

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

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

IT(TP)A No.185/Bang/2017
Assessment years : 2012-13

M/s. Kennametal Shared Services Private Limited, Unit 3, 4, 5 and 6, 5 th Floor, Navigator, ITPL, Whitefield, Bangalore – 560 066. PAN : AACCK 5469 L	Vs.	Assistant Commissioner of Income-tax, Circle -4(1)(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. K. R. Vasudevan, Advocate
Revenue by	:	Shri. C. H. Sundar Rao, CIT

Date of hearing	:	08.07.2019
Date of Pronouncement	:	14.08.2019

ORDER

Per Jason P Boaz, Accountant Member:

This appeal by the assessee is directed against the final order of assessment dated 25.11.2016 for Assessment Year 2012-13, passed under section 143(3) r.w.s. 144C(1) of the Income Tax Act, 1961 (in short ‘the Act’) pursuant to the directions issued by the Dispute Resolution Panel – 2, Bangalore (DRP) under section 144C(5) of the Act on 07.10.2016.

2. Briefly stated, the facts of the case are as under:-

2.1 The assessee, an Indian company, is a wholly owned subsidiary of Kennametal Inc. and provides ITES to its Associated Enterprises (AEs). For Assessment Year 2012-13, the assessee filed its return of income on 30.11.2012 declaring total income of Rs.5,68,16,900/-. The case was taken up for scrutiny for this Assessment Year and subsequent thereto, the Assessing Officer (AO) made a reference under section 92CA of the Act to the Transfer Pricing Officer (TPO) for determination of the arms length price (ALP) of the international transactions reported by the assessee in the year under consideration. The TPO passed an order under section 92CA of the Act dated 14.01.2016 proposing an adjustment of Rs.3,37,89,086/- to the international transactions entered into by the assessee in the ITES segment. Thereafter, the AO passed the draft order of assessment under section 143(3) r.w.s. 144C(1) of the Act dated 14.03.2016, wherein the assessee's income was determined at Rs.9,06,05,986/-; which included the TP adjustment of Rs.3,37,89,086/-.

2.2 Aggrieved by the draft order of assessment dated 14.03.2016 for Assessment Year 2012-13, the assessee filed its objections thereto before the DRP. The DRP issued its direction thereon under section 144C(5) of the Act vide order dated 07.10.2016, pursuant to which the AO passed the final order of assessment under section 143(3) r.w.s. 144C(1) of the Act dated 25.11.2016 wherein the assessee's income was determined at Rs.9,93,98,783/-, in view of the following additions / disallowances:-

- (i) Revised TP adjustment – Rs.4,18,48,488/-
- (ii) Disallowance under section 14A r.w.Rule 8D(2)(iii) – Rs.7,33,395/-

3. The assessee, being aggrieved by the final order of assessment dated 25.11.2016 for Assessment Year 2012-13 has preferred this appeal, wherein it has raised the following grounds:-

The grounds mentioned hereinafter are without prejudice to one another.

1. The learned Assessing Officer ("learned AO") and the learned Transfer Pricing Officer ("learned TPO") grossly erred in making a proposed Transfer Pricing addition of INR 3,37,89,086/- and the Honourable Dispute Resolution Panel ("Hon'ble DRP") further erred in increasing the adjustment amount by INR 80,59,402/- and adjusting the transfer price by INR 4,18,48,488/- of the Appellant's international transactions with its Associated Enterprises ("AEs") u/s 92CA of the Income-tax Act, 1961 ("the Act").
2. The learned AO / learned TPO / Hon'ble DRP erred in rejecting the Transfer Pricing documentation maintained by the Appellant by invoking provisions of sub-section (3) of 92C of the Act without giving any cogent reason for the same.
3. The learned AO / learned TPO / Hon'ble DRP erred in rejecting comparability analysis undertaken in the Transfer Pricing documentation and in conducting a fresh comparability analysis by introducing various filters in determining the Arm's Length Price ("ALP").
4. The learned AO / learned TPO / Hon'ble DRP erred in not considering the previous two years financial data of the comparable companies while determining the ALP.
5. The learned AO / learned TPO / Hon'ble DRP erred in applying different financial year ending filter while selecting the comparable companies, leading to a narrower comparable set and had also not considered the fact that the relevant data for the concerned financial year could be deduced from the corresponding financials.
6. The learned AO / learned TPO / Hon'ble DRP erred in applying export earning filter of 75% of the total sales, leading to a narrower comparable set.
7. The learned AO / learned TPO / Hon'ble DRP erred in not applying the upper limit on turnover while selecting the comparable companies.
8. The learned AO/learned TPO/Hon'ble DRP erred in not appreciating the fact that since the principle of applying lower limit on turnover has been mutually accepted by the Appellant as well as the learned TPO while carrying out the comparability analysis, the principle on upper limit on turnover should also have been applied
9. The learned AO/learned TPO/Hon'ble DRP erred in selecting companies having higher margins as comparable to the Appellant disregarding the fact that the Appellant had operated in a risk-mitigated environment with regard to the transactions with its Associated Enterprises.

10. The learned AO/learned TPO/Hon'ble DRP erred in collating the information that are not publicly available using powers under Section 133(6) of the Act.

11. The Ld. AO/ Ld. TPO/ Hon'ble DRP has erred in not giving any cogent reason for rejecting the Appellant's grounds of objection.

12. The learned AO/learned TPO/Hon'ble DRP has grossly erred in not rejecting the following companies from the list of comparable companies:

- Universal Print Systems Ltd
- Infosys BPO Ltd.
- BNR Udyog Ltd.
- TCS E-Serve Ltd
- Excel Infoways Ltd.

