in PCIT vs. Evalueserve.com Pvt. Ltd. (supra), we direct the exclusion of Mold-Tek Technology from the comparable.

**(3) Accentia Technology Ltd.**

The Id. AR of the assessee submitted that this comparable has neither been selected as comparable in earlier years nor in subsequent Assessment Year in 2008-09. The Accentia Technologies Ltd. is engaged in developing its own Software products and rendering Medical transcription services and cannot be compared to the assessee engaged in providing back office support services. Further, it has undertaken extra-ordinary events during the year under review which have an impact on its financials. The TPO included

Accentia Technology Ltd. by taking his view that this comparable company is in healthcare receivable management and rendered ITeS Services in respect of such healthcare receivable management to its client. The TPO further took his view that this company is mainly into ITeS and accordingly functionable comparable. The Id. CIT(A) confirmed the action of TPO. The co-ordinate bench in Wills Processing Servicing (India) Ltd. (supra) while considering the similar contention held as under:

We have heard both the Ld. Representatives, perused the orders of the lower authorities and the records made available before us. We find that the aforesaid comparable, viz. Accentia Technologies Ltd. was engaged in software development services and was thus functionally different from the assessee company. We find that the fact that the aforesaid comparable was functionally different from the assessee company had duly been acknowledged by the TPO himself who for the said reason had rejected the said comparable, viz. Accentia Technologies Ltd. in the case of the assessee for A.Y 2010-11 and A.Y 2011-12. We further find that that the aforesaid comparable, viz. Accentia Technologies Ltd. was rejected by the DRP in assessee's own case for A.Y 2009-10, for the reason that unlike the assessee company the said comparable earned revenue from sale of software services and was thus functionally different, and there was no separate segmental information available in this regard, and the said order of the DRP having not been further assailed by the department before the Tribunal had thus attained finality. We further find that as stands gathered from a perusal of the 'Annual report' and 'Profit & loss a/c' of the aforesaid comparable, the latter was generating income from three sources, i.e. Medical Transcription, Billing & Coding and Software development & implementation, but however no segmental information was available in the annual report. We are further persuaded to be in agreement with the assessee that the TPO had considered the profitability of the aforesaid comparable, viz. Accentia Technologies Ltd. at an overall entity level, which includes income from software development, which had led to an infeasible comparison in the

hands of the assessee company. We are of the considered view that on the basis of such incomplete information, the aforesaid company could not have been considered as a comparable. We have given a thoughtful consideration to the facts of the case and are of the considerate view that in the backdrop of the aforesaid facts, it can safely be concluded that the comparable, viz. Accentia Technologies Ltd., being functionally different on an entity level, thus in the absence of complete segmental information could not be taken as a comparable. That as observed by us hereinabove, our view stands fortified by the very fact that the TPO himself in the case of the assessee company for the A.Y.2010-11 and 2011-12, for the aforesaid reasons had rejected the said company, viz. Accentia Technologies Ltd. as a comparable. Still further the order passed by the DRP in the case of the assessee company, therein rejecting the said comparable viz. Accentia Technologies Ltd., having been accepted by the department by not assailing the same before the Tribunal, further strengthens and supports our aforesaid view. Thus in light of our aforesaid observations, we herein being of the view that the comparable, viz. Accentia Technologies Ltd. being functionally different, thus cannot be taken as a comparable, and therefore direct the exclusion of the same from the list of the comparables. That as the aforesaid comparable, viz. Accentia Technologies Ltd., being found to be functionally different, has been directed to be excluded from the list of the comparables.

36. Considering the decision of Tribunal wherein it was held that this comparable company is engaged in developing software product and rendering medical transcription services cannot be compared with the assessee engaged in providing back office support services. Further, extraordinary events took place during the year which has impact on its financial. Therefore, we direct to exclude this comparable.

**(4) I Services**

37. The Id. AR submitted that this comparable is into divergent high end services like web hosting, email services spam filtering domain names and DNS hosting, web hosting, email services and are mainly in a product services and cannot be compared. The TPO included this comparable by taking view that this comparable company is in software services and product. The Id. CIT(A) confirmed the inclusion holding that TPO conducted bench marking after calling information under section 133(6). The TPO exercise has helped in authenticating and validating the date. We have noted that the Delhi Tribunal in DCIT vs. Everest Business Advisory India (P.) Ltd. (supra) for same Assessment Year excluded this comparable company holding that business profile of I Services shows that it is into high end diversifying services vis a vis the tax payer who is into divergent high end services like web hosting, email services, spam filtering , domain names and DNS hosting, web hosting, email services and directed to exclude from comparing with ITeS enabled services. Therefore, considering the decision of Delhi Tribunal, we direct the exclusion of I Services.