13. The learned AO/learned TPO/Hon'ble DRP has grossly erred in rejecting companies that ought to have been included as comparable companies:

- ICRA Online Ltd.
- Techprocess Solutions Ltd.
- Crystal Voxx Ltd.
- Cameo Corporate Services Ltd.

14. The Hon'ble DRP has further erred in rejecting Informed Technologies India Ltd., which ought to have been included as comparable companies by both the learned TPO and the Assessee.

15. The learned AO/learned TPO/Hon'ble DRP has erred in making the following errors in the computation of working capital adjustment:

- a. by not considering the fact that the Appellant does not have any working capital risk, therefore, no negative working capital adjustment should be allowed.
- b. in considering the wrong SBI PLR while computing the working capital adjustment

16. The learned AO/learned TPO/Hon'ble DRP erred in not allowing appropriate adjustment towards to the risk differential between the Appellant vis-à-vis independent comparable companies.

Corporate Tax**Disallowance of expenditure under section 14A of the Act by applying the provisions of Rule 8D of the Income Tax Rules, 1962 ("the Rules")**

17. The learned AO has erred in disallowing expenditure amounting to Rs. 733,395 under section 14A of the Act read with Rule 8D of the Rules, despite the fact that no expenditure has been actually incurred/debited to the profit and loss account on this account.

Interest levied under section 234B of the Act

18. The Ld. AO erred in levying interest under Section 234B of the Act amounting to INR 7,803,096/- which is consequential in nature.

19. The Ld. AO erred in levying interest under Section 234C which is consequential in nature.

Short credit of taxes paid

20. The learned AO erred in not granting full credit for taxes paid by the assessee amounting to Rs. 12,150,000. The learned AO has granted credit for advance tax, TDS and self-assessment tax amounting to Rs. 12,146,000 as against Rs. 12,150,000, which has been actually paid by the assessee.

4. Before proceeding to the deal with and dispose off the grounds raised in this appeal, the brief facts related to the TP issues are summarized hereunder.

4.1 The assessee company, in the year under consideration, is engaged in the provision of ITES to its AEs. In the year under consideration, the assessee had reported the following international transactions in its 92CE Report:-

Particulars	Amount in Rs.
ITES Services	374601834
IT Service Cost	16777177
Reimbursement of Salary and related Costs	12586139
Receivables	20772420
Payables	5022026
Grand Total	429759596

4.2 The financial results of the assessee during the year under consideration, as worked out by the TPO are as under:-

Particulars	Amount in Rs.
Operating Income	Rs.37,46,01,384/-
Operating Expenditure	Rs.31,91,43,476/-
Operating Profit	Rs.5,54,58,358/-
OP/OC	17.38%

4.3 The assessee conducted a TP study for the international transactions adopting TNMM as the most appropriate method (MAM) and selected a set of nine companies as its comparables. As the average mean of these 9 comparables worked out at 12.50% was less than the margin shown by the assessee, it was concluded that the international transactions of the assessee in the year under consideration were at arms length. The assessee's list of 9 comparables, chosen suo moto, are as under:-

Sl.No	Name of the Company	Weighted Average (%)
1	Informed Technologies India Ltd.	14.00%
2	Jindal Intellicom Limited	13.27%
3	ICRA Online Limited (segmental Info)	24.01%
4	Cosmic Global Limited	11.27%
5	Accentia Technologies Limited	24.99%
6	Techprocess Solutions Limited (segmental Info)	4.40%
7	Wisec Global	0.14%
8	Cameo Corporate Services Ltd.	10.06%
9	In House Productions Limited	10.33%
Average		12.50%

4.4 The TPO rejected the assessee's TP Report / Study for the reasons mentioned in his order under section 92CA of the Act. The TPO then conducted his own search process adopting various criteria / filters and selected the following 10 companies as the final set of comparables:-

Sl. No.	Name of the Case	OP/OC
1	Accentia Technologies Ltd.	11.75
2	Universal Print Systems Ltd. (Seg)(BPO)	52.46
3	Informed Technologies India Ltd.	6.08
4.	Infosys B P O Ltd.	36.30
5	Jindal Intellicom Ltd.	-0.05
6	Microgenetic Systems Ltd.	19.61
7	T C S E-Serve Ltd.	63.69
8	B N R Udyog Ltd.(Seg)(Medical Transcription)	41.58
9	Excel Infoways Ltd.(Seg)(IT/BVPO)	29.79
10	E4e Healthcare Services Pvt Limited	19.85
Average PLI		28.11%

4.5 The TPO computed the ALP of the international transactions in the assessee's ITES segment as under:-

Arm's Length Mean Margin on cost		28.11%
Less: Working Capital Adjustment (As per Annex. C)		0.15%
Adjusted margin		27.96%
Operating Cost		319,143,476
Arm's Length Price(ALP)		408,390,920
127.96%	of Operating Cost	
Price Received		374,601,834
Shortfall being adjustment u/s 92CA:		33,789,086

4.6 Based on the above computation, the TPO proposed a TP adjustment of Rs.3,37,89,086/- which was incorporated in the draft order of assessment dated 14.03.2016. Pursuant to the DRP's directions issued on 25.10.2016, the TP adjustment of Rs.4,18,48,488/- was, *inter alia*, incorporated in the impugned final order of assessment dated 25.11.2016 for Assessment Year 2012-13.

5.0 Ground Nos.1 to 11 and 15 and 16

5.1 At the outset of proceedings before us, the learned AR of the assessee filed a chart of comparables that the assessee wanted either to be excluded from or included in the final set of comparables and Notes on Arguments. It was submitted by the learned AR that out of the 16 grounds raised on transfer pricing issues, only grounds 12, 13 and 14 related to the plea for exclusion and inclusion of companies from final set of comparables are being pressed; and all other ground Nos. 1 to 11, 15 and 16 (*supra*) are not being pressed. It is submitted that even in ground No.13, relating to inclusion of companies in the list of comparables, only one company, namely, Crystal Voxx Ltd., is being urged /

pressed. In these circumstances, ground Nos. 1 to 11, 15 and 16 raised in this appeal, being not pressed by the assessee, the same are rendered infructuous and are accordingly dismissed as not pressed.

6. Ground No.12 – Companies sought to be excluded by the assessee from final set of comparables

6.1 In this ground (supra), the assessee has sought for exclusion of the following five companies from the final set of comparables:-

- (1) Universal Print System Ltd.,
- (2) Infosys BPO Ltd.,
- (3) BNR Udyog Ltd.,
- (4) TCS E-serve Ltd.,
- (5) Excel Infoways Ltd.,

In support of the assessee's contentions for exclusion of the above 5 companies from the final set of comparables, the learned AR placed reliance on the decision of the Co-ordinate Bench of this Tribunal in the case of Mobility Infotech India Pvt. Ltd., in IT(TP)A No.2055/Bang/2016 dated 08.08.2018 which is also rendered for Assessment Year 2012-13.

6.2 Per contra, the learned DR for Revenue put forth submissions supporting the orders of the authorities below.

6.3.1 We have considered the rival contentions and carefully perused the material on record; including the judicial decisions cited. It is seen that the Co-ordinate Bench of this Tribunal in the case of Mobility Infotech India (P) Ltd., (supra) has considered and adjudicated on the comparability of the above list of 5 companies [i.e., in para 6.1 (supra)] with companies rendering ITES. We find

that the functional profile of that company; i.e., Mobility Infotech India (P) Ltd., is similar to that of the assessee and the assessment year is also the same, viz., Assessment Year 2012-13. It is seen that the TPO has selected the same set of comparables in both; Mobility Infotech India (P) Ltd., as well as in the case on hand. Since the facts and circumstances are similar, we are of the view that the decision rendered by the Co-ordinate Bench of this Tribunal in the case of Mobility Infotech India (P) Ltd., for Assessment Year 2012-13 is applicable to the facts of the case on hand also. The relevant portion of the aforesaid decision of the Co-ordinate Bench (*supra*) at para 6 to 10.3.2 thereof are extracted hereunder:-

6. Universal Print Systems Ltd., (seg: BPO)

6.1 The Id AR for the assessee submitted that this company should be rejected as a comparable for the following reasons.

(i) Fails the employees cost Filter

According to the Id AR, this company fails the employee filter of Rs.25% applied at the entity level. The employee cost filter of the assessee works out to 18.56% (viz. employee cost of Rs.5,27,11,884/- / by total operating revenue of Rs.28,40,79,094/-). It is submitted that since details relating to employee cost allowable to specific segments is not available, the same is taken at entity level.

(ii) Functionally different

The Id AR submits that as per page 69 of its Annual report, this company is engaged in pre-press services and as pre-press activity is connected to the printing industry/process, it is not comparable to call entire services rendered by the assessee. Therefore, it requires to be rejected as a comparable to the assessee since it is functionally different from companies providing ITES. In support of this proposition, the Id AR placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of *XL Health Corpn. India (P.) Ltd. v. Asstt. CIT [2018] 91 taxmann.com 310*.

6.2 The Id DR for Revenue supported the orders of the authorities below. According to the Id DR, in similar facts and circumstances a co-ordinate bench in the case of *CGI Information Systems & Management Consultants (P.) Ltd. v. Asstt. CIT [2018] 94 taxmann.com 97 (Bang. - Trib.)* at paras 47 to 52 thereof has remanded back the issue of comparability analysis at the segmental level to the file of the TPO for examination and verification of the assessee's claim. It is prayed that the same be followed in this case also.

6.3.1 We have heard the rival contentions and perused and carefully considered the factual material on record; including the judicial pronouncements cited. In the facts and circumstances of the case, as narrated above, we are of the considered view that on similar facts, as in the case on hand a co-ordinate bench of this Tribunal in the case of *CGI Information Systems & Management Consultants (P.) Ltd., (supra)*, has remanded the issue of comparability analysis at the segmental level to the file of the TPO for examination and verification, by holding as under at paras 47 to 52 as thereof:—

'47. The next submission of the learned counsel for the Assessee was with regard to exclusion of 2

comparable companies from the list of 7 comparable companies that remain after the order of the DRP. The first comparable company sought to be excluded is Universal Print Systems Ltd. This company was chosen as a comparable company by the TPO. In reply to the proposal of the TPO to include this company as a comparable company, the Assessee vide its letter dated 22.12.2015 had pointed out its objections to including this company as a comparable company. A copy of the said objection is at page-785 of the Assessee's paper book. The Assessee pointed out that the OP/TC of this company as worked out by the TPO at 59.40% was wrong and unallocated costs as per the annual report should be allocated to BPO segment and if that is done then the OP/TC of this company will be only 51.80%. The Assessee further pointed out (Page764 of paper book) that the TPO had applied revenue filter of more than 75% being from non-financial service income. The Assessee pointed out that the percentage of income from ITES was only 21.63% of the total revenue from operations of this company as per its annual report. The Assessee also pointed out that in the Pre-press BPO segment this company was providing integrated print solutions to its customers, which includes scanning, design/layout, trapping, hand-outlined clipping path and image masking and magazine and catalogue publishing. The Assessee submitted that the aforesaid services are not in the nature of ITES. The Assessee pointed out that as per the safe harbor rules introduced by the CBDT ITES has been defined as business process outsourcing services provided mainly with the assistance or use of information technology. It was also submitted that this company does not satisfy the definition of ITES as contained in Rule 10TA(e) of the Rules. Since use of information technology is absent in the various services provided by this company, it cannot be regarded as ITES company. The Assessee also submitted that this company fails the employee cost filter. The employee cost filter requires that the employees cost incurred by the company must be more than 25% of its revenue.