**(5) Coral Hubs Ltd. (Vishal Information)**

38. The Id. AR submitted as we recorded earlier that Coral Hubs Ltd. was outsourcing its significant part of its operation as evident from its low employee cost and have substantial different business model compared to assessee and prayed for exclusion. The Id. DR has supported the inclusion. The TPO while making benchmarking taking his view that this comparable

company is in the business of IT enabled services to overseas markets and included in the list of comparable. The Id. CIT(A) confirmed the action of TPO holding that the TPO conducting benchmarking after calling information under section 133(6) and its benchmarking analysis are correct. We have noted that, though the Id. AR has relied upon a number of decisions of Tribunal/co-ordinate bench. We have noted that in a recent decision of Tribunal in Wills Processing Services (I) Pvt. Ltd. (*supra*) on comparability, the Tribunal held as under:

We though in light of our aforesaid observations had partly disagreed with certain grounds as had been averred by the Ld. A.R to facilitate exclusion of the aforesaid comparable, however as observed by us hereinabove that the aforesaid comparable viz. Coral Hub Limited (earlier known as Vishal Information Technology Limited) had a business model where services are outsourced, as against the business model of the assessee where services are rendered by employing own employees and using one's own infrastructure, on the basis of which we are of the considered view that it can safely be concluded that the said comparable was functionally different, and as such was liable to be excluded from the final list of comparables. That our aforesaid view stands fortified by the aforesaid order passed by the Tribunal while disposing of the appeal of the assessee's own appeal for A.Y. 2005-06, as well as the judgment of the Hon'ble High Court of Delhi in the case of : *Rampgreen Solutions (P.) Ltd. (supra)*. Thus as there has been no material shift in the facts involved in the case of the assessee for the year under consideration, as observed by us hereinabove, we are thus of the considered view that as the business model of the aforesaid comparable, viz. *Coral Hub Ltd. (supra)* is substantially different from that of the assessee, therefore the same cannot be accepted as a comparable and hence is directed to be excluded from the list of comparables.

39. Considering the decision of co-ordinate bench on similar submission, we direct for exclusion of Coral Hubs (Vishal Information) from the comparable.

**(6) Cosmic Global Ltd.**

40. The Id. AR of assessee prayed for exclusion of comparable on the ground that in earlier years and in A.Y. 2008-09, the TPO has excluded this company from comparable. The function of this company is dissimilar to the business model of assessee. Assessee's capital cost is merely 15.15% as against 58.49% and most of the cost is with reference to outsourcing or translation charges. On the other hand, the Id. DR supported the inclusion. The Id. TPO while making bench marking took his view that this comparable is engaged in IT enabled Translation Services. The Id. CIT(A) confirmed the action of TPO holding that benchmarking was conducted after seeking information under section 133(6). We have noted that Delhi Tribunal in United Health Group Information (P.) Ltd. vs. ACIT (supra) while considering this comparable held that revenue of this company from medical transcription services is hardly 1% of total revenue. The major part is the income from translation charges at Rs. 5.59 Crore out of the total revenue of Rs. 5.89 Crore, which is totally dissimilar to that assessee. Further, Pune Tribunal in BNY Mellon International Operation (India) (P.) Ltd Vs DCIT (supra) held that a company indulged in high skill IT services is non-comparable to a routine IT enabled service provider.

41. Considering the fact that major part of income of this comparable is from translation charges and function of this comparable is different to the assessee-company, therefore, we direct the exclusion of Cosmic Global from the list of comparable. Similar view was taken by Pune Tribunal in BNY Mellon International Operations (India) Pvt. Ltd. vs. DCIT (supra) holding that this comparable company had outsourced its vendor and was making high vendor payments as compared to sales and hence was not comparable.

42. Considering the decision of Tribunal, wherein this comparable was held as not comparable and particularly the TPO himself excluded it from the list of comparable in A.Y. 2008-09. Therefore, we direct for exclusion of this comparable.

**(7) Informed Technologies Ltd.**

43. The Id. AR for assessee argued that this comparable was not selected in earlier years nor in A.Y. 2008-09. This company having low employee cost has compared to assessee cannot be considered as comparable. The Id. DR supported the inclusion of this comparable. The TPO while including this comparable took the view that this company is in business process outsourcing (BPO). The Id. CIT(A) upheld the action of TPO holding that the TPO benchmarked the analysis after calling information under section 133(6) and that the higher or lower profit rate are not determinative factor for a comparable. The co-ordinate bench in Stream International Services

(supra) while considering the similar ground for exclusion on the ground of low cost employee compared to assessee held that where employee cost to sale is 27.77% as compared to that of other assessee which is 49.34% , this comparable was directed to be excluded. Therefore, considering the decision of Tribunal, this comparable is also directed to be excluded.