48. The TPO at page-20 of his order has dealt with the above objections by observing as follows:

- (a) Pre-Press BPO unit provides back office support services.
- (b) This company has four major segments viz., Repro, Label Printing, Offset Printing and Pre press BPO. The employee cost of pre press BPO was more than 25% of the revenue from pre press BPO and therefore the employee cost filter is satisfied in the case of this company.
- (c) On the service revenue filter viz., the requirement that a comparable company must have revenue from rendering services of more than 75% of its total revenue, the TPO again held that the pre-press BPO segment's entire income is from services and therefore this objection is not to be accepted.

49. On objections by the Assessee before the DRP, the DRP confirmed the action of the TPO. One of the objection before the DRP was that this company did not figure in the list of companies engaged in ITES. On this objection the DRP held that though this company did not figure in the list of companies in ITES in the main search of capital line and prowess database but on a segmental search these two companies satisfied the requirement of being considered as companies engaged in providing ITES.

50. Aggrieved by the directions of the DRP, the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee reiterated submissions that were made before the TPO/DRP. In particular it was submitted that the service revenue filter was applied by the TPO himself at the entity level and on such search this company was not regarded as engaged in providing ITES. At this stage the TPO ought to have dropped this company as a comparable company because this filter has to be applied at the entity level and not at the segmental level. The learned DR submitted that if the service revenue filter is applied at the segmental level there can be no objection by the Assessee.

She relied on the order of the DRP/TPO.

51. The requirements of Rule 10B (1) (2) & (3) of the Rules in the matter of comparability of companies under TNMM needs to be seen. The same reads as follows: "10B. (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

(a) to (d)

(e) transactional net margin method, by which,— (i) the net profit margin realised by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base;

(ii) the net profit margin realised by the enterprise or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base;

(iii) the net profit margin referred to in sub-clause (ii) arising in comparable uncontrolled transactions is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market;

(iv) the net profit margin realised by the enterprise and referred to in sub-clause (i) is established to be the same as the net profit margin referred to in sub-clause (iii);

(v) the net profit margin thus established is then taken into account to arrive at an arm's length price in relation to the international transaction.

(2) For the purposes of sub-rule (1), the comparability of an international transaction with an uncontrolled transaction shall be judged with reference to the following, namely:—

- (a) the specific characteristics of the property transferred or services provided in either transaction;
- (b) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
- (c) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;
- (d) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail.

(3) An uncontrolled transaction shall be comparable to an international transaction if—

- "(i) none of the differences, if any, between the transactions being compared, or between the enterprises entering into such transactions are likely to materially affect the price or cost charged or paid in, or the profit arising from,

- such transactions in the open market; or
- (ii) reasonably accurate adjustments can be made to eliminate the material effects of such differences."

52. There appears to be no bar in the Rules referred to above to considering segmental data under TNMM because the comparison is of "net profit margin realized by the enterprise from an international transaction" with the "net profit realized from a comparable uncontrolled transaction". Therefore comparison is of similar transaction. When segmental information is available and is not disputed, it cannot be argued that filters have to be applied at entity level. It cannot be argued that when the TPO himself applied the filters at the entity level he was not entitled to apply the filters at segmental level. As we have already stated if clear segmental information is available the filters can be applied at the segmental level in TNMM. Therefore the objection with regard to this company failing the employee cost filter and service revenue filter in our view was rightly rejected by the TPO and DRP. It is however seen that this company has four segments viz., Repro, Label Printing, Offset Printing and Pre press BPO. Whether the label printing and offset printing segments supplement the functions performed in the Pre-press BPO segment has to be seen. We therefore set aside the order of the DRP in this regard and remand for fresh consideration by the TPO the comparability of this company. In terms of Rule 10B(3) of the rules the profit margins of Pre-Press BPO have to be adjusted taking into account the fact that two other segments supplement the pre-press BPO segment. If such adjustment cannot be reasonably or accurately made then this company has to be excluded from the list of comparable companies. The TPO for this purpose can use his powers u/s.133(6) of the Act to get required details from this company. As far as the argument that this company fails functional comparability, we find that none of the objections raised by the Assessee in this regard about lack of information about allied services performed by the pre-press BPO segment of this company and the break-up of the revenue from such allied services have been dealt with specifically by the TPO or DRP. Since the comparability of this company is being remanded to be TPO for consideration of adjustments as mentioned above, the objection with regard to functional comparability should also be looked into by the TPO in the remand proceedings on the basis of materials which he may gather u/s.133(6) of the Act. The Assessee should be given opportunity of being heard by the TPO before the issue is decided by the TPO.'

6.3.2 Respectfully following the decision of the co-ordinate bench in the case of *CGI Information Systems & Management Consultants (P.) Ltd.*, (*supra*) also for asst. year 2012-13, to which one of us is party, we remand the issue of the comparability of this company; Universal Print Systems Ltd., back to the file of the TPO for examination and verification of issues raised by the assessee of functional comparability and employees cost filter of 25% at segmental level, which the AO may gather information u/s. 133(6) of the Act. Needless to add the assessee shall be afforded adequate opportunity of being heard and to file details/submissions required, which shall be duly considered by TPO before deciding the issue.

7. Infosys BPO Ltd.,

7.1 The ld. AR for the assessee submitted that this company, Infosys, BPO Ltd., should be rejected/excluded from the list of comparables for the following reasons:—

(i) Brand Value, intangibles, functionally different

According to the ld. AR, this company has its delivery centres around the globe, whereas the assessee renders services only from India. It is submitted that while the assessee only provides call centre services, Infosys BPO Ltd., has multiple lines of business and renders high end services in the nature of

KPO services. It is also submitted that Infosys BPO Ltd., has huge intangible amounts and high brand value. As per the FAR analysis, Infosys BPO Ltd., bears full fledged risk, whereas the assessee operates at minimal risk. It is submitted that on the basis of the above facts, Infosys BPO Ltd., is functionally different and not comparable to the assessee and therefore should be rejected as a comparable.

(ii) Extraordinary event during the year

The AR submitted that during the year, Infosys BPO Ltd., acquired the Portland Group PTY Ltd., which is an extraordinary event and could affect its comparability.

In support of assessee's claim for rejection/exclusion of M/s. Infosys BPO Ltd., from the list of comparables, the Id. AR placed reliance on, *inter alia*, the decision of the co-ordinate bench in the case of (i) *CGI Information Systems & Management Consultants (P.) Ltd., (supra)*.

7.2 Per contra, the Id. DR for revenue supported the orders of the authorities below in including this company in the final set of comparables.

7.3 We have heard the rival contention and perused and carefully considered the material on record; including judicial pronouncement cited. We find that on similar facts, a co-ordinate bench of this Tribunal in the case of *CGI Information Systems & Management Consultants (P.) Ltd., (supra)* directed that Infosys BPO Ltd., be excluded from the final list of comparables as it is not comparable with a company merely providing ITES, because of its brand value and extraordinary events in the previous years relevant to asst. year 2012-13 viz., the acquisition of an Australia based company which had effect on its profits. Following the aforesaid decision of the co-ordinate bench in the case of *CGI Information Systems & Management Consultants (P.) Ltd., (supra)*, we hold and direct that M/s Infosys BPO Ltd., be excluded from the final set of comparables.

8. BNR Udyog Ltd., (Seg- Medical Transcription)

8.1 The Id AR for the assessee submitted that BNR Udyog Ltd., (Seg - Medical Transcription) ('BNR') should be rejected and excluded from the final set of comparables for the following reasons:—

(i) Functionally Different

According to the Id AR for the assessee, this company 'BNR' is functionally different as it is engaged in multiple business lines, *i.e* IT & ITES, e-governance and construction activities.

*(ii) Fails the RPT filter of 25% on entity basis as segmental transaction details of medical transcription are not available.**(iii) Incorrect Margin Computation*

Without prejudice, the Id. AR submits that as per segmental information the medical transcription segment has earned revenues of Rs.147.40 lakhs whereas in Notes 2-19, sub-schedule to the profit and loss account, revenue from medical transcription services is shown at Rs.138.55 lakhs The margins therefore need to be corrected.

8.2 The Id. DR for Revenue supported the orders of the authorities below and submitted that in similar fact situation and on similar contentions by the assessee, a co-ordinate bench of this tribunal in the case of *Indegene (P.) Ltd. v. Asstt. CIT [2017] 85 taxmann.com 60* had remanded the issue of comparability of this company 'BNR' to the file of the TPO for fresh examination.

8.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. From the details on record, it is seen that the contentions of the assessee that the company u/s BNR Udyog Ltd., is functionally different and fails the RPT filter at

the entity level. We find from the record that the bench marking of 'BNR' has been done only at the medical transcription segment and issue of RPT has not been urged before the AO/DRP. From a perusal of the decision of the co-ordinate bench of this Tribunal in the case of *Indegene (P.) Ltd.*, (*supra*) for asst. year 2012-13, we find that the issue of comparability of 'BNR' has been remanded to the file for the TPO for fresh consideration in tune with its observations at para 10.3.2 thereof, the relevant portion of which are extracted hereunder:—

"Since in the year under consideration, there are 3 segments, how much of the RPT expenses pertain to each of the segments requires examination and we find that this aspect has not been analyzed by either the TPO or the assessee. While it is clear from the TPO's order that if the benchmarking is done only for the medical transcription segment, then the RPT pertaining to that segment only should be considered. However, since how much of the RPT pertain to the medical transcription segment has not been determined by either the TPO or the assessee, we deem it appropriate and proper to remand the matter of comparability of this company M/s BNR Udyog Ltd., to the file of the TPO for determination of the issue afresh in line with our observation above. Needless to add, the assessee shall be afforded adequate opportunity of being heard in the matter and to file submissions/details in this regard which shall be duly considered by the TPO before deciding the issue We hold and direct accordingly."

8.3.2 Following the above decision of the co-ordinate bench in the case of *Indegene (P.) Ltd.*, (*supra*) to which one of us is party, and considering the factual matrix involved, that how much RPT pertains to the medical transcription has not been determined by either the TPO OR the assessee, we deem it appropriate and proper to remand the issue of comparability of this company, M/s. BNR Udyog Ltd., to the file of the TPO for determination afresh in line with the observations above. Needless to add, the assessee shall be afforded adequate opportunity of being heard in the matter and to file details/submissions in this regard, which shall be duly considered by the TPO before deciding the issue. The TPO is accordingly directed.

9. TCS E-serve Ltd., ('TCS')

9.1 Before us, the Id. AR for the assessee submitted that this company TCS E-Serve Ltd. ('TCS') should be rejected and excluded from the final list of comparables for the following reasons:-

(1) Functionally different

The assessee contends that this company deals with various verticals of business, *i.e.*, it renders BPO services to customers in the Banking, Financial services and Insurance domain, and also provides high end KPO services and therefore it is functionally different from the assessee in the case on hand. It is also contended that TCS bears full fledged risk, whereas the assessee bears only minimum risk. In support of the contention that this company is functionally different and therefore ought to be rejected as a comparable, the assessee, inter alia, placed reliance on the following ITAT decisions :—

- (i) *Baxter India (P.) Ltd. v. ACIT [2017] 85 taxmann.com 285 (Delhi - Trib.)* and
- (ii) *XL Health Corp. India (P.) Ltd.'s case (supra)*.