**(8) HCL Connect Ltd.**

44. The contention of Id. AR of the assessee is that this comparable was not selected in earlier years nor in A.Y. 2008-09 and having different financial year ending i.e. June ended and therefore, cannot be considered as comparable in the light of Rule 10B(2). The TPO while including took the view that this comparable is in the business of IT & ITeS. The Id. CIT(A) confirmed the action of TPO by taking view that benchmarking was conducted by calling information under section 133(6). We have noted that the co-ordinate bench of Tribunal in H&S Software Development & Knowledge Management Centre vs. ACIT (supra) while referring the decision of Motorola Solution Pvt. Ltd. directed the exclusion of this comparable.

**(9) Maple Solutions Ltd.**

45. The contention of Id. AR for the assessee is that this comparable was not selected in AY 2008-09. Further, Maple Solutions Ltd is part and parcel of Rastogi Group which was under serious indictment and its financials were distorted and cannot be relied. However, the Id. DR for

the revenue supported the inclusion of this comparable. The Id. TPO included this comparable by taking his view that this company is in the call centre services. The Id CIT(A) upheld the action of Id TPO by taking view that benchmarking was conducted by calling information under section 133(6). We have seen that Mumbai Tribunal in Stream International (P) ltd (supra) held that, a Company under serious indictment in fraud cases is to be excluded from list of comparables on ground of unreliability of data. Thus, following the order of the Tribunal we direct to exclude this company from the comparable.

**(10) Triton Corp Ltd.**(in additional ground of appeal by assessee )

46. The contention of Id AR for the assessee is this company was rejected by Id TPO himself in AY 2008-09. Triton Corp is also a part of is part and parcel of Rastogi Group which was under serious indictment and its financials were distorted and cannot be relied. However, the Id. DR for the revenue supported the inclusion of this comparable. The Id. TPO included this comparable by taking his view that this company is in the call centre services. The Id CIT(A) upheld the action of Id TPO by taking view that benchmarking was conducted by calling information under section 133(6). We have seen that Mumbai Tribunal in Stream International (P) ltd (supra) held that, a Company under serious indictment in fraud cases is to be excluded from list of comparables on

ground of unreliability of data. Thus, following the order of the Tribunal we direct to exclude this company from the comparable.

(11) **ICRA Techno Analytics Ltd.** (objected in the ground of appeal by revenue)

47. The ld. AR for the assessee had argued that this company was not selected as comparable in earlier year nor in AY 2008-09. ICRA is engaged in processing and providing software development and consultancy in engineering services, web development and segmental data is not available and cannot be compared with the assessee who is engaged in back office support services. The ld AR for assessee strongly relied on the decision of Delhi High Court in PCIT Vs BC Management services (2018) 89 taxmann.com 68 (Delhi). On the contrary the ld DR insisted that ICRA Techo Analytics was excluded by ld. CIT(A) from the set of comparables. The ld DR further submits that ld CIT(A) selectively applied parameters in excluding the comparables in contravention of the principles laid down in Rule 10B(2), which provides that comparability parameter should be applied uniformly to all comparables. We have seen that the ld. TPO included this comparable by taking his view that this company is engaged in computer software, software development sub-licensing and web hosting. The ld CIT(A) excluded it holding that this company is providing both software development and ITeS. It is also in sales of software products and thus not comparable. The Hon'ble Delhi Court in PCIT Vs BC Management

Services (P) Ltd (supra), while considering the comparability of ICRA Techo Analytics held that company providing consultancy business solution and testing, and high end BPO services, in absence of segmental data not comparable with ITeS.

48. In view of the above discussions, we direct the AO/TPO to recompute the APL as per direction/ observation hereinabove.

49. In the result, appeal of the assessee is treated as allowed in view of our observation on various set of comparable and the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 10/07/2019.

**Sd/  
G.S. PANNU  
VICE-PRESIDENT**

Mumbai, Date: 10.07.2019  
SK

**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "K" Bench, ITAT, Mumbai
6. Guard File

**Sd/-  
PAWAN SINGH  
JUDICIAL MEMBER**

**BY ORDER,**

**Dy./Asst. Registrar  
ITAT, Mumbai**