9.2 The Id. DR for revenue placed reliance on the orders of the authorities below. The Id. DR submitted that, in all fairness in the facts and circumstances of the case, the matter ought to be remanded to the file of the TPO for fresh coordination, as was held in the decision of the co-ordinate bench in the case of *Indegene (P.) Ltd.*, (*supra*).

9.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncements cited. From the details on record we observe that while the assessee has contended that the services rendered by this company, M/s. TCS E-serve Ltd. are high end

KPO services, it has not brought out as to which of these are the services that would come under Technical services. On the other hand, we also notice that the TPO has held all the services rendered by the assessee to be BPO services with any proper analysis. In this factual matrix of the case, we find that on similar facts, the co-ordinate bench of ITAT-Bangalore in the case of *Indegene (P.) Ltd. (supra)* has remanded the matter of comparability of this company to the file of the TPO for fresh consideration. In view of the factual matrix of the case on hand, as laid out above and following the decision of the co-ordinate bench in the case of *Indegene (P.) Ltd. (supra)* which is also rendered on similar facts, we deem it appropriate to remand the matter of the comparability of this company, TCS E-serve Ltd., to the file of the TPO for fresh consideration in the light of our above observations. Needless to add, the TPO shall afford the assessee adequate opportunity of being heard and to file details/submissions in this regard.

10. *Excel Infoways Ltd (Seg-IT/BPO) ('Excel')*

10.1 The Id AR for the assessee submitted that this company, M/s Excel Infoways Ltd., ('Excel') should be rejected and excluded from the list of comparables for the following reasons:-

(i) *Fails employee cost filter of 25%*

The Id AR submitted that in the segmental report, the details relating to employee cost allowable to each segment is not available and therefore the filter is to be applied at the entity level, where it fails the employee cost filter of 25% since its Employee Cost/Operating revenue is approx 13.05%.

(iii) *Peculiar Economic Circumstances*

It is submitted that as per the Annual Report of this company, 'Excel', it has peculiar economic conditions impacting the earnings of the year under consideration and consequent abnormal volatility in profits.

In support of the assessee's contentions for exclusion of this company from the list of comparables, the Id AR placed reliance, inter alia, on the decisions of co-ordinate Bench of the tribunal in the case of *CGI Information Systems & Management Consultants (P.) Ltd. (supra)* and of ITAT Delhi in the case of *Baxter India (P.) Ltd. (supra)*.

10.2 Per contra, the Id. DR for Revenue supported the orders of the authorities below. Reliance was placed on the decision of the co-ordinate bench in the case of *XL Health Corpn. India (P.) Ltd. (supra)*.

10.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial decisions cited. The assessee seeks exclusion of this company M/s. Excel Infoways Ltd., on grounds of failing the employee filter cost filter of 25% at the entity level in the absence of details of such transactions at the segmental level and also for the reason that there were abnormally high profit margins over the years. In the case of *CGI Information Systems & Management Consultants (P.) Ltd. (supra)*, cited by the assessee, this company was rejected as a comparable on the grounds of consistent diminishing revenue and it was also engaged in the business of software testing, verification and validation of software at the time of implementation and data centre management activities. In the case of *XL Health Corpn. India (P.) Ltd. (supra)*, relied on by the Id. DR, this company was retained as a comparable since the co-ordinate Bench observed that the assessee in that case had not led or filed any evidence to support its contention that this company 'Excel' had failed the employee cost filter. These two decisions (*supra*), in our view, would not apply to the fact situation prevailing in the case on hand.

10.3.2 In the case on hand, from a careful perusal of the factual material before us, we find that the assessee's contentions that this company, 'Excel' had failed the employee cost filter of 25% has not been

examined, either by the TPO or admittedly by the assessee, at the segmental level. Similar is the position with regard to volatility of profits/peculiarity of economic circumstances. In this view of the matter, we deem it appropriate to remand the issue of comparability of this company, M/s. Excel Infoways back to the file of the TPO for examination and verification of the assessee's contentions on the issue of abnormality of profits and of failing of the employees cost filter of 25% at segmental level, for which the AO may gather information u/s. 133(6) of the Act. Needless to add, the assessee shall be afforded adequate opportunity of being heard and to file details/submissions required, which shall be duly considered by the TPO before deciding the issue.

11. (i) Accentia Technologies Ltd., ('Accentia')

(ii) Jindal Intellicom Ltd., ('Jindal')

11.1 Both these companies 'Accentia' and 'Jindal' were selected by the assessee in its TP study. In proceedings u/s. 92CA of the Act, the TPO also accepted and selected both these companies as being functionally comparable to the assessee as can be seen at pgs 17 and 18 of the TPO's order. According to the assessee, no objections were raised against their inclusion in the final set of comparables before the DRP, but however the DRP suo moto rejected and excluded these two companies from the list of comparables.

11.2 We have heard both the parties in the matter and perused and carefully considered the material on record. The basic facts not in dispute are that the above two companies, 'Accentia' and 'Jindal' were selected as comparables both by the assessee in its TP study and the TPO as per his order u/s. 92CA of the Act. We find that, as contended, the DRP has *suo moto* rejected these two companies as comparable without the assessee having raised any objections to their inclusion in the final set of comparables. We have carefully perused paras 3.20 and 3.21 of the DRP's order and find that the DRP has not adduced any proper reasoning as to why these companies should be excluded from the list of comparables, in spite of the fact that no objections to their inclusion has been raised by the assessee. In these circumstances, we deem it appropriate to set aside the DRP's order excluding these two companies from the list of comparables and restore the issue of comparability of these two companies to the file of the TPO for fresh adjudication. Needless to add, that the assessee will be afforded adequate opportunity of being heard in the matter and to file submissions/details required, which shall be considered by the TPO before deciding the matter.

12. In respect of the Transfer Pricing *grounds raised at D-1 to 11 (supra)*, the Id. AR of the assessee urged and pressed before us in the course of hearing only for (i) Exclusion of 5 comparable Companies from the list of comparables and (ii) Inclusion of 2 companies in the list of comparables.

Therefore all other grounds raised on TP issues in the aforesaid grounds not being pressed or urged before us are rendered infructuous and accordingly dismissed as not pressed.

13. Grounds A,B,C, H and I were not pressed or urged before us and are therefore rendered infructuous and consequently dismissed as not pressed.

14. Ground F - MAT Credit u/s. 115JA

14.1 The Id AR for the assessee submitted that the assessee had claimed MAT credit u/s 115JA of the Act for A.Y's 2009-10 to 2011-12 which has not been allowed by the AO both in the draft order of assessment and the impugned final order of assessment. It was prayed to grant the MAT credit claimed.

14.2 We have heard both parties in the matter and perused the material on record. We direct the AO to examine and verify the record in respect of the assessee's claim for MAT credit and allow the same in accordance with law.

6.3.2 Respectfully following the decision of the Co-ordinate Bench of this Tribunal in the case of Mobility Infotech India (P) Ltd., (2018) 97 taxmann.com 2 (Bangalore – Trib), we direct (1) the exclusion of Infosys BPO

Ltd., from the final set of comparables and (2) remand the issue of comparability of the other four companies, namely (i) Universal Print Systems Ltd., (ii) BNR Udyo Ltd., (iii) TCS E-serve Ltd., and (iv) Excel Infoways Ltd., back to the file of the TPO with the same directions rendered by the Co-ordinate Bench in the case of Mobility Infotech India (P) Ltd. We hold and direct accordingly. Consequently, ground No.12 is disposed off as indicated above.

7. Ground No.13 – Plea of assessee for inclusion of Company M/s. Crystal Voxx Ltd., (Crystal) in the set of comparables

7.1 In this regard (supra), the assessee has sought inclusion of the following 4 companies in the final set of comparables:-

- (i) ICRA Online Ltd.,
- (ii) Techprocess Solutions Ltd.,
- (iii) Crystal Voxx Ltd.,
- (iv) Cameo Corporate Services Ltd.,

At the outset, the learned AR for the assessee submitted that the assessee is only pressing for the inclusion of Crystal Voxx Ltd., in the final set of comparables and is not pressing for inclusion of of the other three companies listed at (i), (ii) and (iv) in the final set of comparables. So, we need to deal only with the comparability or otherwise of Crystal Voxx Ltd., ('Crystal').

7.2 The learned AR submitted that this company, 'Crystal' was suggested as an additional comparable by the assessee in proceedings before the TPO as it qualifies all the filters applied and is functionally comparable to the assessee in the case on hand. According to the learned AR, this company, 'Crystal', was rejected only on the ground that the data of this company was not available in the

proress and capitaline database used by the TPO. The learned AR contends that this company is rendering BPO / ITES services and is therefore functionally comparable to the assessee in the case on hand and ought to be included in the final list of comparables. In this regard, reliance was placed on the decision of the Co-ordinate Bench of this Tribunal in the case of FNF India Pvt. Ltd., Vs. ACIT in IT(TP)A No.459/Bang/2017 dated 03.07.2019 for Assessment Year 2012-13.

7.3 Per contra, the learned DR for Revenue supported the orders of the authorities below.

7.4.1 We have considered the rival contentions / submissions and carefully perused the material on record including the judicial pronouncements cited. We find that a Co-ordinate Bench of this Tribunal in the case of FNF India Pvt. Ltd., in its order in IT(TP)A No.459/Bang/2017 dated 03.07.2019 for Assessment Year 2012-13 dated 03.07.2019 for Assessment Year 2012-13 have held that this company i.e., 'Crystal', is a predominantly BPO company and should be included as a comparable to a company providing ITES services. We observe that the Assessment Year involved is the same i.e., Assessment Year 2012-13, as in the case on hand, the set of comparables chosen by the TPO in the cited case (supra) as well as in the case on hand are also the same and as such we find that the facts of both these cases are similar i.e., provision of BPO / ITES services. Therefore, in our view, the decision rendered by the Co-ordinate Bench in the case of FNF India Pvt. Ltd., for Assessment Year 2012-13 (supra) is applicable to the assessee in the case on hand also. At paras 24 and 25 of its order in the case of FNF India Pvt. Ltd., (supra), the Co-ordinate Bench has dealt with the comparability of 'Crystal' with ITES companies and has held as under:-

“24. In ground No.13, the Assessee has prayed for inclusion of Crystal Voxx Ltd. as a comparable company. This company was not regarded as comparable company with the Assessee by the DRP for the reasons given in Para 2.15 of its order i.e., for the reason that in the financial results, the Auditors have mentioned that this company was predominantly a Business Process Outsourcing (BPO) company and therefore this company cannot be said to be an ITES company. The learned counsel for the Assessee brought to our notice that in the very same note, the auditors have also mentioned that the only reportable segment was BPO. Therefore this company was a BPO company and the results of the BPO which is the only segment ought to have weighed in the mind of the TPO to include this company as a comparable company.

25. We have considered the submission of the learned counsel for the Assessee and are of the view that the plea raised by the Assessee is correct and the TPO ought to have regarded this company as comparable company because the only reportable segment of this company was BP We direct the TPO to include this company as a comparable company.”

7.4.2 Respectfully following the decision of the Co-ordinate Bench of this Tribunal in the case of FNF India P. Ltd., (supra), we hold and direct that this company, Crystal Voxx Ltd., is to be included in the final set of comparables.

8. Ground No.14 – Assessee’s plea for inclusion of M/s. Informed Technologies Ltd., in the final set of comparables

8.1 In this ground (supra), the assessee prays for inclusion of Informed Technologies Ltd., (‘Informed’) in the final set of comparables. According to the learned AR, this company, ‘Informed’, was selected as a comparable by the assessee in its TP study, and was accepted by the TPO and formed a part of his final set of comparables. It is submitted that this company was excluded, suo moto, by the DRP on the ground that the correct margin of the company for the ITES segment cannot be determined as “Other Income” is 48% of the total

income. The learned AR contends that the percentage of “Other Income” cannot be a ground for excluding a company, which is otherwise functionally comparable, from the set of comparables and therefore prays that the company ‘Informed’ ought to have been included in the set of comparables.

8.2 Per contra, the learned DR for Revenue supported the orders of the DRP in excluding Informed Technologies Ltd., from the final set of comparables. It was submitted that “Other Income’ constitutes 48% of the total income and unless the expenses related to earning of the income are identified and excluded, the profit margin from ITES activity cannot be ascertained.

8.3.1 We have considered the rival contentions and perused the material on record. We have perused the excerpts of the Annual Report of the company ‘Informed’ placed before us and find that at page 8 thereof under the head ‘Segmental Reporting’ the company has only one reportable segment, namely ‘BPO Segment’ which is functionally comparable to the assessee. Further, it is seen that total sales / turnover reported on page 24 thereof is also entirely from BPO activities and as such the filter applied by the TPO of ITES is satisfied, as the “Other Income” is clearly non-operating revenue. We, however, notice that the effect of “Other Income” on the margin of the company has not been examined. It is also seen that while suo moto excluding this company ‘Informed’, from the set of comparables, the DRP has not put either of the parties on notice.

8.3.2 In this factual matrix of the matter, as discussed above, we are of the view that it would be appropriate to restore the matter to the TPO for examination of the point raised by the assessee before the DRP and decide on the comparability of this company, Informed Technologies Ltd., afresh. Needless to add, the AO / TPO shall afford the assessee adequate opportunity of being heard and to put forth details / submissions required in the matter, which shall be

duly considered by the AO / TPO before deciding the matter. We hold and direct accordingly. Consequently, ground No.14 of assessee's appeal is allowed for statistical purposes.

CORPORATE TAX ISSUES

9. Ground No.17 – Disallowance under section 14A r.w. Rule 8D

9.1 In this ground, the assessee contends that no disallowance under section 14A of the Act r.w. Rule 8D(2)(iii) of the Rules was called for as no expenditure has actually been incurred and debited in the profit and loss account by the assessee.

9.2 We have considered the rival contentions in the matter. On a perusal of the record before us, it is seen that in the course of assessment proceedings, the AO observed that the assessee had made investments in shares yielding exempt dividend income amounting to Rs.91,96,047/- which are claimed exempt from tax under section 10(34) of the Act. The AO did not accept the assessee's claim that no expenditure had been incurred to earn the exempt income and invoking the provisions of section 14A r.w. Rule 8D(2)(iii) to compute the indirect expenses attributable to the earning of such exempt income of Rs.91,96,047/-, as per the formula given in Rule 8D. Except for repeatedly raising the plea that no disallowance is called for, nothing was brought on record by the assessee to controvert the finding of the authorities below that disallowance of Rs.7,33,395/- computed as per the provisions of section 14A r.w. Rule 8D(2)(iii) was called for in the facts and circumstances of the case. We, therefore, find no infirmity in the order of the AO / DRP and uphold the disallowance made under section 14A r.w. Rule 8D. Consequently, ground No.17 of the assessee's appeal is dismissed.

10. Ground Nos.18 and 19 – Charging of interest under section 234B and 234C of the Act

10.1 In this ground (supra), the assessee denies itself liable to be charged interest u/s 234B and 234C of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and we, therefore, uphold the action of the AO in charging the assessee the aforesaid interest u/s 234B and 234C of the Act. The AO is, however, directed to re-compute the interest chargeable u/s 234B and 234C of the Act, if any, while giving effect of this order.

11. Ground No.20 – Short credit for Tax paid

11.1 In this ground (supra), the assessee contends that the AO has granted credit for TDS / Advance tax paid only to the extent of Rs.1,21,46,000/- as against the actual payment of Rs.1,24,50,000/-. It was also submitted that though a specific objection in this regard was raised before the DRP, the DRP at para 22.1 of its order declined to issue directions on this issue stating that since this issue does not relate to variation in income, it cannot be adjudicated by the panel as it is beyond their scope and powers.

11.2 We have considered the issue raised before us in this regard (supra). It is trite law that the assessee is entitled to be allowed full credit for taxes paid by it to the Government exchequer. We, therefore, direct the AO to examine and verify the assessee's claim and allow credit for taxes paid by it as per law. Consequently, ground No.20 of the assessee's appeal is allowed for statistical purposes.

12. In the result, the assessee's appeal for Assessment Year 2012-13 is partly allowed.

Order pronounced in the open court on this 14th day of August, 2019.

Sd/-
(N. V. VASUDEVAN)
Vice President

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 14th August, 2019.

/NS/*

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.